



Global Legal Solutions®

# Training & Reference Guide

Directors' Duties

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# BUSINESS

## 25 great jobs for people who love to travel

Branding is defined as the process of coming up or making a unique name or design for a certain product. Having a good brand strategy allows you to have a major advantage in gaining a large increase in your market competition. Your brand sets your customers and they can't have or expect from the products and services you offer.

Are you innovative or are you the experienced type? Or do you offer a high-cost, high-quality product, or a low-cost, high-value product? It's impossible to be both. You should consider on thinking what your customers need you to be. Your logo is the main foundation of your brand. All the promotional materials should be connected with your logo to communicate with your brand.

Brand messages are delivered and aimed based on the questions: how, what, when, to whom and where your brand strategy is. Advertisement, visual communication and distribution channels are parts of brand strategy.

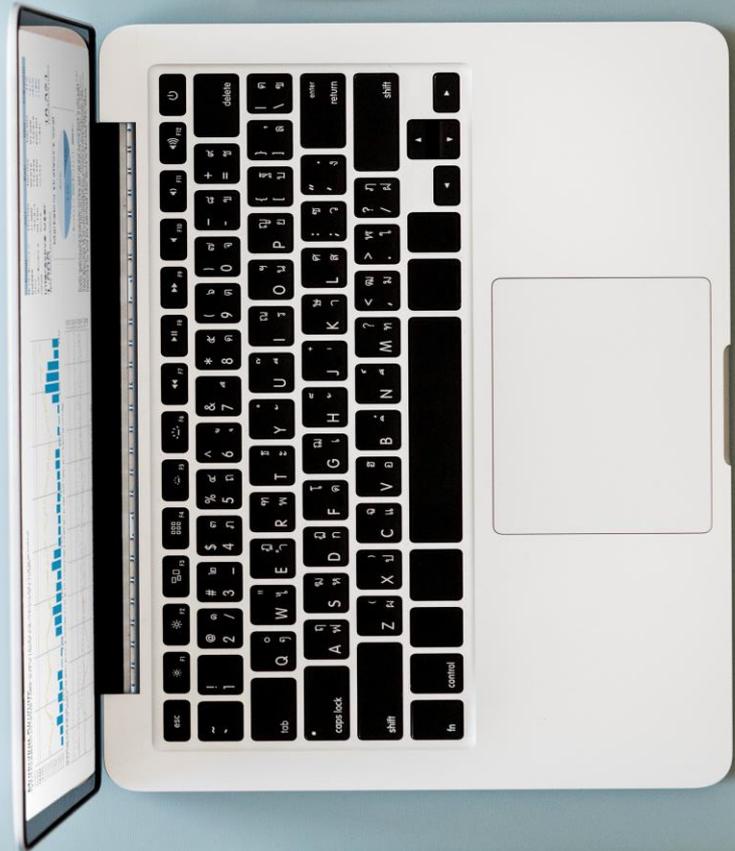
The branding strategy you have should be consistent as it leads to a strong brand equity. Branding is defined as the process of coming up or making a unique name or design for a certain product. Having a good brand strategy allows you to have a major advantage in gaining a large increase in your market competition. Your brand sets your customers and they can't have or expect from the products and services you offer. Are you innovative or are you the experienced type? Or do you offer a high-cost, high-quality product, or a low-cost, high-value product? It's impossible to be both. You should consider on thinking what your customers need you to be. Your logo is the main foundation of your brand.

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**PROCE**  
Date: 2016-06-14  
Invoice No.: 000001  
Customer ID: 223

Bill to: Curabur suscipi, LTD  
455 Pelletiaeque, Aliaquet  
291 St. SUD, 9999  
997-654-321

No.	Description	Quantity	Amount
1234	Id turcum	2	246.53
2357	Sed internum odio	5	852.75
3468	Pelletiaeque	1	489.74
4729	Miacetiae molestie	4	356.40
4830	Interim varius nisi	7	400.00
4893	Quaque luctus turpis	3	456.00
<b>Subtotal</b>			<b>4500.45</b>
<b>Tax Rate</b>			<b>6.75%</b>
<b>Tax</b>			<b>760.87</b>
<b>Other</b>			<b>0.00</b>
<b>TOTAL DUE</b>			<b>\$2441.12</b>

**Comment:**  
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## PART A | INTRODUCTION

### 1. WHY DOES THIS MATTER?

- 1.1 This manual is intended to help Directors fulfill their roles better, more safely and more effectively.

Good corporate governance systems are essential to ensuring the long-term success of a company (Directors play a crucial role in this)

#### AND

When Directors do not fulfil their duties, they expose themselves and their company to the risk of huge regulatory fines, civil actions being brought by stakeholders, reputation damage and/or criminal charges.

- 1.2 If you are Director, you need to fulfil certain duties and this manual is designed to help you understand what those duties actually are!
- 1.3 By understanding those duties, it is intended that your company succeeds, you succeed and neither you nor your company incur any related liabilities.

### 2. WHO DOES THIS APPLY TO?

- 2.1 A “**DIRECTOR**” refers to any person occupying the position of Director, which includes any person:

- 2.1.1 who has been formally appointed to a company’s board;
- 2.1.2 who is not formally appointed, but acts in a manner that effectively means that they are a Director (i.e. a de facto Director); and
- 2.1.3 whose directions/instructions are routinely followed by a board (i.e. a shadow Director).

**Note 1:** While the exact definition of “Director” may vary from jurisdiction to jurisdiction, the general principals set out above typically remain the same.

### 3. WHAT ARE “DIRECTORS’ DUTIES”?

- 3.1 Directors’ Duties encompass statutory, common law and equitable obligations that Directors owe (primarily) to the company that employs them.

U.S. District Judge Lorna Schofield in Manhattan formally ordered BNP Paribas to forfeit **\$8.83 billion** and pay a **\$140 million** fine as part of a sentence that called for BNPP to enhance its corporate governance procedures and policies.

### 4. WHY DOES THIS ESPECIALLY MATTER NOW?

- 4.1 Modern companies operate in many countries simultaneously with supply chains that are long and complex.
- 4.2 This has exacerbated the potential liabilities faced by Directors, as liabilities now extend well beyond the borders of the country in which they are located.
- 4.3 Companies are also increasingly subject to scrutiny by society at large. For example, social media now forms a tangible risk vector for companies.



## 5. WHAT IS THE LEAST YOU CAN DO?

- 5.1 When the public looks at the actions taken by a company it is rarely inclined to give any credit to the nuances of corporate structures or technical loop holes.
- 5.2 If a company as a whole or an individual Director does not achieve the standards expected by the public, both the company and its Directors are likely to suffer significant consequences.
- 5.3 As a Director you therefore do not just need to avoid breaking laws, rather you need to:

**KNOW YOUR DUTIES AND PERFORM THEM WELL.**

## 6. IS THIS A HASSLE OR AN OPPORTUNITY?

- 6.1 Good corporate governance is an investment.
- 6.2 Whilst any corporate governance is better than no corporate governance, good corporate governance resonates wide and far.
- 6.3 Good corporate governance will allow you to gain the respect, good will and investment of stakeholders such as your client base, employees, financiers, regulators and your local community.

## 7. THE LEGAL BIT...

**Corporate Governance and the role of Directors are very wide-ranging topics and their application will always be context specific.**

**This manual is intended to provide general guidance only. It does not and cannot cover all potential issues or anticipate all scenarios faced by a Director during the performance of her/his duties.**

**For guidance on specific issues or queries, please contact a legal advisor.**

**Global Legal Solutions does not accept and expressly disclaims responsibility for loss occasioned by any person acting or refraining from action as a result of the material in this publication.**



My plan:



## PART B | THINGS TO DO

### Section I | Operating Structures

#### 8. HOLD BOARD MEETINGS

- 8.1 A company's board acts, and can only act, by consensus i.e. (usually) by a majority vote at a quorate and duly constituted and conducted meeting.
- 8.2 Section 46 (Board Meetings) sets out helpful tips and checklists that can be applied by Directors to improve the effectiveness of their board meetings, but for the purposes of this section Directors should note that:
- 8.2.1 Enough board meetings need to be held that the Directors can fulfil their supervisory duties but not so many that the board becomes "operational" (i.e. day-to-day managers of the company); and
- 8.2.2 Written "minutes" of each meeting should be taken, and these should:
- form a clear record of all decisions taken (and any dissenting opinions);
  - form a clear record of assigned tasks, responsibilities and timescales;
  - give an overview of the main topics discussed at the meeting; and
  - be circulated to all Directors as soon as is practicable after each meeting.

**Note 1:** Clear and professionally produced board minutes can be an important legal safeguard for Directors.

**Note 2:** Good board minutes can be a good indicator of a board's "professionalism", which can assist smaller companies in obtaining external financing at a later stage.

#### 9. HOLD SHAREHOLDER MEETINGS

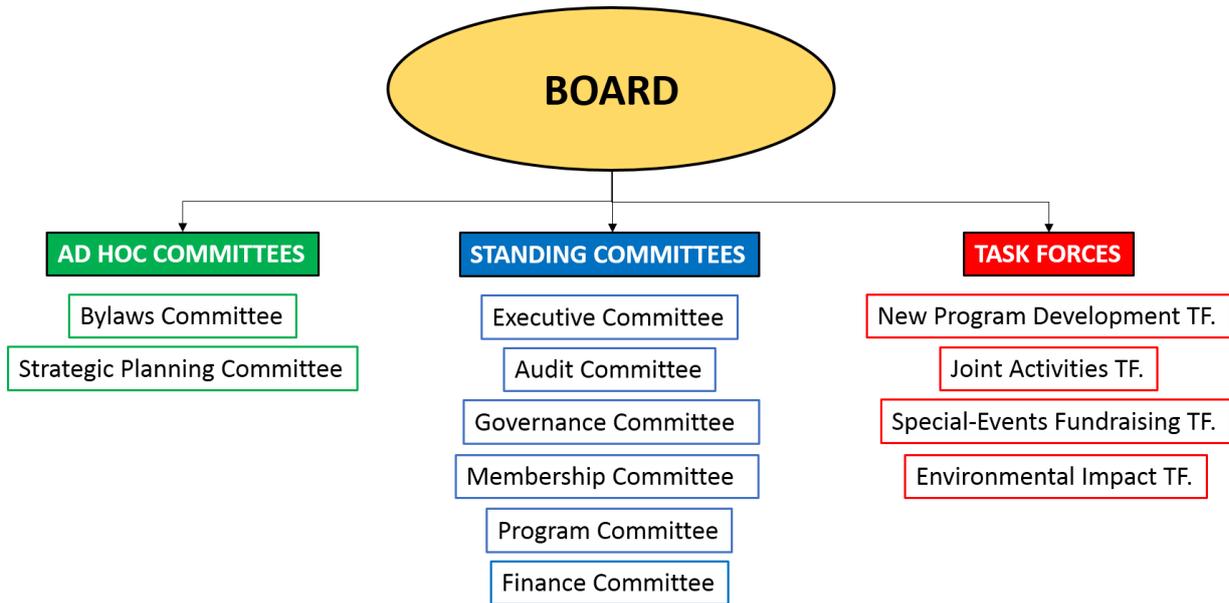
- 9.1 Section 0 (Shareholder Meetings) details the corporate issues that are typically required under law to have shareholder approval, however beyond compliance with the law, a best practice governance framework should also address the responsibilities and rights of shareholders.
- 9.2 As shareholders are not typically a homogeneous group, a clearly defined and transparent framework will save a lot of time and conflict both at times of crisis and during normal business conditions.
- 9.3 Key issues to be addressed by a company's shareholder engagement framework include:

How can shareholders call a shareholder meeting?	What information should be provided by the company to shareholders?
How can shareholders table resolutions at a shareholder meeting?	Do the shareholders have any obligations to contribute to the company (beyond their capital investments)?
How/When can shareholders influence or veto the decision-making of the board?	A definition of acceptable relationships between shareholders.
How/When can shareholders nominate or dismiss individual Directors?	Procedures by which conflicts between shareholders can be anticipated and resolved in an effective manner.

**Note 1:** Directors are not required by law to attend AGMs but it is good practice for the Directors (particularly committee chairs) to attend shareholder meetings in order to maintain

their channels of communication with shareholders.

## 10. ESTABLISH EFFECTIVE COMMITTEES



- 10.1 Board committees are an important element of a company’s governance process. In many cases committee meetings, rather than full board meetings, are where most “board activity” actually takes place.
- 10.2 Board committees provide a number of benefits (particularly, specialization, efficiency, and accountability benefits) but they also have costs (in particular, information segregation).
- 10.3 Just as every board is unique, every board’s committee structure is unique. The graphic above sets out an indicative example of the typical committees one would expect at a large, well-run company.
- 10.4 Key points that determine an effective committee structure are:
  - 10.4.1 that the terms of reference, responsibilities and authorities of each committee are clearly identified and ratified by the board;
  - 10.4.2 committees are reviewed regularly to avoid the committees “drifting” into a state of vague objectives, where committee meetings become endless discussions with no work achieved, and the members becoming bored or frustrated;
  - 10.4.3 companies should avoid the temptation to form too many committees; and
  - 10.4.4 board members should generally not serve on more than two committees simultaneously, or they become too “thinly spread” to be effective and run the risk of burn-out.

**Note 1:** Smaller companies may not necessarily establish formal committees, but performance of these functions will still need to be addressed by the board as a whole.

## 11. HAVE PERIODIC APPRAISALS

**“...Directors have told us that after they initiated board evaluations, their meetings went more smoothly, they got better information, they acquired greater influence, and they paid more attention to long-term corporate strategy.” (Harvard Business Review)**

- 11.1 An effective corporate governance program should include periodic reviews of the board as a

whole and of its Directors individually.

- 11.2 Evaluating the performance of individual Directors can be a very sensitive issue, not least because a board is a collegial body, composed of peers.
- 11.3 As such, it is recommended that appraisals are conducted by independent external assessors, as these tend to be more objective, more rigorous and less “awkward” when giving feedback on a board’s effectiveness, coaching of individual Directors, remuneration, and composition.
- 11.4 Key questions to be addressed by appraisals include:

## DYNAMICS

- a) Do the Directors have an effective balance of expertise and independence?
- b) Is power distributed appropriately in the boardroom?
- c) Do Directors sufficiently and effectively challenge executive management?
- d) Do the Directors collectively act as an effective decision-making body?
- e) Are the board/Directors collaborating effectively with the company’s executive managers?

## EFFECTIVENESS

- a) Does the board correctly perform its duties?
- b) Are Directors effectively setting corporate direction (eg. by providing guidance and advice on strategy)?
- c) Are Directors effectively monitoring the company’s compliance, control and risk management functions?
- d) Do Directors have adequate access to information and advice?
- e) Do the Directors regularly use the information and advice they have access to?
- f) Are Directors devoting sufficient time and effort to the company and their duties?
- g) Does the board engage effectively and appropriately with the company’s shareholders and stakeholders?

### 11.5 Key points to note:

- 11.5.1 The rigor and formality of appraisals should reflect the size and complexity of the company.
- 11.5.2 Appraisals should could consider the performance and effectiveness of:
  - a) the board as a whole; and
  - b) each individual Director and the chairman.
- 11.5.3 Appraisals should be undertaken periodically and, if needed, following key trigger events (eg. following the occurrence of a disciplinary issue or completion of certain projects).
- 11.5.4 Boards/chairmen should address any weaknesses identified eg. by introducing training programs to upskill existing Directors and/or recommend new members for the board.



## Section II | Individual Characteristics

### 12. ACT WITH REASONABLE CARE AND SKILL

*“Nothing I decide in this case should indicate that Directors are required to have infinite knowledge or ability...”*

**Australian Securities and Investments Commission v Healey [2011] FCA 717 at 20**

- 12.1 Directors have a duty to act with due care, skill and diligence i.e. a Director’s actions must reach a certain standard.
- 12.2 That does not mean that a Director needs to be infallible or exceptionally capable.
- 12.3 Rather, each Director should act with the same care and skill that would be exercised by a **REASONABLE PERSON** in that position who has:
  - 12.3.1 the knowledge, skill and experience to be expected of any Director in that role, and
  - 12.3.2 such levels of knowledge, skill and experience as that Director specifically has.
- 12.4 As such, a Director with specialised knowledge (e.g. accountancy or legal qualifications) will be held to a higher standard commiserate that knowledge.

### 13. BE DILIGENT

*“What each Director is expected to do is to take a diligent and intelligent interest in the information available to him or her to understand that information and apply an enquiring mind to the responsibilities placed upon him or her.”*

**Australian Securities and Investments Commission v Healey [2011] FCA 717 at 20**

- 13.1 To fulfil her/his duty of care to the company, a Director is required to act in good faith and on a fully informed basis. In some jurisdictions this standard is clarified as that behavior which “a reasonably prudent person” would undertake in the same circumstances.
- 13.2 Therefore, willful ignorance by a Director will not prevent that Director from being liable for issues that befall the company.

**EXAMPLE:**

If a director with limited finance/accountancy training is appointed as company treasurer she/he cannot simply rely on staff or service providers telling her/him that the company’s finances are in good shape.

Rather, she/he should have the skill and take the time to investigate those finances and the reports received to the point that she/he reasonably believes that the company is in fact in good shape.

## 14. EXERCISE INDEPENDENT JUDGEMENT

14.1 In performing her/his role, a Director is fundamentally expected to apply their own **INDEPENDENT JUDGMENT** when issues are presented to the board.

14.2 In recent years this standard has been applied by regulators and courts more “aggressively” with Directors being expected “take a stand” if in their own judgment their company’s long-term future is being compromised.

**Note 1:** This does not mean that a Director can’t act in accordance with agreements to which the company is a party.

**Note 2:** That is, in most jurisdictions it is recognised that a Director is not completely “free” to act in the company’s interests once the company has become subject to contractual obligations and/or if it has been restricted by the provisions of its constitution.



## 15. GET CONSENT IF YOU ARE A NOMINEE DIRECTOR

15.1 “**Nominee Director**” refers to a person that is appointed to represent the interests of another person or group. For example, large investors will often have a right attached to their investment that they can nominate a Director to attend and/or participate in board meetings.

15.2 In such an arrangement, the nominee Director may be conflicted as to whose interests to represent – i.e. the company or their appointer.

15.3 To exercise good governance and protect themselves from liability a nominee Director should:

15.3.1 declare to the board meeting, the name and office or position held by the person whom they are representing and to whom they will disclose information;

15.3.2 declare the particulars of the information that he intends to disclose;

15.3.3 ensure that the board minutes of that meeting record the board’s authorisation in relation to such disclosure; and

15.3.4 ensure that any disclosures he intends to make will not prejudice the company.



## Section III | Individual Actions

### 16. ACT WITHIN YOUR POWERS

- 16.1 A Director may honestly believe his actions are in the company's interest and still be in breach of her/his fiduciary duties, if his actions amount to a violation of the authorities conveyed on her/him by the company's constitution.
- 16.2 In most cases these powers will be drawn very widely, but a prudent Director should:
- 16.2.1 review and take note of any restrictions on his/her powers or the company's object/purpose that are included in the company's constitution; and
  - 16.2.2 regularly address such restrictions when deciding upon a course of action for the company.

### 17. DECLARE YOUR INTERESTS

- 17.1 Section 25 (Do Not Have Conflicts) details how a Director has a duty to avoid conflicts of interest. However, as an obvious extension of that, if a conflict of interest does arise the Director has a duty to declare it.
- 17.2 A Director is obliged to:
- 17.2.1 Declare to the board the nature and extent of any personal interest they may have in any arrangement to which the company is or may be a party.
  - 17.2.2 If such a declaration is made **BEFORE** the company enters into the transaction, the Director should:
    - a) declare his personal interest and immediately leave the meeting;
    - b) not vote during the board's decision to enter into the transaction;
    - c) not count toward to the quorum of that board meeting;
    - d) not take any action that would or could influence the board's decision; and
    - e) not execute any document on behalf of the company in relation to the transaction without an express, documented request by the board to do so.
  - 17.2.3 If such a declaration is made **AFTER** the company enters into the transaction:
    - a) the Director should make the declaration as soon as possible after he becomes aware of the conflict;
    - b) the board and, subject to the nature of the conflict, the shareholders should (if appropriate) formally acknowledge and ratify their waiver of the conflict.

**Note 1:** A declaration of a conflict of interest can either be made and documented at a board meeting or by way of a written general notice.

**Note 2:** A Director must update her/his conflict of interest declarations as soon as possible if the conflict changes, or the declaration becomes inaccurate or incomplete.

**Note 3:** A Director should retire from the board entirely if her/his conflicts are structural or could be systematically detrimental to the success of the company.

**Note 4:** Set out at Section 52 (Conflicts of Interest) are examples of typical conflict of interest scenarios that a Director should be conscious of and actively manage.



## 18. DOCUMENT THE BOARD'S DECISION MAKING

18.1 A properly documented track record of decisions is an important tool that companies should utilise to promote effective and professional decision making and mitigate potential liabilities.

THINGS TO BE WRITTEN BY BOARDS COLLECTIVELY				
OVERARCHING GOALS	CODES	AUTHORITIES	THINGS TO BE DONE	THINGS DONE
Statement of the company's objectives	Codes of conduct	Clear statement of the roles, responsibilities and terms of reference of the board as a whole	A clear record of how and why decisions were made (including dissenting opinions)	Reevaluation tasks, budgets and timescales (as required)
Statement of the company's strategy	Codes of principles	Clear statement of the roles, responsibilities and terms of reference of each committee	Assigned tasks, budgets and timescales	Refer back to decisions and record the company's progress towards those goals
Statement of the business plan	Compliance policies	Clear statement of the roles, responsibilities and terms of reference of each Director	Metrics and methodologies to measure project progress and success	Record of any disputes the company may have with any regulatory findings
Statement of the board's dedication to operating a best practice corporate governance regime	Compliance procedures	Protocols to govern Directors' access to managers outside of board meetings	Steps to be taken by the company to respond to any regulatory concerns	Plan to develop competencies and achieve the company's strategic vision
<b>Written record of the board's review and approval of the above</b>				



## 19. DOCUMENT YOUR PERSONAL DECISION MAKING

- 19.1 Director liabilities are “long-tail” in nature, meaning that a Director may become the subject of a claim many years after the relevant decisions were made and actions taken.
- 19.2 As such, Directors may wish to consider keeping a private record of events / decisions / their roles and responsibilities.
- 19.3 Please do note however the comments set out in Section 50 (Tips: Director Note Taking).

**Note 1:** In many jurisdictions written statements/evidence may be the only, or at least the most powerful, evidence that can be presented to court/regulatory proceedings.

**Note 2:** In many jurisdictions a Director’s notes and emails are considered to be a part of the “corporate record” and can therefore subpoenaed in court/regulatory proceedings.

THINGS TO BE WRITTEN BY INDIVIDUAL DIRECTORS			
PERSONAL INTENTIONS AND GOALS REGARDING:	CODES	THINGS TO BE DONE	THINGS DONE
Implementation of new plans	A record of interests	Their dissent from objectionable decisions of the board of Directors	A record of the project’s progression
Implementation of new protocols	Express declaration of any existing or potential conflicts of interest	Plan for achieving new projects	A record of the successful resolution of the problem
Implementation of new policies	A note of any concerns/internal irregularities observed by the Director	Plan to address any regulatory concerns	Plan to develop competencies of the company to achieve its strategic vision
New positions/authorities	On resignation, a non-executive Director should provide a written statement to the board detailing any significant concerns they might have about the running of the company	Metrics and methodologies to measure project progress and success	Plan to develop personal competencies



## Section IV | Transparency

### 20. PREPARE ACCOUNTS AND DISCLOSE INFORMATION

“Sunlight is the best of all disinfectants”

- 20.1 Effective oversight is fundamental to the efficient functioning of a company’s governance systems.
- 20.2 As such, a core duty of Directors is to ensure that corporate information is disclosed to shareholders, the market and regulators
- 20.3 Exactly what information is required will be determined by the jurisdiction in question, and whether the company is public or private, listed or unlisted.
- 20.4 The most common disclosure requirements are set out at Sections 0 (Shareholder Meetings) but if a Director is unsure if her/his company is fulfilling its disclosure requirements she/he should seek advice from their company secretary and/or legal counsel.
- 20.5 For the purposes of understanding her/his duties with regards to the disclosure of information, a Director should note the following:

TRANSPARENCY CONSIDERATIONS		
Standards A company must keep records that:	Responsibilities	Other Considerations
Explain the company’s transactions	It is common practice for the board to establish an Audit Committee and allocate statutory reporting oversight to that committee	Where a company has subsidiaries and prepares group accounts, a Director’s responsibilities apply to the group as a whole
“Reasonably accurately” disclose the company’s financial position	Ultimate responsibility for the accuracy and timely release of accounts/reports remains with the Directors	
Enables accounts complying with applicable laws to be prepared	Directors should review the records presented to them with a: <b>“critical and questioning eye”</b>	Unless the company is specifically exempted, Directors must ensure that suitable auditors are appointed to audit the accounts/reports
Are filed and published within all applicable deadlines	Directors must only sign-off on accounts/reports once they are satisfied that they give a <b>“true and fair view”</b> of the assets, liabilities, financial position and profit or loss of the company	

## Section V | Safety Systems

### 21. PROTECT EMPLOYEES

***“The values and culture of the company, which are important to encourage appropriate attitudes and behaviors for health and safety, are determined and influenced by those who make the relevant decisions”***

- 21.1 Traditionally work health and safety laws have only imposed liability on Directors when they knowingly were involved in, or contributed to, a company’s contravention of those laws.
- 21.2 Increasingly however, jurisdictions such as the EU are seeking to enshrine the UN’s **Guiding Principles on Business and Human Rights** into law.
- 21.3 Additionally, incidents such as the Rana Plaza collapse in Bangladesh in April 2013, which killed 1,129 people have caused heightened scrutiny on working conditions.
- 21.4 Legislation, such as the **Devoir de Vigilance** in France, now imposes obligations on companies **AND** their Directors, to prevent risks i) in their own business operations **AND**, ii) in the operations of their subsidiaries, sub-contractors and suppliers.
- 21.5 Section 58 (Health & Safety) sets out key principles that Directors should ensure define their company’s approach to Health & Safety.
- 21.6 Remember, good Health & Safety systems:
  - 21.6.1 represent good, professional governance;
  - 21.6.2 will ensure that even if their company is not under a “legal obligation” today, it will be better placed to deal with such legislation when it does arrive; and
  - 21.6.3 failure to implement adequate systems is likely to be taken into account by prosecutors when deciding whether or not to impose liability/criminal charges against Directors, if an accident ever does occur.



### 22. PROTECT DATA

- 22.1 **“Cyber-security”** is a broad term referring to all security matters arising in relation to the use of technology and data.
- 22.2 Directors have not historically been subject to a stand-alone “duty to protect data”, however:
  - 22.2.1 a failure to understand the risks posed by breaches of a company’s cyber security and implement appropriate security measures could amount to a breach of a Director’s duty to promote the success of the company and to exercise reasonable care, skill and diligence;
  - 22.2.2 new legislation has in recent years been imposed in a number of jurisdictions, most notably in the EU under the new **General Data Protection Regulation** (the “**GDPR**”),



which imposes responsibilities on companies to implement high standards for cyber-security; and

- 22.2.3 a company may be subject to both general data protection obligations (eg under the GDPR) and specific regulatory obligations specific to their industry, for example, finance companies will be subject to obligations under applicable financial services regimes.
- 22.3 It is therefore imperative that Directors, particularly Directors of multi-national companies, are familiar with and properly address cyber-security issues within their organisation.
- 22.4 In order to discharge their duties in relation to data protection / cyber-security Directors should:
- a) ensure appropriate systems are in place to manage and secure data, detect and respond to security breaches and notify regulators and stakeholders of incidents.
  - b) regularly and thoroughly review their company's information and data assets; and
  - c) develop, implement and regularly improve their company's security strategy.

**Note 1:** Being well informed and proactive on cyber-security will give individual Directors and their companies a significant commercial advantage over their competitors. The UK government for example recently published the “*FTSE 350 Cyber Governance Health Check Tracker Report*” which found that only 1% of boards were described as fully informed and skilled in respect of cyber security.

### 23. ENCOURAGE WHISTLE BLOWING

- 23.1 In many companies (potentially the majority of companies), whistleblowing is perceived as a small part of fraud risk management and is treated as a “tick box” issue.
- 23.2 Whistleblowing is however one of the **MOST EFFECTIVE** tools for detecting fraud in its nascent stages.
- 23.3 By ensuring the existence and proper functioning of a robust and effective reporting/whistle-blowing process Directors can gain a number of advantages, including:
- a) the fulfilment of their control and oversight responsibilities;
  - b) the encouragement of an atmosphere of professionalism, where unhealthy risks are avoided, and ethical standards are maintained; and
  - c) being able to proactively address, at an early stage, issues that if left to fester would expose the company and its Directors to significant liability and reputational risk.

**Note 1:** An effective whistle-blowing system should ensure that any direct contact between Directors and employees avoids detailed discussions of management issues which may undermine the authority of managers to manage.

**Note 2:** In many companies whistleblowing has been the responsibility of the audit committee (as reporting of improprieties in matters of financial reporting was of greatest concern).

**Note 3:** Latest good governance theory affirms that whistleblowing should be the responsibility of the board as a whole or at least a stand-alone “**whistle blowing committee**” which reports back to the board.



## 24. HAVE A BUSINESS CONTINUITY PLAN

***“A company’s Directors and senior management bear ultimate responsibility for the state of their company’s business continuity preparedness.”***

- 24.1 As a sub-set of general risk management, a business continuity plan (“BCP”) helps an organisation anticipate and mitigate against events that would otherwise adversely impact their operational capabilities.
- 24.2 A BCP is a risk-based framework of policies and protocols that focus on a range of potential disruption scenarios and outlines reactive steps that the organisation can take to mitigate event impact and return to business-as-usual quickly.
- 24.3 A key metric for determining if a Director is able to fulfill their duties regarding BCP is whether they are able to demonstrate an awareness and understanding of:

**THE RISKS FACING THEIR COMPANY**

**THE RISKS FACING THEIR INDUSTRY**

**THEIR COMPANY’S  
RISK MITIGATION POLICIES**

**THEIR COMPANY’S  
STATE OF READINESS TO DEAL WITH  
DISRUPTIVE EVENTS**





## PART C | THINGS TO NOT DO

Certain of these actions can be done or can be excused in certain circumstances

### BUT

the safest course of action for Directors in terms of personal, criminal and civil liability for themselves and for the company is to not do these things at all.

### 25. DO NOT HAVE CONFLICTS

- 25.1 Directors are subject to a range of statutory and common law obligations to avoid “conflicts of interest”.
- 25.2 What this means in practice is that, subject to certain exceptions, a Director must not exploit any property, information or opportunity that he receives due to his position as a Director.

Note 1:	Note 2:	Note 3:
“Interest” in this context includes BOTH direct and indirect interests.	This duty applies even if a Director resigns before he exploits the opportunity.  I.e. there will still be a breach of duty if a Director retires and then exploits knowledge/an opportunity obtained while he was in his role as Director.	This duty will apply even if the company is unable to exploit the opportunity itself.  I.e. Regardless of whether the Director genuinely believes that the company lacks the expertise, resources, or will to exploit an opportunity.  The opportunity still “belongs” to the company.
<b>OECD Examples of COI Situations:</b>		
A manager or Director has a personal interest in the adoption of a particular corporate strategy or policy (e.g. his or her own remuneration or the sale of company property to related family shareholders), which leads him or her to be less than objective in decision-making.		
Directors or shareholders encourage the firm to undertake activities that benefit specific shareholders (e.g. relating to dividend policy, requiring a subsidiary company to provide special guarantees or loans to another group company) or stakeholders with which they have a strong personal association (e.g. the promotion of a family member).		

### 26. DO NOT WORK AS A DIRECTOR IF YOU ARE NOT A DIRECTOR

- 26.1 A Director may be disqualified from acting as a Director for a variety of reasons.
- 26.2 In many jurisdictions, once disqualified, a person may face a range of liabilities (including criminal and personal liability for company debt) if they:
  - 26.2.1 act as the Director of any company (during the disqualification time period);
  - 26.2.2 are involved with the formation or running of a company;
  - 26.2.3 manage or promote a company;
  - 26.2.4 conduct “Director like” activities eg hiring staff or taking executive decisions; or
  - 26.2.5 instruct other persons to manage a company on their behalf.



## 27. DO NOT USE INSIDE INFORMATION

**“Inside Information”** means information that i) is not publicly known, and ii) would affect the price of a company’s shares if it were made public.

- 27.1 It is generally a criminal and civil offence, regulatory breach and reputationally damaging for a person or company to deal in the shares of a public company on the basis of inside information.
- 27.2 The key actions to avoid, are for someone who has inside information:
- a) to themselves deal in the price-affected securities on a regulated market;
  - b) to encourages or enable another person to deal in the price-affected securities; or
  - c) to encourage another person to disclose the inside information.
- 27.3 Dealing in securities in this context is defined very widely, such that dealing in the shares of the company will be caught, but so too will dealing in any:
- a) Options;
  - b) Derivative products;
  - c) Debentures;
  - d) Options; or
  - e) Debt instruments.

**Note 1:** Directors of private companies are not generally subject to statutory restrictions, however they may be subject to restrictions in their company’s constitution, a shareholders’ agreement, an investment agreement, his service agreement or other relevant agreements.

**Example:**

**Wind Hydrogen Ltd - Australia**

A director was sentenced to 2 years imprisonment, fined AUS\$70,000 and disqualified from managing any company for 5 years.

The director had, through his pension fund, purchased shares in a company that he knew his company was in confidential talks with regarding a joint venture.

## 28. DO NOT DECEIVE THE MARKET

- 28.1 In many jurisdictions applicable company law, civil law, criminal law and securities law may all be violated if a Director “knowingly or recklessly” makes statements that encourage someone to invest in the equity of a company, if those statements are:
- a) false;
  - b) materially misleading; or
  - c) deceptive.
- 28.2 This concern is most acute for Directors if their company is publishing a prospectus or financial promotion in connection with an issue of securities



## 29. DO NOT ACCEPT BRIBES

“Benefit” means, in this context, gifts or inducements of any form.

- 29.1 A Director may not accept a “benefit” from third parties if those benefits are being given to influence her/his his actions as a Director.
- 29.2 This duty is similar and related to the duty to avoid “conflicts of interest” but is typically treated as a distinct category requiring different forms of disclosure and ratification.
- 29.3 Regulators in different jurisdictions may give guidance and/or set out minimum thresholds of what kind of “gifts” would not constitute a breach of duty. These issues may also be addressed in the constitution of a company.
- 29.4 A Director should generally assume that the greater the value of the gift received, the more likely it is to be viewed as something that would change her/his behaviour and therefore give rise to a breach of duties.

**“Corruption is an insidious plague that has a wide range of corrosive effects on societies.**

**It undermines democracy and the rule of law, leads to violations of human rights, distorts markets, erodes the quality of life and allows organized crime, terrorism and other threats to human security to flourish.”**

**(UNAC, Kofi A. Annan)**

## 30. DO NOT GIVE BRIBES

- 30.1 Paying a bribe to win a lucrative contract for your company may not at first appear to be a breach of a Director’s duties to act in the best interest of her/his company (after all the company is likely to make a profit by winning that contract).
- 30.2 However, as discussed throughout this manual, “Best Practice Governance” is based on a Director’s duty is to promote the long-term benefits of the company.
- 30.3 As such a corporate action or culture that:
  - 30.3.1 degrades the rule of law (that the company relies on in other contexts);
  - 30.3.2 harms the societies in which the company physically exists; or
  - 30.3.3 exposes the company to potentially huge regulatory fines and sanctions,is unlikely to be seen as acting in the “best interests” of a company.
- 30.4 Further, following the United Nations **Convention Against Corruption** many jurisdictions have passed anti-bribery and corruption legislation to prohibit the giving of inducements to government officials/other companies.

**Note 1:** Dealing with bribery may seem daunting for companies that lack sophisticated compliance systems. Set out at Section 53 (Checklist: ABC) is some useful guidance resources and principals to assist.

## 31. DO NOT COMPETE UNFAIRLY

EU term = "Competition Law"

US term = "Anti-trust Law"



31.1 Competition laws now exist in most major markets as well-developed sets of policies aimed at preventing and penalising anti-competitive behaviour.

31.2 Typical examples of corporate actions that would amount to a breach competition law include:

- a) price fixing (explicit or implicit);
- b) group boycotts/concerted refusals to deal;
- c) allocating customers, products and/or geographic markets;
- d) bid rigging;
- e) tie-in arrangements; and
- f) certain forms of information exchange.

31.3 **First Point to Consider:** A breach of competition law potentially exposes a company to significant liabilities, including:

31.3.1 financial: a company may end up paying the EC a fine of 10% of its global group turnover AND paying regulators in other jurisdictions similar sized fines AND paying competitors for damages AND paying customers for civil claims;

31.3.2 time: regulator investigations and civil actions will cause the diversion of considerable amounts of management time, potentially for years;

31.3.3 lawyers: regulatory investigations take a long time, which will usually involve incurring significant legal expenses; and

31.3.4 reputation: adverse reputational impact.

31.4 **Second Point to Consider:** Directors may be held personally liable for a breach of competition law if their personal conduct:

31.4.1 contributed to the infringement OR did not contribute to the infringement but she/he had reasonable grounds to suspect that the infringement was occurring, and she/he did not prevent it; or

31.4.2 the Director did not know but reasonably ought to have known.

**Note 1:** Be wary of trade associations as they, by their nature, are an association of competitors. If joining an association, Directors should ensure that it has a formal compliance program:

1. that is distributed regularly to all members.
2. that requires the meeting agendas to be prepared in advance and reviewed by legal counsel
3. that requires all association meetings to be regularly schedule.
4. prohibits members from holding "rump" meetings.



## 32. DO NOT TRADE IF YOUR COMPANY IS INSOLVENT

***“In a solvent company the proprietary interests of the shareholders entitle them as a general body to be regarded as the company when questions of the duty of Directors arise...***

***But where a company is insolvent the interests of the creditors intrude... it is in a practical sense their assets and not the shareholders' assets that, through the medium of the company, are under the management of the Directors....”***

**(Street CJ in Kinsela v Russell Kinsela Pty Ltd (in liq) (1986) 4 NSWLR 722 at 730)**

- 32.1 In an insolvency situation the focus of a Director’s duties shifts from progressing the interests of the company’s shareholders to ensuring that the assets of creditors are protected.
- 32.2 In common law jurisdictions this is described as the duty not to:
  - a) wrongfully trade;
  - b) grant unfair preference; or
  - c) trade fraudulently.
- 32.3 Whilst these concepts/terms are from common law jurisdictions, they give a good indication of the kind of actions that Directors should be wary of whenever/wherever their company is in an insolvency situation.

<b>“Wrongful Trading”</b>	Refers to a company incurring debt at a time when the Directors knew, or should reasonably have known, that the company was unlikely to be able to pay the debt
<b>“Unfair preference”</b>	Refers to a company, in or approaching an insolvency, giving preference to the interests of one of its creditors over those of other creditors.  A simple example of this would be choosing to use all of a company’s remaining assets to pay the debts of one unsecured creditor thereby leaving the other creditors with nothing.
<b>“Fraudulent trading”</b>	Refers to a company entering into a transaction with the objective of hiding or putting the company’s assets beyond the reach of creditors.

- 32.4 Typically, “look back” periods will apply in such situations, i.e. a court may look at what creditors had been paid in the 6 months prior to the company’s insolvency.
- 32.5 In situations where the paid creditor is “connected” to a company’s Director (eg. is a family member) that look back period will be extended (e.g. to 2 years for UK insolvencies).
- 32.6 Subject to jurisdiction, the above actions may result in some or all of the following consequences:
  - 32.6.1 Directors may face criminal charges;
  - 32.6.2 Directors may become personally liable for the debts of the company;
  - 32.6.3 Directors may be disqualified;
  - 32.6.4 the transactions may be unwound; and/or
  - 32.6.5 civil claims may be brought against the company and the Directors.





## PART D | LIABILITIES AND INDEMNITIES

### 33. SHAREHOLDERS ACTIONS

#### 33.1 Derivative Claims:

In common law jurisdictions, minority shareholders typically can bring a “Derivative Action” against a Director on the basis that an actual or proposed act or omission involved the Director’s negligence, default, breach of duty or breach of trust.

A derivative claim is brought by a shareholder on the company's behalf (rather than on behalf of the shareholder personally). As such, any remedies granted by the court are provided to the company and not the shareholder.

#### 33.2 Insolvency Claims:

Insolvency laws in many jurisdictions will allow shareholders to get a court order for the winding up of a company if the mismanagement of its Directors means that it would be "just and equitable" to wind up the company.

#### 33.3 Shareholder Agreements/Constitution Rights:

Shareholder agreements and constitutions will often set out additional rights of shareholders to bring actions against a company and/or its Directors.

### 34. SHAREHOLDERS RELIEF

34.1 If a company is solvent its shareholders can “ratify” (i.e. approve/forgive) almost any lawful act of negligence, default, breach of duty or breach of trust by a Director.

34.2 A ratification resolution is an ordinary resolution which requires a simple majority of shareholders attending a meeting to pass (subject to the provisions of the company’s constitution).

34.3 If the Director in question is also a shareholder then her/his votes may not be counted, nor will any votes from anyone connected with that Director.

**Note 1:** Shareholders cannot relieve a Director from liability if the action was beyond the valid powers of the company.

For example, if the breach of duty involved a fraud on the company’s creditors, committing a crime or giving the assets of the company to the shareholders other than by way of a lawful distribution of profits.

### 35. AVOIDING LIABILITY: CONFLICTS OF INTEREST

35.1 It is worth noting that there will be no breach if the situation cannot “reasonably be regarded” to give rise to a conflict of interest.

35.2 Nonetheless, conflicts and potential conflicts do often arise in business and as such a robust governance framework should define credible, fair and transparent mechanisms to manage and resolve potential conflicts of interest.

35.3 If a conflict exists but the board objectively decides that it is in the best interests of the company to pursue the transaction anyway:

35.3.1 the Director should disclose the nature, character and extent of any conflict to the board and the board should make a record of the conflict;

35.3.2 the conflicted Director should not vote or be counted in the quorum at the relevant



board meeting;

35.3.3 the board should pass a resolution ratifying the conflict and approving the company's entry into the contemplated transaction; and

35.3.4 if there are insufficient Directors to pass a valid authorisation then the company's shareholders can pass a resolution to approve or ratify the conflict and the decision to progress with the transaction.

## 36. ACCOUNTS/REPORTS

36.1 Directors may be liable to compensate their company if it suffers loss as a result of untrue or misleading statements in (or omissions from):

36.1.1 the Directors' reports,

36.1.2 Directors' remuneration reports; or

36.1.3 summary financial statements.

36.2 Directors may face civil liabilities to investors for the information contained in published accounts that they approve.

36.3 Directors may additionally be criminally liable where their company's filed accounts are not reasonably accurate or where accounts do not conform to applicable laws in their jurisdiction.

## 37. COMPETITION LAW

37.1 Directors may face personal liability in relation to breaches of competition law under both general company law regarding fiduciary duties and the competition laws themselves.

37.2 Fiduciary duties relate to the Director's obligations to his company, whilst competition laws relate to her/his obligations to the public.

37.3 When determining the extent of the Director's responsibility for a breach of competition law, regulators will typically consider:

37.3.1 the level of knowledge the Director had of the breach;

37.3.2 the level of knowledge the Director OUGHT to have had of the breach;

37.3.3 the Director's level of commitment to competition law compliance;

37.3.4 the steps she/he took to prevent, detect and bring to an end the breach bearing in mind the nature of the business and the individual Director's role within the company; and

37.3.5 the steps she/he took to ensure that the company has an effective compliance culture in general.

37.4 Obviously, all Directors should refrain from any personal involvement in a breach of competition law.

37.5 However, it should also be clear that for a Director to avoid personal liability she/he will also need to actively take reasonable steps to ensure that their company can effectively:

37.5.1 Detect & prevent;

37.5.2 bring to an end; and

37.5.3 report to regulators,

any infringements of competition law committed by their company, its employees and its



agents.

### 38. BECOMING LIABLE: CORRUPTION

**"a German business with retail outlets in the UK which pays a bribe in Spain could, in theory at least, face prosecution in the UK"**

**(David Aaronberg and Nichola Higgins - Archbold Review)**

- 38.1 Following efforts by the **United Nations** and the **OECD**, many jurisdictions have implemented and/or are in the process of implementing legislation with the express goal of creating a corporate culture geared towards the prevention of bribery and corruption.
- 38.2 Much of this legislation is designed so that companies and their Directors can be held liable not only for their own actions but also for the actions of their employees, subsidiaries, external agents and related third-parties.

CORE "CORRUPTION" OFFENCES	
Bribery in General:	Bribery of Government Officials:
<p><b>"Bribery"</b> in this context means Person A offering, giving, promising to give or retrospectively rewarding Person B with a financial or other advantage, in exchange for Person B improperly performing a function or activity.</p>	<p><b>"Public official"</b> is typically defined very widely, so as to include any individual holding legislative, administrative or judicial posts, carrying out a public function, acting for a country's public agencies or acting for a public international organisation</p>
<p>Such bribery offences will apply both to Directors giving or receiving bribes.</p>	<p>Anti-corruption legislation is particularly concerned with addressing the negative effects on society posed by the corruption of public officials.</p>
<p>Liability under such legislation is distinct and would apply in addition to any liabilities faced by a Director for breach of his duties as a Director.</p>	<p>As such much of this legislation will classify the bribery of public officials as distinct crime/violation with lower thresholds to prove liability.</p>
<p>Typically, such offences cover:</p> <ul style="list-style-type: none"> <li>a) offering, promising or giving a bribe; and</li> <li>b) requesting, agreeing to receive or accepting a bribe</li> </ul>	<p><b>Example:</b> if a bribe is paid/offered to an official, regulators are typically not required to prove that the official acted as a result of such a bribe, that the bribe was ever actually paid or that a company's Directors even knew of the bribe.</p>

- 38.3 Establishing Anti-Bribery Systems:
  - 38.3.1 Most anti-corruption legislation is specifically designed to incentivise companies to implement and use bribery prevention systems.
  - 38.3.2 Typically, such legislation achieves this incentivisation by imposing automatic liability on a company and its Directors if the company has not proactively established an anti-corruption system within the company.
- 38.4 The best protection a Director can have against the incurrance of liability is therefor to ensure that her/his company establishes, implements, maintains and regularly reviews its anti-bribery and corruption management system.
- 38.5 The reporting of any corrupt activities to regulators is important as anti-corruption legislation is



typically designed so that liability will be reduced in exchange for a company's self-reporting.

As such, a company's ABC management system should ensure that once any corrupt activities are detected, that these are disclosed to the applicable regulators as soon as possible.

### 39. BECOMING LIABLE: DATA PROTECTION

- 39.1 Under the EU's General Data Protection Regulation ("GDPR"), state regulators:
  - 39.1.1 can fine companies €20 million or 4% of annual global turnover for breaching the principles of data processing and customer rights;
  - 39.1.2 can fine companies €10 million or 2% of annual global turnover for "administrative" failures such as not maintaining written records, not implementing technical/organisational measures or not appointing a suitable "Data Protection Officer"; and
  - 39.1.3 have discretion to designate certain breaches of the GDPR as criminal offences.
- 39.2 For liabilities under the GDPR, the level of penalty imposed will be determined by reference to, amongst other things:
  - 39.2.1 the nature, gravity and duration of the infringement;
  - 39.2.2 any mitigating actions taken; and
  - 39.2.3 the company's history of previous infringements.
- 39.3 Directors of regulated entities will typically face additional regulatory requirements and scrutiny of their personal actions to address cyber security.
- 39.4 In the UK, for example, the Financial Conduct Authority expressly warns that they review the acts of "senior managers" for the purposes of the UK financial services regulatory regime.

### 40. AVOIDING LIABILITY: DATA PROTECTION

- 40.1 In addition to implementing the systems described at Section 57 (Overview: Data Security), Directors should strongly consider:
  - 40.1.1 reviewing and updating the company's risk registers;
  - 40.1.2 putting in place a formalised incident management strategy that:
    - a) addresses both actual and suspected cyber security breaches; and
    - b) address communication protocols, to mitigate regulatory risk and long term reputational damage;
  - 40.1.3 reviewing their company's Group Legal Policy in relation to the allocation data breach risk in its contracts;
  - 40.1.4 reviewing their existing arrangements with customers and suppliers to assess their liability exposure would be in the event of a data protection breach; and
  - 40.1.5 implementing insurance arrangements to ensure that they are sufficiently covered.



## 41. ASSUMING PERSONAL LIABILITY: EXPRESS

- 41.1 A Director's duties are usually to her/his company, not to third parties.
- 41.2 There are however circumstances in which a Director may assume personal liability to third parties expressly or impliedly.
- 41.3 A Director can, for example, expressly assume personal liability by signing a personal guarantee (eg. as security for financing being provided to the company).

### Note 1:

Unless stated otherwise, a personal guarantee will normally continue until it has been expressly terminated.

As such, a Director should be careful to ensure that a guarantee given for 1 purpose is not later used in relation to the company's other obligations.

<b>Example</b>	A personal guarantee given to secure a term loan may continue to apply to overdrafts/other facilities later obtained by the company with the same bank.
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## 42. ASSUMING PERSONAL LIABILITY: IMPLIED

- 42.1 Please note that the following list is not comprehensive - some elements in the list will be explored separately below and not all elements will apply or incur the same level of liabilities in all jurisdiction.
- 42.2 Nonetheless, Directors should be aware that undertaking any of these actions will in many jurisdictions incur personal liability and/or criminal liability and/or reputational damage:

ID Issues	Statutory Obligations	Fraud Activities
Signing contracts on behalf of the company before it is incorporated.	Not maintaining proper accounts and records of the company.	Making a fraudulent or negligent misrepresentation to a third party / shareholder / creditor.
Failing to make it clear that he is not acting in his personal capacity when signing a contract on behalf of the company.	Managing a company while disqualified.	Being a party to the company undertaking business for fraudulent purposes.
Signing a contract on behalf of the company without authority and thereby allowing the company to set the contract aside.	Dishonestly failing to disclose to another person information which he is under a legal duty to disclose, with the intention of making a gain or causing loss or risk of loss to another person.	Being a party to the company breaching competition/anti-trust laws.
Acting on the instructions of someone whom is disqualified.	Being a party to the company breaching anti-bribery and corruption laws.	Acting as a Director when the company is fraudulently trading in an insolvency situation.
	Being a party to the company undertaking business for fraudulent purposes.	Acting as a Director when the company is wrongfully trading in an insolvency situation.



### 43. INDEMNITIES FOR DIRECTORS

- 43.1 Companies can and often do indemnify Directors in relation to liabilities that they may incur in their role as a Director.
- 43.2 Companies can also agree to pay a Director's legal fees in relation to such liabilities.
- 43.3 However, such indemnities are, in most jurisdictions limited by law such that:
  - a) they cannot cover criminal and regulatory fines;
  - b) they cannot cover liabilities owed by the Director to the company itself; and
  - c) if the Director is unsuccessful in his legal defense, any legal fees paid on his behalf would be repayable to the company.

### 44. DIRECTOR LIABILITY INSURANCE

- 44.1 Companies and Directors may also take out insurance policies to protect Directors in the event that claims are made against them in relation to the discharge of their duties.
- 44.2 Careful attention should be paid to the exclusions and limitations of such insurance policies, as these may be so extensive as to render the policy practically useless.

Typical PI Insurance Exclusions	
Actions brought by the company against the Director (including shareholder derivative or representative class actions).	Liabilities relating to dishonest, criminal or fraudulent conduct.
Fines, penalties and punitive damages incurred by the Director.	Legal fees associated with employees suing for discrimination/wrongful termination.
Loss relating to illegal profits or remuneration to which the Director was not legally entitled.	Legal fees if the Director does not agree to settle;
Legal fees for proceedings where the Director is unsuccessful.	Actions that occurred prior to a Director's departure if the claim is brought after she/he retires or resigns.

checklist

yes



no





## PART E | HELPFUL TOOLS & CHECKLIST

### 45. INTRODUCTION

- 45.1 Set out below are suggestions, tips, tricks and tools for effective management and good governance systems that a Director can use when implementing “best practice” governance systems at their company.
- 45.2 The formality, sophistication and size of the management systems that a good Director should put in place at their company will be subject to the nature, size, complexity and level of maturity of that company.
- 45.3 Nonetheless, a responsible Director should always at least consciously consider these systems and her/his company’s approach to them (and, ideally, should document that decision-making process).
- 45.4 It is important to remember that when implementing governance systems and frameworks, an effective manager should always be looking to promote:
- 45.4.1 long term;
  - 45.4.2 sustainable growth; and
  - 45.4.3 profitability,
- which will go hand in hand with the avoidance of problems such as bankruptcy, bribery and security breaches that could trigger legal action against the company (and its Directors).



## SECTION I | BOARD & SHAREHOLDER MEETING SYSTEMS

### 46. BOARD MEETINGS

46.1 As well as promoting better decision-making, a track record of properly documented board meetings is an important indicator of professionalism and provides important legal safeguards for Directors.

#### 46.2 Key Considerations:

Consider if these issues are characteristics of your company's board meetings. If they are not, make a plan to ensure that they are.

<b>Considerations:</b>  <b>Strategy &amp; Objectives</b>	<p>A company's board has a specific leadership role.</p> <p>Directors should therefore ensure that "board meetings" are clearly distinguished from "management meetings" (even in owner-managed companies).</p>
	<p>Having too many board meetings suggests that the meetings are "management/operational".</p> <p>Too few meetings will make it difficult for a board to fulfil its duties.</p>
	<p>Seek to keep Board meetings strategically focused.</p>
<b>Considerations:</b>  <b>Admin</b>	<p>Set board and committee meeting dates as firmly and regularly as possible.</p> <p>Frequently deferring board meeting dates can lead to poor attendance by non-executive Directors.</p>
	<p>Distribute meeting agendas and materials to Directors early enough that they can be reviewed in advance of meetings.</p>
	<p>Have external auditor attend board meetings when annual financial statements are being considered.</p>
<b>Considerations:</b>  <b>Repeat Items</b>	<p>Ensure that the board formally approves and regularly reviews:</p> <ul style="list-style-type: none"> <li>) Committee terms of reference,</li> <li>) codes of conduct,</li> <li>i) delegated authorities, and</li> <li>) governance frameworks</li> </ul>
	<p>Ensure that the board formally approves and regularly reviews the mechanisms / metrics that it uses to measure the items above and "shareholder value" in general.</p>
	<p>Periodically review the board's skills and competencies.</p>



46.3 **Checklist: Board “Warning Signs”**

If you run through this list and check any of the items as being a characteristic of your board, there is likely an issue and you should proactively seek to address it and/or get external counsel.

ISSUE	Y/N
<b>Governance</b>	
The company’s constitution and/or governance instruments are rarely (if ever) referred to in board discussions/documentation.	
The company does not keep a regularly updated, transparent register of Directors’ interests.	
Directors often act with undue regard to the interests of a special interest group or major shareholder, rather than with a view to the best interests of the company as a whole.	
The company has a solvency problem, but the board allows the business to continue trading or fails to seek further information and advice in relation to its accounts when a reasonable Director would do so.	
The board culture does not allow discussion of difficult, controversial or sensitive matters in the boardroom.	
Directors are unfamiliar with best practice standards for corporate governance and risk management.	
The family member of a Director has a senior role at one of the company’s major suppliers, but this is not regularly reviewed or considered by the board.	
The “independence” of Directors is only assessed informally / infrequently.	
Board does not receive reports on whistleblower policy / whistle-blown issues.	
<b>Strategic</b>	
The board does not regularly schedule time for discussing the alignment of the company’s risk appetite or strategy.	
The board lacks a diversity of skill sets, backgrounds, ethnicities or genders.	
Discussions (regardless of topic) are dominated by one or two Directors.	
The company does not maintain stakeholder mapping, tiering or profiling information.	
The board has a lot of Directors compared to the boards of similar organisations.	
There is a lack of ongoing board succession planning.	
Inductions of new Directors to the board are informal and/or insufficient.	
<b>Administrative</b>	
The company does not have an information sharing portal and/or Directors rely on emails and handouts as their primary communication and data storage medium.	
Agenda items intended for one meeting, often drift/have to be carried over to the next meeting.	
Minutes of board meetings are often incomplete and distributed only after much delay or distributed unevenly.	



Meetings close without actions and/or timelines for execution having been agreed.	
---	--

## 47. SHAREHOLDING MEETINGS

47.1 Set out below is a checklist / aide memoire of issues to be covered at meetings with shareholders.

ISSUE	Y/N
<b>Reports to be provided to Shareholders</b>	
Directors' report	
Directors' declaration	
Auditor's report and independence declaration	
Corporate governance statement	
<p><b>Note 1:</b> Companies are increasingly including additional reports and information to proactively manage stakeholder relations.</p> <p>Some typical examples of such additional reports, include information on:</p> <ul style="list-style-type: none"> <li>a) sustainability;</li> <li>b) diversity;</li> <li>c) corporate citizenship; and</li> <li>d) global taxation summaries.</li> </ul>	
<b>Items to be Approved by Shareholders</b>	
Final dividend declaration.	
Election/ re-election of Directors.	
Appointment/ re-appointment of auditors and fixing their remuneration.	
Directors' remuneration policy (to be reviewed at least every three years).	
Directors' authority to allot shares.	
Amendments to or disapplication's of shareholder rights eg. disapplication's of pre-emption rights on share issues.	
Directors' authority to make political donations or incur political expenditure.	
Directors' authority for market purchases of own shares.	



47.2 **Checklist:** Shareholder and Stakeholder “Warning Signs”

47.3 If you run through this list and check any of the items as being a characteristic of your company’s engagement with its shareholders and stakeholder, there is an issue and you should proactively seek to address it and/or get external counsel.

ISSUE	Y/N
<b>Reports</b>	
The company’s annual report is missing disclosures required by applicable legislation.	
The company’s business model is not clearly articulated in external communications.	
There is poor linking of financial and non-financial reporting in external communications.	
Reports include information that is not accurate / misleading.	
Reports are generated through an informal approvals process.	
Reports do not include all points of information required by applicable laws/accounting standards.	
Publication does not comply with applicable timing requirements.	
<b>Stakeholder Engagement</b>	
“Stakeholders” are only defined narrowly e.g. as clients and customers.	
The company only engages in dialogue with stakeholders after negative events/disputes.	
There is public criticism of the company’s governance practices or executive remuneration policy.	
There are no clearly defined authorities / protocols for the board’s stakeholder engagement.	
The annual general meeting regularly leads to negative public relations.	
There is no regular contact between the board and the investor relations manager.	
Directors messages are inconsistent or unclear regarding their position on PE bids.	

**48. CHECKLIST FOR AUDIT COMMITTEE**

48.1 As discussed above, an audit committee will typically be established to focus on key statutory reporting issues.

48.2 By way of a checklist, an Audit Committee’s terms of reference should include a remit to:

48.2.1 review any potential conflicts of interest and related party transactions;

48.2.2 providing approvals for conflicts/related party transactions;

48.2.3 reviewing any significant accounting and reporting issues, including professional and regulatory announcements and providing analysis of their effect on the company’s financial statements;

48.2.4 reviewing half-year/annual financial statements and periodic disclosures;

48.2.5 ensuring that the company’s financial and non-financial reporting are coordinated/tell the “same story”; and

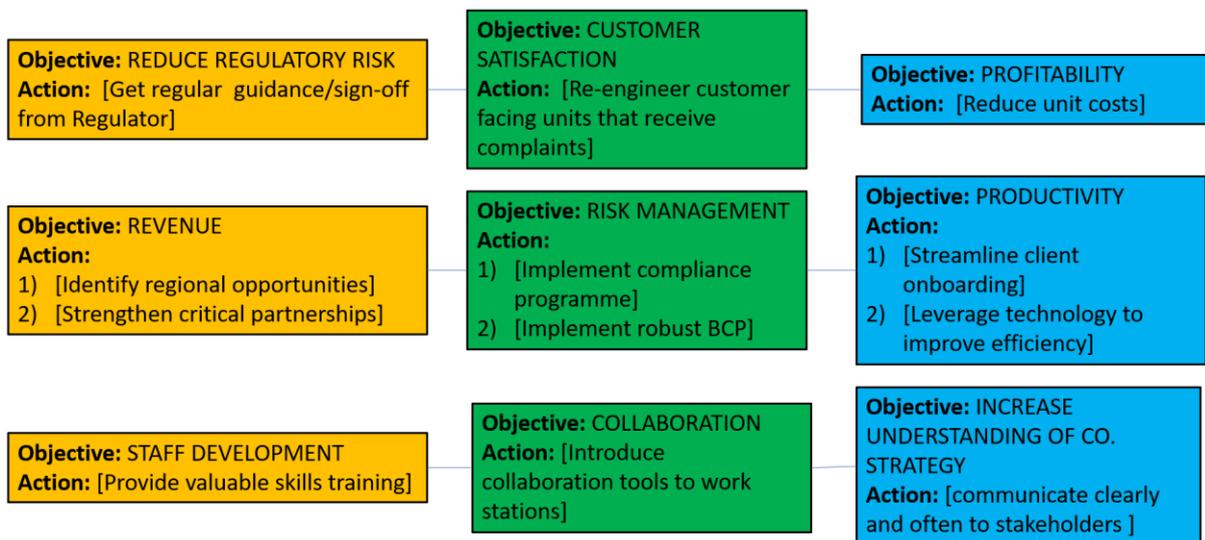
48.2.6 reviewing policies and protocols of the company’s continuous disclosure obligations.



## 49. TIPS: BALANCED SCORE CARD

- 49.1 A “balanced score card” (“BSC”) can be a useful tool for Directors to gather and sort information before board meetings and then track:
- 49.1.1 board decisions and objectives; and
  - 49.1.2 the company’s progress towards those objectives.
- 49.2 A BSC goes beyond financial metrics as measures of performance tracking, rather it tracks success according to a range of quantitative and qualitative criteria.
- 49.3 Set out below is an example BSC. This general framework/template can obviously be adapted for issues and companies of different sizes and complexities, but the key points are:
- 49.3.1 A BSC sets out multiple “perspectives” of the company and actionable strategic objectives associated with each perspective;
  - 49.3.2 A BSC can be used to efficiently map out an organization’s hierarchy of objectives and the associated strategies at a glance (typically these are read from the bottom to the top of a BSC);
  - 49.3.3 Strategic objectives are paired with measurable, empirical performance indicators and these should be measured on a regular schedule;
  - 49.3.4 The BSC should be referred to during and updated after each board meeting; and
  - 49.3.5 The ultimate intention of a BSC is to provide a balanced, long term view of company performance and a trackable path towards achieving that performance.

### EXAMPLE: BALANCED SCORECARD





## 50. TIPS: DIRECTOR NOTE TAKING

- 50.1 Notes taken by Directors can, and routinely do, become a part of the “corporate record” and as such can become important pieces of evidence in court hearings regarding the company and/or its Directors.
- 50.2 That does not mean that Directors should avoid taking notes, on the contrary notes can be:
- a) critical to a Director defending her/his actions; and
  - b) important tools when synthesizing large amounts of information in order to make critical commercial judgments.
- 50.3 Considerations Directors should be aware of when taking notes:
- 50.3.1 Assume that all of your notes will eventually be read by a court and therefore:
- a) only take relevant notes; and
  - b) avoid doodles and statements that could be misunderstood out of context.
- 50.3.2 If your notes contain questions or concerns, ensure that these are followed up on and that a note is taken of the outcome.
- 50.3.3 Consider taking a disciplined and systematic approach to discarding your notes/documents (when you are not in a litigation scenario).
- 50.3.4 If litigation becomes likely, it will never be appropriate to change or destroy your notes.
- 50.3.5 Be aware that electronic notes can often be reconstituted even after they have ostensibly been deleted.

BAD DIRECTOR NOTES	GOOD DIRECTOR NOTES																
<p>Meeting notes</p> <p>☺</p> <p>How did john get employed?!!</p> <p>Accounts done – wow that party budget is brilliant</p> <p>Aeromarine 1 having difficulties completing Sojourner contracts. They will lose considerable cash if they actually complete them. Sell Aero 1 to Aero 2, avoid S contracts.</p> <p>ACRA focusing on BCP – get Mark to fix</p> <p>To do:</p> <ul style="list-style-type: none"> <li>• Review BCP</li> <li>• Speak to HR</li> </ul> <div style="border: 1px solid black; padding: 5px; margin-top: 10px;"> <ul style="list-style-type: none"> <li>• Carrots</li> <li>• Eggs</li> <li>• Aubergine</li> <li>• Chicken fillets</li> <li>• Horse radish</li> <li>• Toothpaste</li> </ul> </div>	<p>Board Meeting: 15 Jan 2018, 3pm – 4pm</p> <table border="1" style="width: 100%;"> <thead> <tr> <th colspan="2" style="text-align: center;">Business Continuity Plan</th> </tr> </thead> <tbody> <tr> <td>Review our BCP</td> <td style="text-align: center;">✓</td> </tr> <tr> <td><del>Needs updating?</del></td> <td style="text-align: center;"><del>✓</del></td> </tr> <tr> <td>Appoint external specialist</td> <td>GLS appointed 21/01/18</td> </tr> <tr> <td>Appoint BCP improvement team</td> <td>BP JT RS (Legal) AL (HR)</td> </tr> <tr> <td>Key date for BCP improvement implementation</td> <td><del>Board Review:</del> 15/02/18</td> </tr> <tr> <td>ACRA signed-off on new BCP</td> <td>ACRA don't do formal sign-off but reviewed 22/02/18 And comments incorporated</td> </tr> <tr> <td>Board signed-off on new BCP</td> <td>26/02/18</td> </tr> </tbody> </table>	Business Continuity Plan		Review our BCP	✓	<del>Needs updating?</del>	<del>✓</del>	Appoint external specialist	GLS appointed 21/01/18	Appoint BCP improvement team	BP JT RS (Legal) AL (HR)	Key date for BCP improvement implementation	<del>Board Review:</del> 15/02/18	ACRA signed-off on new BCP	ACRA don't do formal sign-off but reviewed 22/02/18 And comments incorporated	Board signed-off on new BCP	26/02/18
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## SECTION II | INSIDER TRADING & CONFLICTS OF INTEREST

### 51. TEMPLATE POLICY: INSIDER TRADING

- 51.1 The EU Market Abuse Regulation came into effect on 3 July 2016, with the intention of further tackling insider dealing and market manipulation in Europe's financial markets.
- 51.2 In response, The Governance Institute, GC100 (an industry group for general counsel at FTSE 100 companies), the Quoted Companies Alliance and other market participants have published a freely available specimen “**group-wide dealing policy, dealing code and dealing procedures manual**”.
- 51.3 Clearly, these guides are most relevant to EU listed companies.
- 51.4 Nonetheless, they represent a “gold standard” that can be adapted to many jurisdictions.
- 51.5 If a Director is unsure whether her/his company has appropriate insider dealing policies in place, this would be a very good starting point.

[http://www.theqca.com/article\\_assets/articledir\\_235/117706/MAR\\_Guidance\\_Notes\\_Dealing\\_Code\\_FINAL.pdf](http://www.theqca.com/article_assets/articledir_235/117706/MAR_Guidance_Notes_Dealing_Code_FINAL.pdf)

### 52. CONFLICTS OF INTEREST

- 52.1 As discussed in Section 17 (Declare your Interests), Directors have an obligation to disclose their interests whenever a scenario arises where the company's interests may be in conflict with those of the Director.
- 52.2 The Director is also required to update her/his conflict of interest declarations as soon as possible if the conflict changes, becomes inaccurate or incomplete.
- 52.3 As an aide memoire the following are situations in which a “conflict of interest declaration” will likely need to be made:

Situation	COI Declaration Made Y/N
Co. is considering: granting the Director an employment/service contract with a guaranteed term in excess of 2 years.	
Co. is considering: purchasing assets from the Director.	
Co. is considering: selling assets to the Director.	
Co. is considering: issuing a loan or any kind of “quasi-loan” to the Director.	
Co. is considering: guaranteeing / providing security for a loan issued to the Director.	
Co. is considering: making any payments to the Director in relation to her/him changing or being relieved of office.	



## SECTION III | ABC & COMPETITION LAW

### 53. CHECKLIST: ABC

53.1 With Anti-Bribery and Corruption, Directors are well-advised to avoid just aiming for “minimum compliance”.

Key Elements of a Robust Compliance Programme
Conspicuous buy-in, endorsement and compliance by the company’s board and senior managers.
A group legal policy requiring legal documentation to include clear obligations on counterparties to comply with the highest ABC regulations faced by the company.
<b>Robust reviews of:</b> <ul style="list-style-type: none"> <li>a) ABC risk faced by the company’s operations as a whole;</li> <li>b) projects or proposals involving business with or in other countries; and</li> <li>c) the agreements governing relationships with business partners.</li> </ul>
<b>Processes for:</b> <ul style="list-style-type: none"> <li>a) internal and external reporting of potential violations;</li> <li>b) regular training programs for all employees and executives;</li> <li>c) the protection of whistle-blowers from reprisals; and</li> <li>d) the documentation of all compliance initiatives, activities and training.</li> </ul>
<b>Clear, transparent and readily available guidelines/manuals for all staff, that articulates the necessary requirements regarding:</b> <ul style="list-style-type: none"> <li>a) financial controls and records;</li> <li>b) facilitation payments, gifts and hospitality;</li> <li>c) the engagement of third parties or agents;</li> <li>d) the due diligence to be conducted in relation to mergers and acquisitions; and</li> <li>e) investigation protocols.</li> </ul>
<b>A regular programme whereby the board and senior management conduct:</b> <ul style="list-style-type: none"> <li>a) audits to assess and confirm compliance levels and effectiveness;</li> <li>b) assessments of the general and specific risks faced by the company; and</li> <li>c) a review of applicable legislation and benchmarking with corporate peers.</li> </ul>
ABC Tools
<b>OECD:</b> An extensive library of guidelines and advice that can be used by companies, in any jurisdiction, to form effective anti-bribery and corruption systems: <a href="http://www.oecd.org/corruption/keyoecdanti-corruptiondocuments.htm">http://www.oecd.org/corruption/keyoecdanti-corruptiondocuments.htm</a>
<b>Transparency International UK:</b> Clear, practical advice on good practice anti-bribery systems that will constitute “adequate procedures” for compliance with the UK’s Bribery Act: <a href="http://www.transparency.org.uk/our-work/business-integrity/bribery-act/adequate-procedures-guidance/#.WqTrNGpuZpg">http://www.transparency.org.uk/our-work/business-integrity/bribery-act/adequate-procedures-guidance/#.WqTrNGpuZpg</a>
<b>USA DOJ:</b> A resource guide on the US Foreign Corrupt Practice Act: <a href="https://www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf">https://www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf</a>



## 54. CHECKLIST: COMPETITION LAW

- 54.1 Design of a robust “competition law compliance” programme will be influenced by a company’s size, structure, geographic presence, activity and industry.
- 54.2 Whilst there is no definitive template that can be “copied’n’pasted” into a business, any robust programme should include the following elements:
- 54.2.1 appointment of a specialist compliance executive/committee and Director(s) with requisite authority to implement the programme;
- 54.2.2 a formal/documented policy, that is widely circulated (i.e. throughout the company and its partners), that:
- a) identifies compliance with competition law as a core value of the company;
  - b) confirms the commitment of the company and its Directors to comply with applicable competition law and the “spirit” of such law;
  - c) confirms that compliance is a priority at all levels of the company;
  - d) confirms that a “zero tolerance” policy applies to illegal or unethical behaviour;
- 54.2.3 regular training to ensure that staff are aware off and implement the compliance dimension of their work; and
- 54.2.4 regular reevaluation the programme of the compliance risks faced by the company and upgrading of the programme as necessary.

## 55. TOOLS: COMPETITION LAW

PUBLISHER	TOOL
<b>International Chamber of Commerce</b>	Practical toolkit for establishing a compliance programme: <a href="https://cdn.iccwbo.org/content/uploads/sites/3/2013/04/ICC-Antitrust-Compliance-Toolkit-ENGLISH.pdf">https://cdn.iccwbo.org/content/uploads/sites/3/2013/04/ICC-Antitrust-Compliance-Toolkit-ENGLISH.pdf</a>
<b>International Chamber of Commerce</b>	Recommended framework for international best practices in competition law enforcement proceedings: <a href="https://cdn.iccwbo.org/content/uploads/sites/3/2017/06/ICC-International-Due-process-08-03-10.pdf">https://cdn.iccwbo.org/content/uploads/sites/3/2017/06/ICC-International-Due-process-08-03-10.pdf</a>
<b>The Chief Legal Officers’ Round Table</b>	A “blue print” resource to guide companies in their efforts to develop effective compliance cultures and systems: <a href="http://ec.europa.eu/competition/antitrust/compliance/clo_blue_print_en.pdf">http://ec.europa.eu/competition/antitrust/compliance/clo_blue_print_en.pdf</a>
<b>Autorité de la Conc. (France)</b>	A guidance note to assist companies achieve compliance with French competition law: <a href="http://www.autoritedelaconcurrence.fr/doc/brochure_conformite_uk.pdf">http://www.autoritedelaconcurrence.fr/doc/brochure_conformite_uk.pdf</a>



**56. CHECKLIST: AN EFFECTIVE WHISTLEBLOWING SYSTEM**

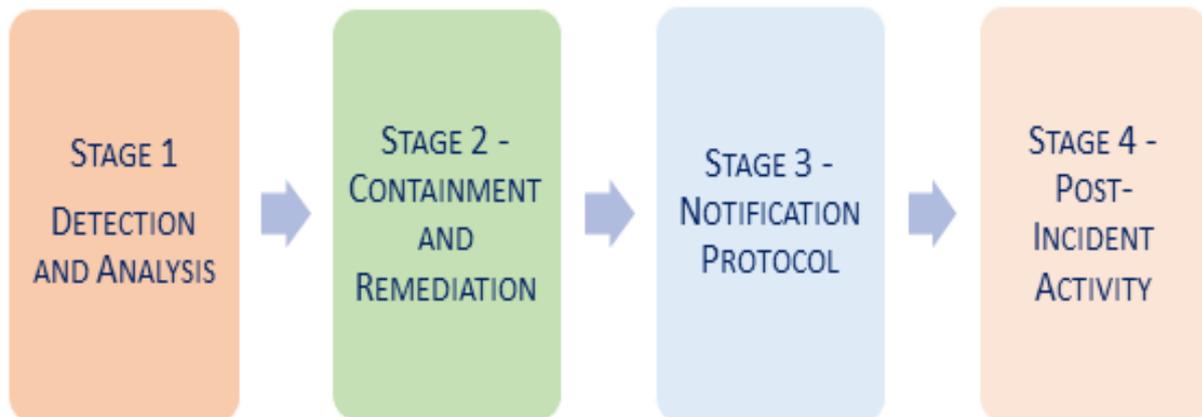
- 56.1 Directors should ensure that their company has an impropriety/fraud reporting mechanism, such as a hotline, that can receive tips from both internal and external sources, whilst ensuring anonymity and confidentiality.
- 56.2 Fear of retaliation is one of the most significant causes of ineffective reporting systems.
- 56.3 As such, Directors should also ensure that a credible framework exists for the ongoing support to the whistle-blowers.

SYSTEM	KEY FEATURES
<b>Reporting Mechanism</b>	A transparent process for establishing and investigating allegations involving junior, middle ranking AND senior/management staff.
	Clearly documented roles, responsibilities and authority of internal whistle blowing team, HR teams and management.
	Clearly documented roles, responsibilities and authority of external investigators, legal service providers.
	Mechanism is open to third parties such as vendors and business partners.
	Separation of powers i.e. investigations and enforcement should be objective (potentially being conducted entirely by third party providers) such that allegations against senior managers do not risk becoming compromised by the managers involved.
	A records retention and review process to identify patterns and risk vectors within the company.
	Readily available, detailed non-retaliation policy credibly describing how whistle-blowers who make reports in good faith will be protected.
<b>Whistle-blower Support Framework</b>	Linking of the policy to employee codes of ethics and on-boarding training.
	Periodic refresher training and communication from Directors and senior management endorsing the policy
	A mechanism to receive, investigate and manage complaints of retribution.
	Regular training of Directors and senior management about the policy (especially non-retaliation).
	Regular review of complaints and investigation results with a view to continuously improve the framework; and
	Allocation of a central function or person, such as the corporate compliance and ethics officer, to monitor the: <ul style="list-style-type: none"> <li>a) career progression,</li> <li>b) compensation, and</li> <li>c) any proposed disciplinary actions against whistle-blowers, for a reasonable period of time (eg 3 year) after their report is made.</li> </ul>

## SECTION IV | SECURITY & SAFETY SYSTEMS

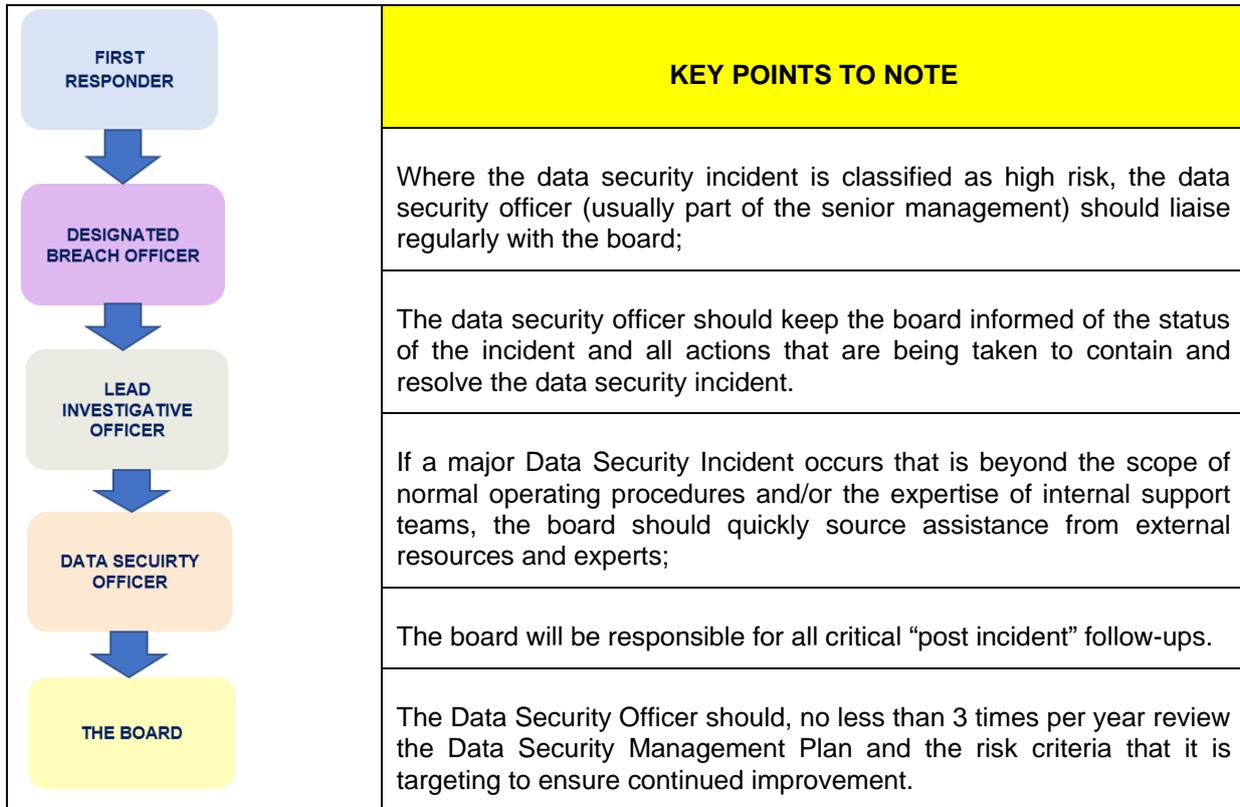
### 57. OVERVIEW: DATA SECURITY

- 57.1 Data Security Incidents are generally recognised as one of the costlier security failures faced by companies and frequently lead to financial losses and loss of customer trust.
- 57.2 A Data Security Response framework should follow this basic pattern:



- 57.3 A “**Data Security Incident**” refers to any unauthorised access and/or retrieval of Company Information. This may include company and personal data (regardless of format).
- 57.4 Examples of Data Security Incidents include:
- 57.4.1 The disclosure of Company Information to unauthorised individuals.
  - 57.4.2 Loss or theft of paper records, data or equipment such as tablets, laptops and smartphones.
  - 57.4.3 Attempts, or suspected attempts, to gain unauthorised access to computer systems, e.g. hacking.
  - 57.4.4 Records altered or deleted without authorisation by the data “owner”.
  - 57.4.5 Viruses or other security attacks on IT equipment systems or networks.
  - 57.4.6 “Blagging” offences where information is obtained by deception.
  - 57.4.7 Breaches of physical security e.g. forcing of doors or windows into secure rooms.
  - 57.4.8 Covert or unauthorised recording of meetings and presentations.

57.5 A Data Security Management Plan should provide for coordinated response teams to work together in the face of a Data Security Incident in a systematic way through the following management stages:



**Note 1:** The UK Government provides a “10 Step Guide” for companies to assist them to “protect themselves in cyberspace”. These 10 steps are represented graphically as:



<https://www.gov.uk/government/publications/cyber-risk-management-a-board-level-responsibility/10-steps-summary#steps-to-cyber-security-at-a-glance>



## 58. HEALTH & SAFETY

- 58.1 Companies should document a “**Health and Safety policy**” that:
- 58.1.1 notes and accepts their collective role in the health and safety leadership of their organisation;
  - 58.1.2 nominates a Director/committee to champion health and safety issues;
  - 58.1.3 sets out reasonable and practical protocols to address health and safety risk applicable to the company and its industry; and
  - 58.1.4 encourages all workers at the company to be actively involved in health and safety.
- 58.2 Boards should:
- 58.2.1 regularly refer to the health and safety policy in their meetings, making sure that all decisions reflect the intentions set out in the policy; and
  - 58.2.2 keep up to date with relevant health and safety risk management issues and review the policy’s performance regularly (at least annually).
- 58.3 Individual Directors should proactively note their individual responsibility towards the policy and its objectives and their actions and decisions that reinforce the policy.

## 59. CHECKLIST: BUSINESS CONTINUITY PLANNING

- 59.1 An effective BCP should take into account the size, nature and complexity of a company, nonetheless checklist set out below is a list of key components that should be present in any effective BCP
- 59.2 Note a board should receive comprehensive reports on their company’s BCP and BCP policy and collectively attest/sign-off on the BCP/BCM policy at least once a year.

**Note 1:** an effective business continuity management strategy is a proactive process and Directors should therefore actively promote an organisational culture that embeds the BCP into the “business-as-usual” operations of the company.

BCP ELEMENT	PRESENT Y/N
Defined policy, strategy and budget.	
Detailed actions list and hierarchy of priorities.	
Clearly defined roles, authorities and responsibilities.	
Pre-incident mitigation protocols (e.g. weekly back up of data to off-site location)	
A succession plan / identification of “next in line” personal for critical staff and senior management.	
Impact analysis and stress testing of business units to identify risks and appropriate responses.	
A programme for the testing, improvement, implementation and maintenance of the BCP;	
A programme for the training and “raising awareness” of staff and stakeholders;	
External communications protocols and “authorised information” to be distributed in the event of a disruption.	
Coordination protocols for dealing with external stakeholders (including relevant authorities).	



## SECTION V | INSOLVENCY

### 60. CHECKLIST: PRACTICAL STEPS IF THE COMPANY IS APPROACHING INSOLVENCY

- 60.1 As discussed at Section 32 (Do not Trade if Your Company is Insolvent) in an insolvency situation the focus of a Director's duties shift from protecting the interests of shareholders to protecting the interests of creditors.
- 60.2 As such, this can be one of the more likely operating environments in which a Director incurs personal liability risk.
- 60.3 Practical steps to mitigate such risk include:

FINANCIAL
Carefully monitor the company's day-to-day cash flows and liabilities.
Set out a clear timetable of the financial milestones faced by the company.
Set out a clear timetable for raising additional funds.
Ensure that the company reviews and pursues potential sources of new capital.
Unless absolutely necessary, avoid the company incurring fresh liabilities.
As soon as possible start negotiations with creditors to postpone payments, formally waive defaults, agree caps on any liabilities and/or terminate claims.
GOVERNANCE
Hold regular board meetings with, as far as possible, all Directors present.
At each board meeting, the company's financial position and its plans to minimising potential losses to creditors should be reviewed and agreed upon.
Take and circulate minutes of each meeting to all Directors as soon as possible after each meeting.
MISCELLANEOUS
As soon as possible ensure that the company takes professional advice from its lawyers and accountants in respect of the solvency issues and how to minimise the effect on creditors.
Take and safely secure careful records of all advice that is received by the company, its plans to address the situation and all steps that it takes.
Ensure that you are familiar and compliant with the terms of any Directors and officers insurance held by the company/you personally.





## ANNEX A | WHO'S WHO AND WHAT DO THEY DO?

### 61. SHAREHOLDERS

- 61.1 **They are:** the owners of a company.
- 61.2 **Why they are important:** Whilst there are nuanced differences between different jurisdictions, it is generally accepted that the point of a company is to further the interests of its shareholders.
- 61.3 **Their powers:**
- 61.3.1 The shareholders key power is their ability to appoint and dismiss Directors.
  - 61.3.2 They also have the power to influence the board's decision-making.
  - 61.3.3 HOWEVER, technically, shareholders do not have the power to direct a company's operations.
- 61.4 **Documents that are important:**
- 61.4.1 Company law will set out the baseline of shareholder rights that apply in a specific jurisdiction.
  - 61.4.2 Company's Constitutional Documents (eg. memorandum, articles of association and bylaws, will set out specific rights and powers applicable to that company
  - 61.4.3 Shareholder Agreements, may set out and defined specific agreements between shareholders. Typically rights and obligations relating to transferability of shares, veto powers and Director appointment rights etc.

### 62. DIRECTORS

- 62.1 **They are:**
- 62.1.1 collectively, the primary decision-making body of the company.
  - 62.1.2 Note in most jurisdictions even if a person is not formally appointed as a Director, he will still be recognised (and held liable) as a Director under law, if the board follows his instructions or if he is actively involved in the management of the company.
  - 62.1.3 Typically, there is no statutory distinction between the roles, duties and responsibilities of a "non-executive Director" vs an "executive Director". That being said:
    - a) a non-executive Director would normally be understood to be a Director whose role is that of an advisor or supervisor to the board, a Director that is primarily there to scrutinise and challenge the corporate strategy and management; and
    - b) an executive Director would normally be an employee of the company, someone who is understood to be a "senior manager" and would fulfil an active operational role.
- 62.2 **Why they are important:** they are accountable and responsible to a company's shareholders and stakeholders for all aspects of a company's actions.
- 62.3 **Their powers:**
- 62.3.1 A company's board has the power to make decisions for the company and are therefore responsible for:
    - a) establishing and executing the company's objectives/mission/values;



- b) determining a company's structure, strategy, and risk profile;
- c) delegating operational authority to the company's managers;
- d) monitoring how well those strategies, operations and structures are working;

#### 62.4 Documents that are important:

- 62.4.1 The Director's role and powers are primarily defined in the company's articles.
- 62.4.2 Employment agreements, where applicable, will set out the key terms that will frame a Director's ongoing engagement with a company; and
- 62.4.3 Manuals, policies, responsibility matrixes, standards set by governing bodies/regulators etc will all be applicable to the day-to-day duties and responsibilities of a Director.

### 63. MANAGEMENT

- 63.1 **They are:** not a company's key decision-makers BUT they are responsible for running day-to-day operations.
- 63.2 **Why they are important:** In many ways management has the greatest capacity to determine the success or failure of company.
- 63.3 **Their powers:**
  - 63.3.1 A key issue for any company's governance framework is the establishment of an appropriate level of executive power to delegate to management.
  - 63.3.2 If management's powers are excessively constrained the company will likely be too inflexible to effectively implement the board's strategy.
  - 63.3.3 With too much power there is a risk that management may become mis-aligned from the goals of the board/shareholders and pursue their own interests.
- 63.4 **Documents that are important:** Remuneration policy and contractual conditions.

### 64. STAKEHOLDERS

- 64.1 **They are:** employees, customers, financiers, suppliers, local communities/environments and governments i.e. persons effected by the actions of the company.
- 64.2 **Why they are important:** A company's exposure to reputational, monetary and operational risk can be considerable if stakeholder perspectives are insufficiently incorporated into a company's governance structures.
- 64.3 **Their powers:**
  - 64.3.1 In some jurisdictions the rights of stakeholders are expressly addressed in company law. Common examples including codetermination and employment protection legislation.
  - 64.3.2 In most jurisdictions, clients can "vote with their wallets" and express power by choosing to patronise a company's competitors (whose governance they prefer).
- 64.4 **Documents that are important:**
  - 64.4.1 applicable laws;
  - 64.4.2 mutual agreements; and
  - 64.4.3 records of active dialogue.



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## ANNEX C | JURISDICTION SPECIFIC CONSIDERATIONS

[Ask GLS to address own bespoke requirements]

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