New legislation and King III

Implications for Records Management

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Agenda

- What is King III
- Principles and proposed usage
- Related new legislation
- Implications for records management

What is King III

KING CODE OF GOVERNANCE FOR SOUTH AFRICA - 2009

KING COMMITTEE ON GOVERNANCE

Effective from 1 March 2010

All text is from the code – commentary is from COR Concepts

Background

- King II has been widely accepted as principles of good corporate governance
- Previously, The JSE Limited (JSE) required listed companies to comply with King II
- King III must be read in conjunction with the New Companies Act 71 of 2008
- Act will be effective on 1 July 2010 (subject to change).
- King III was effective from 1 March 2010.

We have only highlighted areas of interest for information governance – King III is far more comprehensive than discussed here.

The Governance framework

- The governance of corporations can be on a statutory basis, as a code of principles and practices, or a combination of the two.
- King III adopts a “recommendation for a course of conduct”.
- Thus, if a board believes it to be in the best interests of the company, it can adopt a practice different from that recommended in the code, but must explain it.
- King III = “Apply or explain”

The Governance framework

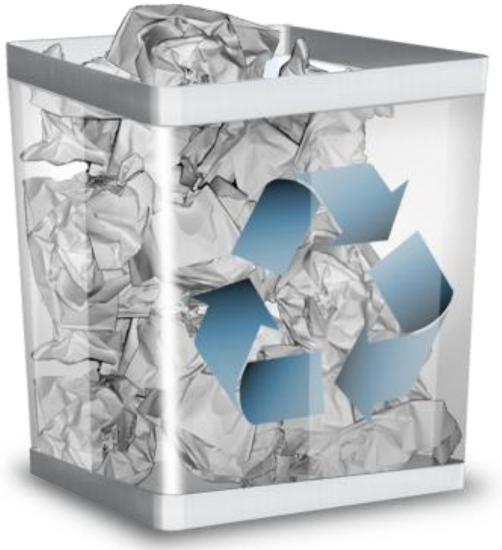
- The board has a duty to establish structures and processes, with appropriate checks and balances that enable directors to discharge their legal responsibilities
- This includes the following principles:
  - Sustainability
  - Innovation, fairness, and collaboration
  - Governance, sustainability and strategy are seen as inseparable – hence the term “integrated performance and reporting”

King III (and the Act) require many reports. Accurate, timeous access to information is critical to fulfil this requirement.

Principles

- Sustainability includes taking the environment into account. Ultimately this will be written into law (*Minister of Environmental affairs – Marinus van Schalkwyk*)
- It is likely that Companies may use digitisation as one of the means to achieve their environmental obligations. Organisations should identify whether scanning will assist in meeting environmental obligations.
- This will require less printing, and more use of the original digital records.

Going green will become increasingly fashionable and legislated.



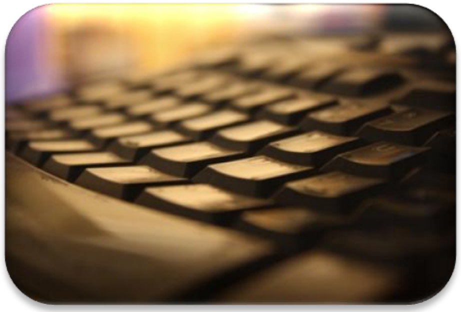
Principles

- Internal audits should be Risk-based
- Risk of loss of information should be one of the components of the audit.
- IT Governance is critical. "*The risks involved in IT governance have become significant*".

IT Governance

- "There is no doubt that there are operational risks when one has a service provider because confidential information leaves the company. In IT governance, one seeks confidentiality; integrity and availability of the functioning of the system; possession of the system, authenticity of system information; and assurance that the system is usable and useful. Concerns are unauthorised use, access, disclosure, disruption or changes to the information system."
- Directors must implement reasonable steps …

Ensure that any service provider meets these requirements.



Principles

- The board should appreciate that strategy, risk, performance and sustainability are inseparable
- The board should consider sustainability as a business opportunity. *Think how digitisation or other practices could assist.*

Principles

- The board should ensure that the company implements an effective compliance framework and effective processes
  - without contravention of any laws and regulations (*regulatory universe and retention requirements become important)*
- …directors have a wider responsibility to familiarise themselves with the relevant laws, regulations and codes applicable to the company and to ensure that appropriate processes are in place to address compliance. (*This includes record retention processes*)

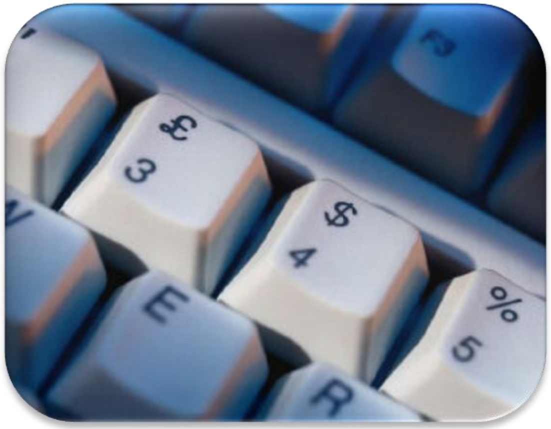
Principles

- The role of the CEO includes:
  - ensuring that the company complies with all relevant laws and regulations.
- The board will look to the company secretary for guidance on their responsibilities and their duties and how such responsibilities and duties should be properly discharged in the best interests of the company

Unfortunately many company secretaries do not have the requisite knowledge .

IT Risks

- Audit committees should consider IT risk as a crucial element of the effective oversight of risk management of the company, including:
  - IT risks and controls;
  - business continuity and data recovery related to IT; and
  - information security and privacy.



Risk management

- Risk management is a very critical aspect of corporate governance and a risk plan must be documented.
  - *IT, Records and information managers need to understand the organisation's*
    1. *Appetite for risk;*
    2. *Risk philosophy*
    3. *Risk strategies*
       1. Including - compliance risk in relation to legislation
  - *and help them understand the risks attached to information.*

Information security

- confidentiality: *ensuring that information is accessible only to those authorised* to have access;
- integrity: *safeguarding the accuracy and completeness of information and processing methods; and*
- availability: *ensuring that authorised users have access to information and associated assets when required.*

Information Security

- Information security deals with the protection of information, in its electronic and paper-based forms, as it progresses through the information lifecycle for capture, processing, use, storage, and destruction. For this reason, information security has to address people-, process- and technology-related dimensions in order to be truly effective.

This is a board responsiblility!

Information Security

Contributes to:

- *enabling the business strategy:*
- *sustaining normal business operations:*
- *managing risk:*
- *avoiding unnecessary costs:*
- *reduced chance of litigation due to legal liability:*
- *meeting compliance requirements:*
- *investing for success:*

Compliance with the regulatory environment

- Companies must comply with applicable laws and regulations.
  - *Including the retention requirements!!*
- The board and each individual director should be aware of the laws, regulations, rules and standards applicable to the company.
  - *This is onerous, and most don't know the retention laws.*
- The board:
  - has a duty to identify the laws, regulations and non-binding rules and standards applicable to the company.
  - Should ensure that the company implements an effective compliance framework and processes

Related current and pending legislation

- New Companies Act
- ECT Act under review
- Promotion of Access to Information Act (PAIA)
- Protection of Personal Information Bill

Protection of Personal Information Bill – Data Protection/Privacy

Information must be:

- obtained fairly and lawfully;
- used only for the specified purpose for which it was originally obtained;
- adequate, relevant and not excessive to purpose;
- accurate and up to date;
- accessible to the subject;
- kept secure; and
- destroyed after its purpose is completed.

Promotion of Access to Information Act (PAIA)

Who must comply?

All so-called public and private bodies.

- A requester must be given access to any record of a private body if—
  - that record is required for the exercise or protection of any rights;
  - that person complies with the procedural requirements in this Act relating to a request for access to that record; and
  - access to that record is not refused in terms of any ground for refusal contemplated in ……

PAIA Compliance

All organisations must:

- Review document management procedures and practices
- Map all records (at a high level)
- Categorize record types
- Develop clear availability policies
- Implement procedures and forms to deal with requests
- Appoint, educate and empower personnel to deal with requests
- Develop clear categorization and storage policies
- Ensure that the all staff adhere to the procedures and policies

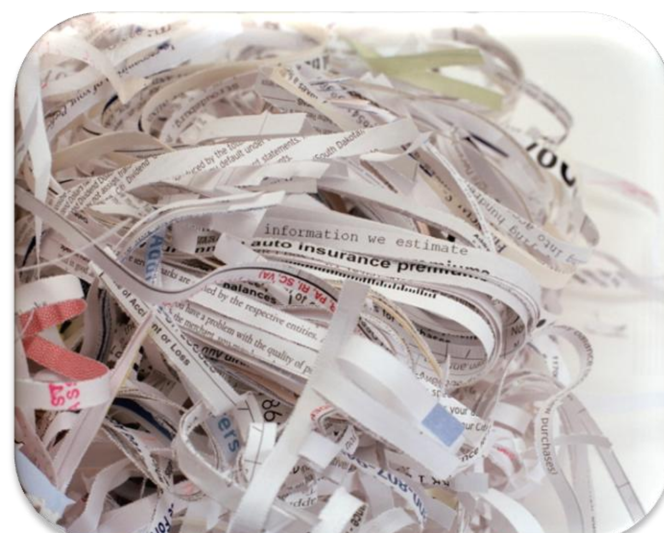
The Companies Act 71 of 2008

- Form and standards for company records
- Location of company records
- Access to company records

The Companies Act 71 of 2008

It is an offence for *a company—*

- (i) with an intention to deceive or mislead any person—
  - *to fail to keep accurate or complete accounting records;*
  - *to keep records other than in the prescribed manner and form, if any;*
  - (ii) to falsify any of its accounting records, or permit any person to do so; or
  - *(b) any person to falsify a company's accounting records.*



The Companies Act 71 of 2008

S7. An unaltered electronically or mechanically generated reproduction of any document, other than a share certificate, may be substituted for the original for any purpose for which the original could be used in terms of this Act.

The Companies Act 71 of 2008

Any documents, accounts, books, writing, records or other information

- that a company is required to keep in terms of this Act or any other public regulation must be kept—
- *(a) in written form, or other form or manner that allows that information to be* converted into written form within a reasonable time; and
- *(b) for a period of seven years, or any longer period of time specified in any other* applicable public regulation…

The Companies Act 71 of 2008

- If, in terms of this Act, a notice is required or permitted to be given or published to any person, it is sufficient if the notice is transmitted electronically directly to that person in a manner and form such that the notice can conveniently be printed by the recipient within a reasonable time and at a reasonable cost.

The Companies Act 71 of 2008

If, in terms of this Act, a document, record or statement, other than a notice …. is required—

- *(a) to be retained, it is sufficient if an electronic original or reproduction of that* document is retained as provided for in section 15 of the Electronic Communications and Transactions Act; or

Companies Regulations December 2009

- **Keep the following:**
- Incorporation records (Indefinitely)
- Information regarding directors (7 years)
- Access to information – in accordance with PAIA
- Accounting records
- Records of all liabilities and obligations
- Records of all revenue and expenditures
- Reports (7 years)
- Minutes of directors and committee meetings (7 years)

Companies Regulations December 2009

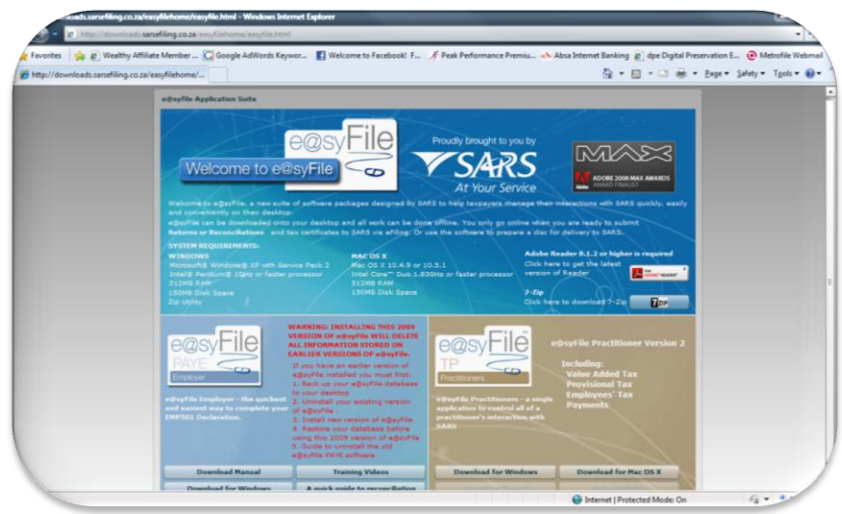
If a company keeps any of its accounting records in electronic form, the company must

(a) provide adequate precautions against loss of the records as a result of damage to, or failure of, the media on which the records are kept; and

(b) ensure that the records are at ail times capable of being retrieved to a readable and printable form, including by converting the records from legacy to later storage media, or software, to the extent necessary from time to time.

Can documents be managed electronically?

- Yes, but only if the conditions of the Electronic Communications & Transactions Act are met.
- Those conditions are found in sections on "retention", "original" and "evidence"



The New Companies Act

- **Adds weight to the ability to manage documents electronically**
- **Changes some retention periods.**

> *........ it is sufficient if an electronic original or reproduction of that* document is retained as provided for in section 15 of the Electronic Communications and Transactions Act;

Final thoughts

- All organisations need to implement some form of corporate governance
- Most will adopt King III (most will have to)
- It is closely aligned to the new Companies Act
- And to the ECT Act
- Good corporate governance is dependent upon good information governance
- Most directors don't know, (and aren't really interested) in the information requirements
- IT and records managers can assist.

Questions

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