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# THE NEW SOUTH AFRICAN COMPANIES ACT AND KING III – THE FUTURE

Presented by Mervyn E King SC

- Committee formed 1992
- Special circumstances
- Wide remit
- Profile of members
- Inclusive approach
- Evolutionary – retain committee

- Recommendations legislated
- Urban vs rural
- Natural resources – regeneration
- World summit – GRI
- Integrated sustainability reporting

- IT and shareholder revolutions
- New Companies Act – Rubicon
- New general awareness
- Legislation on impacts
- Community and environment
- International governance trends

- 18<sup>th</sup> and 19<sup>th</sup> centuries
- Mid-20<sup>th</sup> century
- Last decades of 20<sup>th</sup> century
- Integral to society – link
- Greatest pools of human and monetary capital
- The 100 largest economies

- New capitalists
- Legitimate expectations
- Analysts and consultants
- After-quality of product
- Trust and confidence in the company
- By its stakeholders

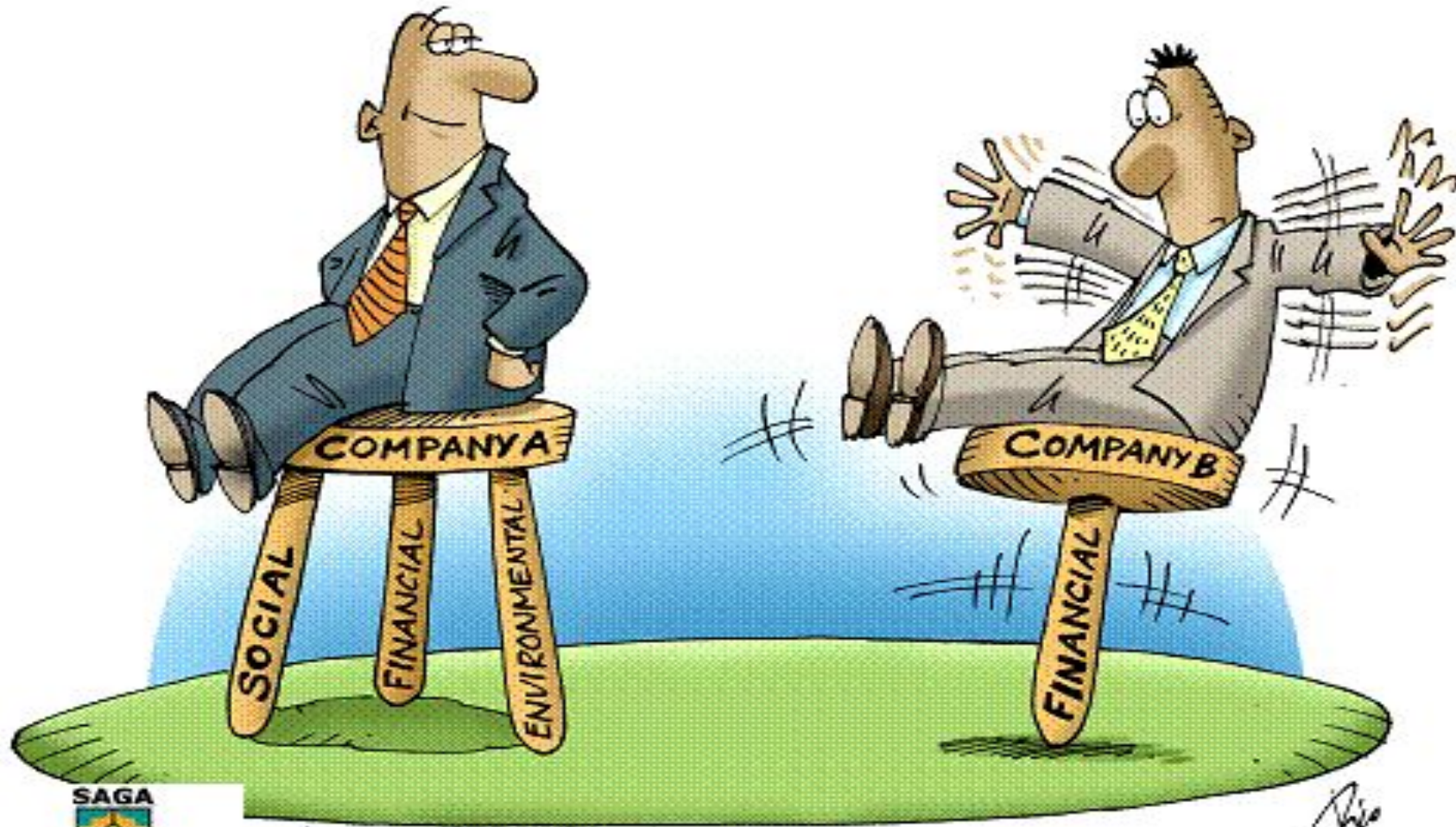
- A moment in time – balance sheet
- Total economic value – many factors
- Information for informed assessment
- Coca Cola

- Financial information
- Backward looking
- Forward looking information
- First priority – product
- Second priority – trust and confidence



- Good governance
- Strategy
- Sustainability
- Governance, strategy and sustainability have become inseparable

# INTEGRATED REPORTING



SOUTH AFRICAN GREEN ACCOUNTING ASSOCIATION

*Pico*

- Norway and Sweden
- The Stiglitz Report, France
- Danish Financial Statements Act
- UK Companies Act
- German Commercial Code
- Indonesia
- IFAC
- Harvard
- SEC
- A4S
- GRI
- G3 Guidelines on sustainability reporting
- IRCSA and IIRC

- *One Report is a call for more integrated financial and non-financial reporting. The key word here is integrated. While the separate outcomes on financial and non-financial performance measures are important, equally important is the relationship between them. Just how does non-financial performance contribute to financial performance and vice versa?”*

One Report: Integrated Reporting for a Sustainable Strategy, by Robert G Eccles and Michael P Krzus, John Wiley & Sons

- Integrated reporting – SEE - sustainability
- Internal audit risk-based – strategy
- Assessment of internal controls
- Governance of risk
- Policy for remuneration
- IT governance
- ADR

- Greater agents for change
- Millions of companies, a few hundred governments
- 21<sup>st</sup> century – the “century of the environment”
- Individual – provider of capital, customer and citizen

- King III issued on 25 February 2009 for public comment
- Launch on 1 September 2009
- Effective from 1 March 2010
- New Act effective from third quarter 2010?

- United Nations – “adopt or explain”
- Netherlands – “apply or explain”
- United Kingdom “missed a trick” – FRC
- King III – “apply or explain”
- Not substantial compliance



- Section 7 of the new Act to promote compliance with the Bill of Rights
- To promote entrepreneurship, flexibility and simplicity
- To encourage transparency and high standards of corporate governance
- Does legislation improve governance standards?

- Company incorporated by Memorandum of Incorporation (Mol)
- State-owned companies (SOC Ltd)
- Private companies ((Pty) Ltd)
- Personal liability companies (Inc)
- Public companies (Ltd)
- Non-profit companies (NPC)

- Conduct of a director in s76
- Fiduciary duty of good faith “and for a proper purpose”
- In the best interests of the company
- Care, skill and diligence
- Be reasonably expected
- Test is objective

- The business judgment rule
- Objectively speaking, all the facts
- No personal financial interest
- Decision a rational one
- Escape liability based on breach of duty of care
- Section 218(2)

- New Act – information furnished
- Employee or other professional persons
- Rely on it
- Reason to believe no confidence
- Cannot remain supine if reason to enquire arises

- Accountability and transparency
- Public company and state-owned company
- Company secretary
- Audit committee
- External auditor – independence
- Designated auditor five consecutive financial years

- Appointed by shareholders
- Audit committee members must be directors
- No qualifications for members
- Audit committee nominates for appointment a registered auditor
- In the opinion of the audit committee is independent
- Fees of the auditor
- Nature and extent of any non-audit services
- Report on the accounting practices and internal financial controls of the company

- Sections 86 and 88
- A Ltd and SOC must appoint
- Attributes
- Duties



- The Companies Tribunal or accredited entity
- Forum for voluntary alternative dispute resolution
- Any matter arising under the new Act
- Reviews of administrative decisions made by the Commission

- Emerging trend in corporate governance globally
- Duty of care to preserve relationships
- Disputes destroy relationships
- Resolved as efficiently, expeditiously and effectively as possible
- King III recommends alternative dispute resolution clause

- King III – internal audit has changed to risk-based
- Understanding of the long-term strategic direction
- Whether controls are adequate
- Written assessment of the adequacy
- Audit committee
- Context of substance for directors' report

- IT governance and IT security
- Service providers
- Pervasive
- Built into the business plan

- Policy of remuneration to the shareholders for their approval
- Within that framework, the board and management to determine individual remuneration
- Annual evaluation of boards and individual directors

- Chairman and chief executive separate
- Chairman should be independent non-executive director
- Lead independent director
- Independence on takeover

- The new Act, shareholder approval
- Shares and share options to be issued to directors
- King II provided for share options
- King III recommends in future, non-executive directors should not be granted share options

## HOW REPORT PERFORMANCE?

- Financial information alone?
- Not sufficient for informed assessments
- How has the company positively and negatively impacted on a community economically, socially and environmentally through its operations during the year under review?
- How is the company going to improve the positive aspects and eradicate or ameliorate the negative aspects in the financial year ahead?
- Corporate reporting not what it used to be



- Apply or explain (comply or explain)
- Integrated reporting (silos)
- Shareholder remuneration policy (none)
- Recommendations on remuneration (none)
- Internal audit – risk-based (no written assessment)
- Sub-committees – deemed directors (not deemed)
- Audit Committee (report to and appointed by shareholders)

- Lead independent director (none)
- IT governance and security (none)
- “Must” and “should” (none)
- Duty of care and ADR (none)
- Training (some)
- Investor code (July 2010)

- Assessment of internal controls (none)
- Responsible corporate citizen (theme – imperative of 21<sup>st</sup> century)
- Risk governance and management (not separated)
- Share options (approved at AGM)
- Stakeholder relationships (King I)
- Evaluation of management and board (emphasis)
- At the forefront

- Financial capital
- Human capital
- Natural capital
- Social capital
- Manufactured/technology capital
- Critical interdependence

- Nature provides human society with a vast diversity of benefits such as food, fibres, clean water, healthy soil, carbon capture and many more. Though our well-being is totally dependent upon the continued flow of these “ecosystem services”, they are predominantly public goods with no markets and no prices, so are rarely detected by our current economic compass. As a result, biodiversity is declining, our ecosystems are being continuously degraded and we, in turn, are suffering the consequences

- Traditional accounting and reporting emphasise discrete assets, presenting them as additive rather than interdependent. In the modern economy, it is increasingly the interaction among assets, e.g. people, technology, capital, networks, that drives value creation.

- Foresight
- New economy
- Step by step
- An ascending path
- *The Age of Stupid* - 2010

# THANK YOU

Prof Mervyn E King SC