

KING III AND EXAMPLES OF WHAT IT SHOULD CONTAIN

Much has already been written about the Corporate Laws Amendment Bill, which is an interim amendment to the Companies Act and will form part of the law reform planned for this year.

This means that those in the corporate world are well aware of its content. Where there is less certainty, and much speculation, is around whether we will see a new Companies Act this year or next.

Another issue occupying the minds of those involved in the corporate world is whether the new legislation (when it sees the light of day) will be followed by another corporate governance report, already being fondly referred to as King III.

Why is it important that King III sees the light of day? As is well known, it is proposed that the new act will contain a chapter dealing with corporate governance and the consequences of the failure thereof.

This will result in lawyers dealing with corporate governance issues interpreting the letter of the law rather than the spirit of the law. King III will allow for a spirit of the law interpretation also and, in my respectful opinion, this is absolutely critical as the one cannot go without the other.

In recent months I have been thinking of matters which should find their way into the much-hoped for King III.

Corporate lawyers and others have many ideas of what should be contained in the new report in addition to the matters which will be retained from the old report.

Global climate change will, I am sure, receive a considerable amount of attention as it becomes increasingly important and relevant for companies to report on the effect of climate change, not only locally but globally.

Two excellent articles that I have read recently have revealed to me two issues which I believe are of paramount importance in the world of good corporate governance.

In the first, the author, Sean J. Griffith, explores the connection between corporate governance and directors' and officers' liability insurance policies.

He argues that the insurers of directors and officers act as gate keepers and guarantors of corporate governance, screening and pricing corporate governance risks to maintain the profitability of their risk pool. As a result, he argues, in a well-working insurance market, directors and officers insurance premiums would convey the insurers' assessment of a firm's governance quality.

Simply stated by him, firms with better corporate governance would pay relatively low premiums for their directors and officers, while firms with worse corporate governance would pay more. I think this is an excellent idea.

In the second article, the authors Douglas Baird and Robert Rasmussen correctly point out that traditional approaches to corporate governance focus exclusively on shareholders and neglect the large and growing role of creditors. Today's creditors, they write, craft elaborate covenants that gives them a large role in the affairs of the corporation.

Correctly, they point out that while creditors do not exercise their rights in sunny times when things are going well, these are not the times that matter most.

When a business stumbles, creditors typically enjoy powers that public shareholders never have. They point out that these are powers exercised by creditors even when the business is far from being insolvent and continues as a going concern.

Many agreements entered into in SA today give creditors wide and extensive powers and, indeed, a case can be made for good corporate governance requiring the company to disclose the powers that they have given to creditors so that all stakeholders are aware of the powers directly or indirectly exercised by third parties.

These are but some examples of the thinking in corporate governance circles which, I am sure, are being thought through by Mervyn King and those around him as they hopefully convince him to write the next report when the new act (which is so badly needed) sees the light of day.

There can be no doubt that the present King Report has indeed been a success.

But as Joseph Gorman, the chairman of TRW, said: "success is a journey, not a destination."

In King III, and in the new Companies Act, the journey will continue as corporate SA gets to grips with an as yet undefined set of corporate governance rules and regulations.

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