

KING IV AN OVERVIEW



The King Reports on Governance for South Africa have for more than 20 years constituted the premier corporate governance codes in this country. They contain numerous recommendations and principles with respect to best corporate governance practice for enterprises. The reports are supplemented by practice notes issued from time to time by the Institute of Directors in Southern Africa (IODSA).

INTRODUCTION

The King reports are not legally binding. However, for entities with a primary listing on the JSE Limited securities exchange certain aspects are binding by virtue of the listings requirements imposing obligations on issuers to comply therewith. In respect of those matters in King which the JSE does not consider mandatory, an issuer is nevertheless required to describe the extent of its compliance, and explain any non-compliance, in its annual report to shareholders.

There have also been cases where the high court has considered the principles expounded by King to be binding on state-owned entities (SABC v Mpofu 2009), and where it has referred to those principles as a yardstick against which the conduct of directors should be measured in the context of their fiduciary duties (Minister of Water Affairs and Forestry v Stilfontein Gold Mining Company 2006).

Up until 1 November 2016, the applicable code was King III. On that date the King IV Report on Corporate Governance for South Africa, 2016 was launched. The JSE soon thereafter published proposed amendments to its listings requirements as an update with a view to incorporating certain of the provisions of King IV.

From a structural and format perspective, King IV is significantly different to King III. The substantive principles however are broadly in line with its predecessor. Much has been made of King IV's switch to an "apply and explain" philosophy as opposed to King III's "apply or explain". However, in substance essentially the same position is arrived at, given that King IV has reduced the 75 governance principles in King III, to 17 principles (one of which is applicable only to institutional investors). The 17 principles are general and high-level in nature, the idea being that they are capable of application by any entity regardless of its nature and size. It is the granular practices which are implemented in applying the principles which will naturally differ depending on the entity.

As with King III, King IV applies to all entities, and accordingly employs the generic term "governing body" when referring to the primary governance structure within an entity (in the case of a company, its board).

There are sector-specific supplements which apply to state-owned entities, municipalities, retirement funds, non-profit organisations and small/medium enterprises. These supplements set out some of the nuances and modifications to be borne in mind when applying the governance code to entities that fall within those categories.

AREAS OF COMPARISON

What follows is a table containing a brief comparison of some of the material and practical aspects of King III and King IV, as well as a comparison of these from a Companies Act perspective.

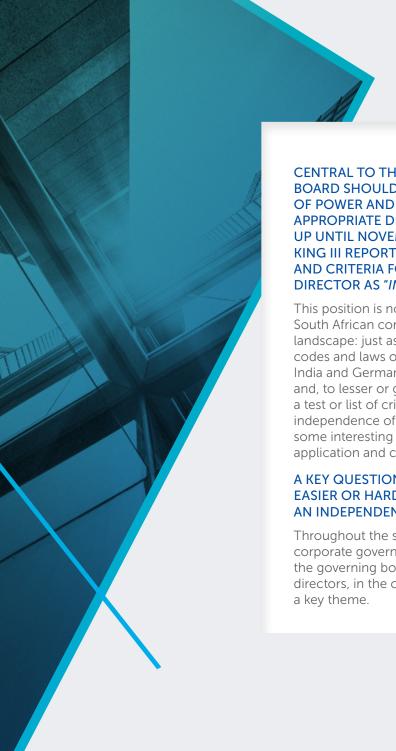
	KING III	KING IV	COMPANIES ACT, 2008
COMPOSITION OF GOVERNING BODY	Should comprise a majority of non-executives, and the majority of non-executives should be independent. Diversity of membership must be considered. Should be a minimum of two executive members, namely the CEO and CFO. Recommends that at least one-third of non-executive directors rotate at every annual general meeting.	Unchanged. Diversity of membership is further emphasised by the addition that the governing body should set targets for race and gender representation in its membership. Less prescriptive with regard to rotation. The board is left to decide on a rotation policy.	Little is prescribed in respect of board composition. At least 50% of directors (and alternates) must be elected by shareholders, and other directors may be directly appointed by any third party named in the MOI, or as ex officio directors. There is no requirement for the rotation of directors.
INDEPENDENCE OF DIRECTORS	A list of criteria (e.g. financial interests in the entity, and present or past relationships with the entity) are set out which criteria deem directors to be independent or non-independent.	Similar criteria are utilised, however these are now framed as non-exhaustive factors to be taken into consideration, and are therefore not necessarily determinative, of a director's status as independent or otherwise.	There is no general requirement or test for independence of directors other than in the context of the audit committee composition, as well as that of the "independent board" in the context of takeover law.
CHAIRMAN OF GOVERNING BODY	Should be an independent, non-executive. The office of chairman and CEO must not be occupied by the same person.	Unchanged.	Not regulated or prescribed. At common law, he is appointed by the board. Nothing prevents the CEO from being the chairman as well.
LEAD INDEPENDENT DIRECTOR	Required to be appointed only if chairman is not independent, and fulfils chairman's role when the latter is conflicted.	Required to be appointed irrespective of the chairman's position, and has an enhanced role under King IV.	Not regulated or prescribed.

	KING III	KING IV	COMPANIES ACT, 2008
CHAIRMAN'S INVOLVEMENT IN COMMITTEES	Should not be a member of the audit committee. Should not chair the remuneration committee, but may be a member of it. Should be a member of the nomination committee and may also be its chairman. Should not chair the risk committee but may be a member of it.	Position unchanged insofar as audit, nomination and remuneration committee is concerned. May chair the risk committee. May be a member of the social and ethics committee but should not chair it.	Not regulated or prescribed. The board can constitute any number of committees and has wide powers of delegation to such committees, but the chairman's participation in such committees is not directly regulated. However, the audit committee's composition is prescribed and therefore if the chairman does not meet the relevant criteria he cannot be a member of that committee.
DELEGATION	General principles of delegation are set out.	Adds that delegation to a member of the governing body must be formal and reduced to writing, setting out the scope and duration of the delegation.	In terms of s76(4) read with s76(5) directors are entitled to rely on delegates to whom they have reasonably delegated any functions or powers. The form and manner of delegation is not prescribed or regulated.
COMMITTEES OF GOVERNING BODY - GENERAL	Should comprise a minimum of three members, and must have formal terms of reference.	Unchanged. The minimum content of committees' terms of reference is slightly expanded. Annual report to disclose the committees' respective work and areas of focus during the relevant reporting period.	Only the composition of the audit committee and social and ethics committee is prescribed. Only public and state-owned companies are required to have an audit committee. Listed companies are required to have a social and ethics committee, as well as unlisted companies that reach 500 on their public interest score in any two of the previous five financial years. Audit committee and social and ethics committee must report to shareholders on their respective areas of work.

	KING III	KING IV	COMPANIES ACT, 2008
AUDIT COMMITTEE MEMBERSHIP	Should comprise at least three members, all of whom must be independent, non-executive.	Unchanged	Member of the audit committee must not be — involved in the day-to-day management of the company's business or have been so involved at any time during the previous financial year;
			a prescribed officer, or full-time employee, of the company or another related or inter-related company, or have been such an officer or employee at any time during the previous three financial years;
			a material supplier or customer of the company, such that a reasonable and informed third party would conclude in the circumstances that the integrity, impartiality or objectivity of that director is compromised by that relationship; and
			not be related to any person above.
NOMINATIONS COMMITTEE MEMBERSHIP	Composition not specifically prescribed. Practice note (Sept 2009) recommends all members to be non-executive; majority to be independent.	All members to be non-executive; majority to be independent.	Not prescribed or regulated.
RISK GOVERNANCE COMMITTEE MEMBERSHIP	Should comprise of both executives and non-executives.	Same, but adds that the majority should be non-executives.	Not prescribed or regulated.

	KING III	KING IV	COMPANIES ACT, 2008
SOCIAL AND ETHICS COMMITTEE MEMBERSHIP	Not addressed; regulated entirely by Companies Regulations.	Should comprise executives and non-executives; majority to be non-executives. To be applied together with Companies Regulations.	Must comprise at least three directors or prescribed officers, with at least one non-executive director.
CEO - DISCLOSURES	General disclosures relating to remuneration of directors and prescribed officers apply to the CEO.	Adds that there should be disclosure of the notice period for termination of: the CEO's contract as well as conditions attaching hereto; other professional commitments of the CEO; and whether succession planning is in place for the CEO position.	Only remuneration disclosures are required (by virtue of him being a director or prescribed officer).
COMPANY SECRETARY	Should have an arm's-length relationship with the governing body, and thus should not be a member of the governing body.	Unchanged.	Functions and duties are prescribed but it is not stated that the relationship with the board must be at arms-length.
REMUNERATION - VOTE BY SHAREHOLDERS OF A COMPANY	Recommends the remuneration policy be submitted for a non-binding advisory vote by shareholders at every AGM (ordinary resolution).	Unchanged, but adds that the remuneration policy must contain the measures that the board will take if 25% or more of votes exercised are cast against the policy. The measures taken must be disclosed in the next integrated report.	Remuneration to directors in their capacity as such must be approved by a special resolution within the prior two years. This is understood to include only director fees to non-executive directors, not salaries, bonuses etc. to executive directors.

	KING III	KING IV	COMPANIES ACT, 2008
COMPANY GROUPS	Recommends a governance framework to be in place between holding companies and their subsidiaries.	Unchanged. More detail is provided on the suggested content of the governance framework.	Governance framework is not prescribed or regulated.
INSTITUTIONAL INVESTORS	Not addressed in King III; dealt with in the separate Code for Responsible Investing in South Africa (CRISA).	Specific principles are set out concerning the overarching obligation of the governing body of an institutional investor to ensure that responsible investment is practised by the organisation to promote good governance and the creation of value by the companies in which it invests.	Not addressed.
SECTOR SUPPLEMENTS	Not addressed.	Contains sector-specific supplements which address the nuanced and specialised applicability of King IV in respect of municipalities, non-profit entities, retirement funds, SMEs and state-owned entities.	Not addressed other than in terms of the concept of a "state-owned company"; however this is simply regulated in the same way as a public company except to the extent a ministerial exemption applies in terms of s9. Non-profit companies are also a separate category, but are regulated the same way as profit companies save for certain exceptions as set out in s10 (mainly pertaining to share capital aspects).



CENTRAL TO THIS THEME IS THAT THE BOARD SHOULD COMPRISE A BALANCE OF POWER AND SHOULD HAVE AN APPROPRIATE DEGREE OF INDEPENDENCE. UP UNTIL NOVEMBER OF THIS YEAR, THE KING III REPORT SET THE BENCHMARK AND CRITERIA FOR CATEGORISING A DIRECTOR AS "INDEPENDENT".

This position is not unique to the South African corporate governance landscape: just as examples, the respective codes and laws of the US, UK, Australia, India and Germany also stress independence and, to lesser or greater extents, set out a test or list of criteria for measuring the independence of directors. King IV has made some interesting changes with regard to the application and content of the criteria.

A KEY QUESTION UNDER KING IV: IS IT EASIER OR HARDER TO BE CLASSIFIED AS AN INDEPENDENT DIRECTOR?

Throughout the series of King Codes on corporate governance, the composition of the governing body of the entity (the board of directors, in the case of a company) has been a key theme.

In terms of King III, in the first place, an independent director has to be a non-executive director. In addition to being non-executive, an independent director is a director who:

- is not a representative of a shareholder who has the ability to control or significantly influence management or the board;
- does not have a direct or indirect interest in the company (including any parent or subsidiary in a consolidated group with the company) which exceeds 5% of the group's total number of shares in issue:
- does not have a direct or indirect interest in the company which is less than 5% of the group's total number of shares in issue, but is material to his personal wealth;
- has not been employed by the company or the group of which
 it currently forms part in any executive capacity, or appointed
 as the designated auditor or partner in the group's external
 audit firm, or senior legal adviser for the preceding three
 financial years;
- is not a member of the immediate family of an individual who is, or has during the preceding three financial years, been employed by the company or the group in an executive capacity;
- is not a professional adviser to the company or the group, other than as a director:
- is free from any business or other relationship (contractual
 or statutory) which could be seen by an objective outsider to
 interfere materially with the individual's capacity to act in an
 independent manner, such as being a director of a material
 customer of or supplier to the company; or
- does not receive remuneration contingent upon the performance of the company.



IF A DIRECTOR FAILED TO COMPLY WITH ANY ONE OF THESE CRITERIA, HE WOULD FOR PURPOSES OF KING III BE REGARDED AS NON-INDEPENDENT.

King IV moves further away from the notion of boxing independence into set criteria: the criteria are now "factors" to be considered in assessing independence – the overarching general test is always whether "there is no interest, position, association or relationship which, when judged from the perspective of a reasonable and informed third party, is likely to influence unduly or cause bias in decision- making in the best interests of the organisation." The factors are not determinative and neither are they exhaustive. The factors also differ in some notable respects from the previous ones, indicating some interesting concessions and new angles taken by the drafters of King IV.

The newly stated range of factors to be considered are whether the director:

- is a significant provider of financial capital, or ongoing funding to the organisation, or is an officer, employee or a representative of such provider of financial capital or funding;
- if the organisation is a company, participates in a share-based incentive scheme offered by the company;
- if the organisation is a company, owns securities in the company, the value of which is material to the personal wealth of the director;
- has been in the employ of the organisation as an executive manager during the preceding three financial years, or is a related party to such executive manager;
- has been the designated external auditor responsible for performing the statutory audit for the organisation, or a key member of the audit team of the external audit firm, during the preceding three financial years;
- is a significant or ongoing professional adviser to the organisation, other than as a member of the governing body;
- is a member of the governing body or the executive management of a significant customer of, or supplier to, the organisation;
- is a member of the governing body or the executive management of another organisation which is a related party to the organisation; or
- is entitled to remuneration contingent on the performance of the organisation.





One of the new factors is whether the director is on the board of a "related" entity.

The first criterion that was in King III, namely that the director must not be a representative of an influential shareholder, is removed. This is an interesting deletion and an indication that the drafters have reconsidered the viewpoint that a representative of a substantial shareholder is necessarily in any position of "conflict" that places him apart from any other investor. In its place now are "significant providers of capital or funding". Note however that one of the new factors is whether the director is on the board or executive management of a "related" entity - "related" is defined as per the Companies Act, and in the context of companies it essentially refers to group companies. Cross-directorship within a group of companies is now an indication of possible non-independence. A clear distinction is thus drawn between, for instance, representatives of substantial (but not majority) shareholders on the one hand and representatives of holding companies on the other: The latter represent the de jure controller of the company, and one more readily perceives their non-independence.

Participation in a share-based scheme has been added as a factor. This is perfectly understandable as participants in such schemes are often awarded further shares in a manner directly, or at least very closely, linked to the performance of the company, whereas other investors are generally not. This factor can probably be seen as a sub-category of the last factor which is whether the director "is entitled to remuneration contingent on the performance of the organisation."

Lastly, the criterion of holding 5% or more of the company's or group's share capital is done away with: the question now is solely whether the shareholding is material to that director's wealth. Again understandable: what is more relevant is the materiality to the director personally.

What then is the answer to the opening question? Yes it is easier in the sense that the test now is less rigid, but no in the sense that not all the questions are set out for you nicely on a page. The key will be to apply the listed factors, and others, in a considered, substance-over-form way and arrive at an honest, justifiable assessment of a director's independence.

MARKET RECOGNITION

The way we support and interact with our clients attracts significant external recognition.

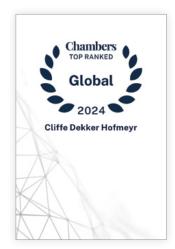
Chris Charter is the Practice Head of our Competition Law team. Chambers Global 2018–2024 ranked him in Band 1 for competition/antitrust. The Legal 500 EMEA 2017–2024 recommended Chris as a 'Leading Individual' for competition. The Legal 500 EMEA 2012–2016 recommended him for competition. IFLR1000 2019–2023 recommended him as a highly regarded lawyer. IFLR1000 2011–2018 recommended Chris as a leading lawyer. Global Competition Review 2020–2021 named Chris a highly recommended lawyer.

Tim Fletcher is the Chairperson and a director in our Dispute Resolution practice. Chambers Global 2022–2024 ranked Tim in Band 2 for dispute resolution. Chambers Global 2019–2021 ranked him in Band 3 for dispute resolution. The Legal 500 EMEA 2024 recommended Tim in the 'Hall of Fame' for dispute resolution. The Legal 500 EMEA 2016–2023 recommended him as a 'Leading Individual' for dispute resolution.

Aadil Patel is the Practice Head of our Employment Law team, and the Head of our Government & State-Owned Entities sector. Chambers Global 2024 ranked Aadil in Band 1 for employment. Chambers Global 2015–2023 ranked him in Band 2 for employment. The Legal 500 EMEA 2021–2024 recommended Aadil as a 'Leading Individual' for employment and recommended him from 2012–2020.

IFLR1000 2018-2023 recommended Yaniv Kleitman as a 'Notable Practitioner' in M&A.

IFLR1000 2018–2023 recommended Francis Newham as a 'Notable Practitioner' in capital markets: equity, and M&A.











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