

**Author: HJ Kloppers**

**DRIVING CORPORATE SOCIAL RESPONSIBILITY (CSR)  
THROUGH THE *COMPANIES ACT*: AN OVERVIEW OF THE ROLE  
OF THE SOCIAL AND ETHICS COMMITTEE**

**ISSN 1727-3781**



**2013 VOLUME 16 No 1**

<http://dx.doi.org/10.4314/pelj.v16i1.6>

**DRIVING CORPORATE SOCIAL RESPONSIBILITY (CSR) THROUGH THE  
COMPANIES ACT: AN OVERVIEW OF THE ROLE OF THE SOCIAL AND  
ETHICS COMMITTEE**

**HJ Kloppers\***

## **1 Introduction**

The reform process of the company law reached its pinnacle with the enactment of the new *Companies Act*,<sup>1</sup> which became effective on 1 May 2011 and changed the landscape of corporate law. The Act introduced new concepts such as business rescue practices<sup>2</sup> providing companies in financial distress with an option other than continuing with insolvency procedures, and laid down new solvency and liquidity requirements.<sup>3</sup> Despite the comprehensive changes brought about by the Act no express reference is made to companies' social responsibility (which is commonly referred to as CSR),<sup>4</sup> and as long as no legal requirement is set to integrate CSR issues into their decision-making and governance structures businesses will not be legally obliged to act in a socially responsible manner.<sup>5</sup> The legislature has taken

\* Henk J Kloppers. B Com (Law), LLB, LLM (PU for CHE), LLD (NWU), Post Graduate Diploma in Financial Planning (UFS). Senior Lecturer, Faculty of Law, North-West University (Potchefstroom Campus). This contribution stems from the author's LLD thesis entitled "Improving Land Reform through CSR: A Legal Framework Analysis". Email: henk.kloppers@nwu.ac.za.

<sup>1</sup> *Companies Act* 71 of 2008. The 2008 *Companies Act* repealed the previous *Companies Act* which had been in place since 1973, bringing an end to the 38-year reign of the previous Act. It should be noted that chapter 14 of the repealed *Companies Act* 61 of 1973 remains applicable in certain instances related to the winding-up of companies.

<sup>2</sup> For a discussion of the new business rescue measures, see Rushworth 2010 *Acta Juridica* 375-408; Loubser (Part 1) 2010 *TSAR* 501-514; and Loubser (Part 2) 2010 *TSAR* 689-701.

<sup>3</sup> Section 4 *Companies Act* 71 of 2008. For a discussion of the solvency and liquidity requirements, see Van der Linde 2009 *TSAR* 224-240. The solvency and liquidity requirements are not generally applicable, and are applicable only in instances dealing, for example, with company distributions to shareholders.

<sup>4</sup> For the purposes of this contribution the definition of CSR provided by the International Organisation for Standardisation (ISO) is used. The ISO defines CSR as "the responsibility of an organization for the impacts of its decisions and activities on society and the environment, through transparent and ethical behaviour that contributes to sustainable development, health and the welfare of society; takes into account the expectations of stakeholders; is in compliance with applicable law and consistent with international norms of behaviour; and is integrated throughout the organization and practised in its relationships" (*ISO Guidance on Social Responsibility* 3).

<sup>5</sup> In *Minister of Water Affairs and Forestry v Stilfontein Gold Mining Company* 2006 5 SA 333 (W), the court, with reference to the King Report on Corporate Governance, 2002 (King II), noted

cognisance of this fact and the fact that the public is increasingly paying attention to social issues, and has through section 72 of the Act without specifically referring to CSR made an attempt to ensure that CSR becomes infused and embedded in a company's governance structures.

The contribution of the Act in the CSR context is, however, not immediately evident from the Act itself, that makes no reference to CSR. From a CSR perspective the Act's contribution is found in section 72(4)(a), which authorises the Minister of Trade and Industry to prescribe through the use of regulations that a company or category of companies described in terms of their annual turnover, the size of their workforce and the nature and extent of their activities must have social and ethics committees.<sup>6</sup> The Minister has acted on this mandate and on 26 April 2011 the *Companies Regulations, 2011*<sup>7</sup> were released, which *inter alia* introduced the new requirement that companies falling within a certain category (see paragraph 2) *must*

---

that one of the characteristics of good governance is social responsibility. This particular case dealt with the issue of preventing water pollution in mining operations, and the court came to the conclusion that the relevant respondents acted irresponsibly by not addressing the issue of the water pollution (at paras 16.7-16.9). However, it should be noted that King II is not *per se* a legally enforceable instrument. It should also be noted that the entire chapter 1 of the King Report on Governance for South Africa (2009), commonly referred to as King III, is devoted to the issue of ethical leadership and corporate citizenship, in terms of which the board of a company is expected to provide effective leadership based on an ethical foundation (Institute of Directors King Report II 36). This contribution focuses on the legislative intervention regarding a company's social and ethics committee and not on the voluntary measures included in King III.

<sup>6</sup> Although the establishment of a social and ethics committee has now been enshrined in legislation, the notion of having a social and ethics committee – or a CSR committee, as they are generally referred to – is nothing new, with numerous companies listed on the Johannesburg Stock Exchange (JSE) having established CSR board committees. Despite the fact that the membership of these committees does not necessarily conform to the composition required by the Regulations, many of these committees are already responsible for monitoring governance and implementing CSR as part of the companies' efforts to enhance their levels of transparency and accountability. A search of the websites of, for example, the major agricultural companies operating in the North-West Province indicated that none of these companies currently has a CSR committee operating at an executive level. None of these companies has directors with a dedicated CSR portfolio, possibly indicating that CSR has not yet been fully integrated into their governance structures – a position which will have to be addressed in terms of the new regulations.

<sup>7</sup> GN R351 in GG 34239 of 26 April 2011 (hereinafter referred to as the *Companies Regulations, 2011*). It should be noted that these regulations were released only in the second quarter of 2011. Literature on the subject is extremely limited and the discussion of the relevant regulations will focus on the Regulations themselves as the primary source. It should be noted that in terms of s 72 of the *Companies Act* 71 of 2008 the social and ethics committee is a board committee appointed by the board (s 72(5)). This position is reaffirmed by the wording of reg 43(3), which states that "a board of a company that is required to have a social and ethics committee ...".

establish a social and ethics committee.<sup>8</sup> The introduction of these measures could be regarded as an attempt by Government from an external position to put pressure on the private sector to operate in a socially responsible fashion, thus enhancing its social legitimacy.<sup>9</sup> In terms of the Regulations only certain companies are required to form social and ethics committees.

The aim of this contribution is to provide an overview of the role of the social and ethics committee, as envisaged by the *Companies Regulations*, 2011, as a potential driver of CSR. The following section will address the scope of application of this requirement. In order to achieve this aim, the contribution will firstly determine which companies are required to have social and ethics committees. Following this, a discussion of the functions and standards of conduct and the liability of members of the committee will be provided. Finally the contribution will refer to the powers of the committee and concluding remarks will be provided.

## 2 General requirements

In terms of regulation 43(1) of the *Companies Regulations*, 2011 companies that are state-owned, listed public companies or companies that have in any two of the previous five years scored above 500 points in terms of regulation 26(2)<sup>10</sup> must appoint a social and ethics committee consisting of not less than three directors or

---

<sup>8</sup> These companies must appoint a social and ethics committee unless exemption has been provided in terms of s 72(5) and (6) of the *Companies Act* 71 of 2008, or unless the company is a subsidiary of another company which has a social and ethics committee and which will perform the functions required by the *Companies Regulations*, 2011 on behalf of the subsidiary company (reg 43(2)(a)).

<sup>9</sup> Weaver, Trevino and Cochran 1999 *Academy of Management Journal* 539; DiMaggio and Powell 1983 *American Sociological Review* 147-160; and Wood 1991 *Academy of Management Review* 691-718.

<sup>10</sup> Regulation 26 addresses issues regarding the interpretation of the regulations affecting transparency and accountability, and reg 26(2) provides the method to be used to determine a company's "public interest score" for the purposes of reg 43, amongst others. The 500 points referred to in reg 43(1) refer to the public interest score, which is calculated as the sum of (a) a number of points equal to the average number of employees of the company during the financial year; and (b) one point for every R1 million (or portion thereof) in third-party liability of the company; and (c) one point for every R1 million (or portion thereof) in turnover during the financial year; and (d) one point for every individual who at the end of the financial year is known by the company to directly or indirectly have a beneficial interest in any of the company's issued securities.

prescribed officers of the company.<sup>11</sup> At least one of these directors or prescribed officers must be a director not involved in the day-to-day management of the company and who has not been so involved in the preceding three financial years.<sup>12</sup> This requirement might in future develop to the point where it is required that a board member should be responsible for the CSR portfolio and be held responsible at board level for all matters related to CSR. This step would contribute to embedding CSR in corporate governance in a significant manner and drive CSR throughout this section of the corporate sector.

The requirement that at least one of the members of the committee should be a non-executive director (someone not involved in the day-to-day management of the company)<sup>13</sup> represents an attempt by the legislature to enhance transparency in the

<sup>11</sup> This position is similar to the position proposed in the Indian *Companies Bill*, 2011 (India 2011 <http://bit.ly/10SVRRh>). In terms of s 135(1) of the said Bill, companies with a net worth exceeding an estimated R800 million ("rupees five hundred crore") or with an annual turnover exceeding an estimated R1.6 billion ("rupees one thousand crore") will be required to constitute a Corporate Social Responsibility Committee (recognised as a Board committee) consisting of three or more directors, of whom one should be independent.

<sup>12</sup> Regulation 43(4). The social and ethics committee is appointed by the board of a company. Failure by the board to appoint the committee is addressed in s 84(6), which reads as follows: If the board of a company fails to make an appointment as required by this Part—  
 (a) the Commission may issue a notice to that company to show cause why the Commission should not proceed to convene a shareholders' meeting for the purpose of making that appointment; and  
 (b) if the company fails to respond to a notice contemplated in paragraph (a) or, in responding, fails to satisfy the Commission that the board will make the appointment, or convene a shareholders' meeting to make the appointment, within an acceptable period, the Commission may—  
 (i) give notice to the holders of the company's securities of a general meeting, and convene such a meeting, to make that appointment; and  
 (ii) assess a pro-rata share of the cost of convening the general meeting to each director of the company who knowingly permitted the company to fail to make the appointment in accordance with this Part.

From the wording of this regulation the conclusion can be drawn that all state-owned and listed public companies will in future be required to have a social and ethics committee, while the establishment of the committee is required for only those private companies referred to in reg 43(1)(c).

<sup>13</sup> The draft *Companies Regulations* initially required that the committee should comprise a minimum of three independent non-executive directors (Cassim *Practitioner's Guide* 104). This requirement exhibits similarities with the recent trend in trust law, where the move is towards having an independent trustee on the board of trustees to insure proper governance in the trust's affairs. In the 2005 Appeal Court decision of *Land and Agricultural Bank of South Africa v Parker* 2005 2 SA 77 (SCA) the court expressed the opinion that the time has come to require that at least one of the trustees of a trust should be an independent trustee who has no vested interest in the trust itself. This recommendation has already been implemented by a number of Masters offices requiring newly registered trusts to have an independent trustee. For a discussion of the *Parker*-decision, see Kloppers 2006 *TSAR* 414-423. It should, however, be

functioning of the committee and to act as a counterbalance to corporate greenwash.<sup>14</sup> Although the regulation does not require the committee to include external CSR experts or stakeholder representatives,<sup>15</sup> it should be noted that the committee will add further value to its functioning if it could demonstrate that it is actively engaging with its stakeholders.<sup>16</sup> It is further suggested that the committee should consist of key personnel within the company, who are directly involved in the company's CSR management and who will be able to help embed and integrate CSR into the company's business ethos and practices as well as the corporate structure. It would defeat the purpose of the establishment of the committee if, for example, the committee were to be led by the company secretary, who possibly would have no involvement with the company's CSR efforts.

The Act authorises the social and ethics committee to require any director, prescribed officer or any employee to provide the information or explanations necessary for the performance of the committee's responsibilities.<sup>17</sup> The committee is further entitled to attend general shareholders meetings and to be heard at such meetings to the extent that the functions of the committee are discussed.<sup>18</sup> This step will ensure that CSR matters and policies are brought to the shareholders' attention at the annual general meeting and that CSR will in future become a standing item on the agenda of companies' shareholder meetings.<sup>19</sup>

---

noted that the final regulations did not retain the requirement of three independent non-executive directors.

<sup>14</sup> This quaint term refers to an attempt to improve a business' image without changing the business model to incorporate CSR principles – camouflaging business-as-usual (Utting 2003 *Global Future* 10). Corporate greenwash is often a public relations attempt to obscure the true impact of business activities (Hamann, Khagram and Rohan 2008 *Journal of Southern African Studies* 23).

<sup>15</sup> Each company will have a different set of stakeholders, depending on its core business. A socially responsible business should attend to the legitimate interests of all of its stakeholders and act in the interest of all of the stakeholders, not just the shareholders (who are also stakeholders) (Kloppers *Improving Land Reform* 156). Stakeholders could include employees, local communities, the Government, customers, and suppliers.

<sup>16</sup> A company may engage with stakeholders only if it has identified those stakeholders with legitimate interests in the business – stakeholders that merit and receive consideration in business decisions.

<sup>17</sup> Sections 8(a) and (b).

<sup>18</sup> Sections 8(c) to (e).

<sup>19</sup> In this regard reports by the social and ethics committee should be viewed as a furtherance of integrated reporting advocated by the various reports on corporate governance released by the

### 3 Function of the committee

The function of the social and ethics committee is to monitor and report on matters within the committee's mandate.<sup>20</sup> In terms of regulation 43(5)(a), the committee should monitor the company's activities having regard to any *relevant legislation, other legal requirements or prevailing codes of best practice* with regard to matters concerning:

- (i) social and economic development, including the company's standing in terms of the goals and purposes of –
  - (aa) the 10 principles set out in the United Nations Global Compact Principles; and
  - (bb) the OECD recommendations regarding corruption;
  - (cc) the Employment Equity Act; and
  - (dd) the Broad-Based Black Economic Empowerment Act
- (ii) good corporate citizenship, including the company's –
  - (aa) promotion of equality, prevention of unfair discrimination, and reduction of corruption;
  - (bb) contribution to the development of communities in which its activities are predominantly conducted or within which its products or services are predominantly marketed; and
  - (cc) record of sponsorship, donations and charitable giving;
- (iii) the environment, health and public safety, including the impact of the company's activities and of its products or services;
- (iv) consumer relationships, including the company's advertising, public relations and compliance with consumer protection laws; and
- (v) labour and employment; including –
  - (aa) the company's standing in terms of the International Labour Organization Protocol on decent work and working conditions; and
  - (bb) the company's employment relationships, and its contribution toward the educational development of its employees.

---

Institute of Directors of Southern Africa. For a discussion of these reports see Kloppers *Improving Land Reform* 339-366.

<sup>20</sup> In terms of s 135(3) of the Indian *Companies Bill*, 2011, the CSR Committee of a company is required to (a) formulate a CSR policy and indicate which CSR initiatives the company intends to undertake; (b) recommend the amount of expenditure to be incurred in implementing the CSR initiatives identified in (a); and (c) monitor its CSR policy continuously. The Board of a company is required to ensure that the activities identified in the CSR policy are undertaken. Schedule VII of the Bill identifies the following activities that may be included by companies in their CSR policies. These activities relate to those aimed at eradicating extreme hunger and poverty; promoting education; combating HIV; ensuring environmental sustainability; enhancing vocational skills; social business projects; or contributing to nationally identified funds aimed at socio-economic development.

The following paragraphs will provide a concise overview of each of the sub-regulations which the committee is required to monitor and report on, with the focus on social and economic development, good corporate citizenship, the environment, health and public safety, consumer relationships and labour as well as employment issues.<sup>21</sup>

### ***3.1 Social and economic development***

Although the *Companies Regulations*, 2011 provides no definition for social and economic development, it does provide guidance on what the committee should take into consideration when reporting on social and economic development. It is proposed that reporting on this subject should lean toward reporting on social development as opposed to reporting on economic development. This is due to the fact that reporting on economic issues is dealt with by other committees such as the company's audit committee, while none of the other board committees focus on social development.<sup>22</sup>

When fulfilling its monitoring role, the committee should in terms of regulation 43(5)(a)(i) be guided by two recognised international instruments – the UN Global Compact<sup>23</sup> and the Organisation for Economic Cooperation and Development (OECD) recommendations regarding corruption.<sup>24</sup> It is unfortunate that the Regulations do

---

<sup>21</sup> The matters on which the social and ethics committee is mandated to report closely resemble the core CSR principles as identified by the ISO. For a discussion of these principles see Kloppers *Improving Land Reform* 325-339.

<sup>22</sup> According to Marx and Van der Watt 2011 *Journal for New Generation Science* 61, the audit committee's role "now includes taking oversight responsibility on the board's behalf for ensuring that the company provides accurate, reliable and credible financial and non-financial information to the various stakeholder groups to ensure not only the short-term profitability of the company, but also its long-term sustainability".

<sup>23</sup> For a discussion of the principles of the UN Global Compact, see Kloppers *Improving Land Reform* 389-399; Runhaar and Lafferty 2009 *Journal of Business Ethics* 479-495; and Fritsch 2008 *Global Society* 1-26.

<sup>24</sup> A search of the official website of the OECD produced no document entitled *OECD Recommendations Regarding Corruption*. It is accepted that the drafters of the Regulations referred to the various instruments released by the OECD addressing the issue of corruption such as the *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (OECD 2011 <http://bit.ly/YbXVAI>) or the 2009 *Recommendation for further Combating Bribery of Foreign Public Officials in International Business Transactions* (OECD 2009 <http://bit.ly/10SZrLh>) or the *OECD Guidelines for Multi-National Enterprises* (OECD

not refer to the leading national instruments such as the *Guidance on Social Responsibility*,<sup>25</sup> the only standard addressing social responsibility, or any of the King Reports<sup>26</sup> addressing corporate governance, which reports are internationally recognised as being world leaders in the field of corporate governance. The Department of Trade and Industry, which released the *Regulations*, was presented with a unique opportunity to further the CSR agenda from a very important platform and provide a greater measure of legitimacy to these existing national instruments. Unfortunately the Department chose to refer to international instruments. Had the Department included the leading national instruments, it could have established by incorporation through reference these instruments as soft law which could potentially be transformed into national legislation.

When monitoring and reporting on social and economic development, the *Regulations* make express reference to the *Broad-Based Black Economic Empowerment Act*<sup>27</sup> and the *Employment Equity Act*<sup>28</sup> – two pieces of national legislation expressly aimed at improving the social and economic standing of black South Africans and addressing inequalities brought about by past racially discriminatory laws and practices. As is the case with the two international instruments referred to, compliance with the *BEE Act* or its *General Code of Conduct* is not a requirement (although it is morally and ethically right and commercially prudent), and companies in the private sector can elect not to comply with the *BEE Act* without legal consequence.<sup>29</sup> The *BEE Act* does not require a business to draft a

---

Date unknown <http://bit.ly/ZrccIg>). Another possibility is that the drafters meant to refer to the *UN Convention against Corruption* (UN 2004 <http://bit.ly/13YAEpX>), which is aimed at promoting and strengthening measures to prevent and combat corruption more effectively and efficiently (A 1 of the *Convention*). This convention was signed and ratified by the South African Government in 2004.

<sup>25</sup> For a discussion of the *Guidance on Social Responsibility* as a national instrument addressing CSR, see Kloppers *Improving Land Reform* 325-339.

<sup>26</sup> For a discussion of the *King Reports* as national instruments addressing corporate governance, see Kloppers *Improving Land Reform* 339-366; and Rossouw 2005 *Business & Society* 94-106.

<sup>27</sup> *Broad-Based Black Economic Empowerment Act* 53 of 2003. Hereinafter referred to as the *BEE Act*. For a discussion of the *BEE Act*, see Janse van Rensburg *Constitutional Framework*; Jack *Broad-Based BEE* 1-61; Gqubule "True Meaning of BEE" 1-39; and Kloppers *Improving Land Reform* 247-287.

<sup>28</sup> *Employment Equity Act* 55 of 1998. Hereinafter referred to as the *Equity Act*.

<sup>29</sup> The compulsory nature of BEE is limited to organs of state and public entities as opposed to the private sector, for whom it is voluntary (s 10 of the *BEE Act*). While compliance is compulsory for the public sector, the private sector is merely "encouraged" to comply. Enforcement in the

BEE-plan in which the business' BEE strategy is spelt out, and as a result the social and ethics committee will not have a clear indication of what management's approach to BEE is. In this regard the Institute of Directors in Southern Africa has released a *Practice Note on Broad-Based Black Economic Empowerment and King III*<sup>30</sup> providing guidance to a board of directors on how to integrate BEE and social transformation into its sustainability considerations.<sup>31</sup> The *Practice Note* proposes that a board should ensure that the company has an established BEE policy in line with the overall company strategy and that transformation targets are included in performance and risk management targets.<sup>32</sup> In addition, as a matter of good governance, the extent to which these set targets have or have not been reached should be included in the company's integrated report and communicated to stakeholders.<sup>33</sup> The *Practice Note* further advocates the establishment of a committee – chaired by an independent director who should ensure objective oversight – who should be responsible for monitoring compliance with the *BEE Act* as well as with the company strategy.<sup>34</sup> Although the *Practice Note* was released in 2009, almost two years before the *Companies Regulations* were released, it is argued that the *Practice Note* envisaged the creation of a social and ethics

---

private sector is limited to the issuing of licences, concessions or other authorisations in private-public partnerships (s 10 of the *BEE Act*). The current BEE framework does not create any mandatory compliance for the private sector and as a result the private sector is left with a cost-benefit analysis where the cost of non-compliance is weighed against the cost of complying with the set targets. Businesses need to decide whether or not they are willing to accept the risk of non-compliance and face the possibility of losing business based on the fact that non-compliance necessarily implies a lower BEE recognition level which would eventually deter other businesses from procuring from the business with a lower recognition level.

<sup>30</sup> Institute of Directors 2010 <http://bit.ly/16v9xCx>.

<sup>31</sup> Institute of Directors 2010 <http://bit.ly/16v9xCx> 3. It should be noted that although the *Practice Note* identifies BEE and social transformation as board matters it would be equally well at home within the mandate of the social and ethics committee. Although the board remains the principal functionary responsible for BEE and its implementation in the company, the social and ethics committee will in future have an extremely important role to fulfil in ensuring that social transformation is taking place.

<sup>32</sup> Institute of Directors 2010 <http://bit.ly/16v9xCx> 3.

<sup>33</sup> Integrated reporting refers to reporting that goes beyond reporting on financial issues. Integrated reporting includes environmental and social issues and requires reporting businesses to focus on the effect that these issues together with economic issues will have on sustainability. For a discussion of integrated reporting, see Kloppers *Improving Land Reform* 345-349, 362-364; and Painter-Morland 2006 *Business Ethics* 352-364.

<sup>34</sup> Institute of Directors 2010 <http://bit.ly/16v9xCx> 3. The idea of an independent director as a member of the committee monitoring and reporting on social transformation is re-affirmed in the *Companies Regulations*, which requires that at least one of the members of the social and ethics committee should be non-executive and not involved in the day-to-day management of the company. See para 2 of this contribution.

committee which would assume the responsibility for monitoring and reporting on issues relating to social transformation.

Whereas compliance with the international instruments and the *BEE Act* is voluntary, compliance with the requirements of the *Equity Act* is compulsory for employers who employ more than 50 employees or who have an annual turnover exceeding the turnover thresholds specified by Schedule 4 of the Act.<sup>35</sup> The *Equity Act* is aimed at providing content to the constitutional right to equality through the promotion of fair and equal treatment in employment as well as through the implementation of affirmative action measures aimed at redressing imbalances in employment.<sup>36</sup> In terms of the *Equity Act*, employers are required to draft an employment equity plan<sup>37</sup> setting out the business' plan to achieve employment equity, and once the plan has been drafted are required to report on an annual basis on its progress towards reaching employment equity in the business. Section 24(1) of the *Equity Act* instructs employers to assign one or more senior managers to take responsibility for implementing and monitoring the equity plan. The Act, however, does not specify that an employment equity committee must be established to monitor and report on employment equity and matters related thereto.

It is unclear from the wording of regulation 43(5)(a)(i)(cc) whether the social and ethics committee will or will not in future be required to take responsibility for employment equity matters and the employment equity report, and whether or not the committee merely has an oversight function where it is only required to report that the equity report has been submitted as legally required. If the narrow approach is followed to the above issue, the committee will in all likelihood have an oversight function, but if the wider approach is followed the committee will be

---

<sup>35</sup> In terms of Schedule 4 of the *Equity Act*, businesses in the agricultural sector with an annual turnover exceeding R2 million will have to comply with the Act.

<sup>36</sup> Chapter 3 of the *Equity Act* makes specific provision for affirmative action and how it is to be achieved.

<sup>37</sup> Section 20 of the *Equity Act*. The employment equity plan must stipulate the objectives to be reached for each year of the plan (s 20(2)(a)) together with the procedures to be followed in order to monitor and evaluate the progress of the plan (s 20(2)(f)).

expected to take charge of employment equity matters which might intrude on the areas of responsibility of other company structures.

### **3.2 *Good corporate citizenship***

The second issue that the social and ethics committee is required to monitor and report on relates to good corporate citizenship. This term refers to the acceptance by a business that it has a responsibility toward various stakeholders resulting from its business operations, and that as a result of this responsibility it can be held accountable if it neglects to act responsibly.<sup>38</sup> Accordingly, a socially responsible business – one that accepts and acts on its social responsibility – will be regarded as a good corporate citizen. Although the *Regulations* do not provide an explanation of what is meant by corporate citizenship, they do provide some clues. In terms of the *Regulations* a good corporate citizen would be one that promotes equality, prevents unfair discrimination, acts against corruption<sup>39</sup> and contributes to community development.<sup>40</sup> The reference to the promotion of equality and the prevention of unfair discrimination (aspects advocated by the *Equity Act*) clearly establishes the link between social and economic development (discussed in the previous paragraph) and corporate citizenship. A good corporate citizen refrains from unfairly discriminating against its employees.

One of the most important contributions of the *Companies Regulations* to embedding CSR in the corporate operations is the reference to contributions to community development in regulation 43(5)(a)(ii)(bb). The premise of this regulation is that a good corporate citizen contributes to the development of the communities in which its activities are predominantly conducted or within which its products or services are predominantly marketed. The focus on community

<sup>38</sup> The notion of good corporate citizenship is central to good governance and within the South African context rose to prominence in the *King Report on Corporate Governance for South Africa 2002*. The *King Report* refers to various defining characteristics of good corporate citizenship, which include corporate governance (managing businesses in a responsible and accountable fashion), respect for human rights, environmental responsibility and community engagement through the promotion of collaborative partnerships (Institute of Directors *King Report II* 92-93).

<sup>39</sup> Regulation 43(5)(a)(ii)(aa) of the *Companies Regulations*, 2011.

<sup>40</sup> Regulation 43(5)(a)(ii)(bb) of the *Companies Regulations*, 2011.

development is in line with the developmental nature of CSR, in terms of which businesses attempt through their CSR initiatives to contribute to the development of communities.<sup>41</sup> The social and ethics committees of agricultural companies, for example, will in future be required to report on the extent to which the companies contribute to community development through their CSR programmes. In the context of land reform, for example, and with specific reference to land redistribution, in many instances a single piece of land is transferred to numerous beneficiaries that might constitute a community. Due to its proximity to these beneficiaries an agricultural company may have the opportunity to contribute to the development of such a community and ultimately will have to report to its shareholders on the extent to which the company has contributed to the community's social and economic transformation.

The final aspect of this regulation indicates that the social and ethics committee should consider the company's record of sponsorship, donations and charitable giving.<sup>42</sup> Sponsorships, donations and charitable or philanthropic giving could be regarded as manifestations of socially responsible behaviour where funds are invested in communities, and these investments should therefore be monitored and reported on by the committee.<sup>43</sup> This requirement is closely related to the previous regulation referring to community development, since most sponsorships, donations and charitable giving are aimed at a section of the community with which the

<sup>41</sup> The issue of community development is central to CSR. The ISO *Guidance on Social Responsibility* identifies community involvement and development as one of its core CSR topics (ISO *Guidance on Social Responsibility* 62), while community development is one of the outcomes of enterprise development in terms of black economic empowerment. Community involvement not only strengthens the relationship of trust between a business and the community but also serves as a tool through the use of which development can take place – development that empowers the community and improves its quality of life.

<sup>42</sup> Regulation 43(5)(a)(ii)(cc) of the *Companies Regulations*, 2011. The requirement that the social and ethics committee should report on these issues is repeated in the Economic Performance Indicators of the *Global Reporting Initiative*, which require a business to indicate to what extent it has distributed its economic value (GRI *Sustainability Reporting Guidelines* 26). This core indicator correlates strongly with the community investment principle identified by Kerr, Janda and Pitts as one of the seven CSR legal principles (Pitts *Corporate Social Responsibility* 497-530) as well as the community involvement and development principle identified as one of the core principles of social responsibility in the ISO *Guidance on Social Responsibility*. (For a discussion of this principle, see Kloppers *Improving Land Reform* 334-337.)

<sup>43</sup> The need to report on donations or charitable giving features prominently in the social sustainability policies which companies participating in the JSE Socially Responsible Index are required to have in place.

business interacts, and as a result it is necessary not only to monitor and report on the extent to which a business has contributed to community development but also the extent to which business funds have been utilised to bring the development about.

### **3.3 The environment, health and public safety**

In terms of regulation 43(5)(a)(iii), the committee should monitor the company's activities having regard to any relevant legislation, other legal requirements, or prevailing codes of best practice with regard to matters concerning the environment, health and public safety, including the impact of the company's activities and of its products or services. This regulation extends the monitoring task of the committee to matters beyond those which are purely social in nature. In effect this regulation requires the members of the committee to have a working knowledge of legislation relating to the environment,<sup>44</sup> health<sup>45</sup> and public safety.<sup>46</sup> The inclusion of these issues in the mandate of the committee is in line with national and international trends. The South African National Standard (SANS) 26000:2010 *Guidance on social responsibility*,<sup>47</sup> for example, identifies health and safety at work as the issues resorting under labour practices, and among the core CSR subjects,<sup>48</sup> while

---

<sup>44</sup> Legislation such as the *National Environmental Management Act* 107 of 1998; the *National Environmental Management: Air Quality Management Act* 39 of 2004; the *National Environmental Management: Biodiversity Act* 10 of 2004; the *National Environmental Management: Protected Areas Act* 57 of 2003; the *National Environmental Management: Waste Act* 59 of 2008 or the *National Water Act* 36 of 1998.

<sup>45</sup> The *Regulations* provide no indication of what is to be understood under the term "health", but given the context in which the reference to health is made, it is accepted that "health" in this instance could refer to occupational health and safety, which is addressed in the *Occupational Health and Safety Act* 85 of 1993, which addresses the issue of the health and safety of persons at work. It should be noted that s 19 of the *Occupational Health and Safety Act* requires employers to establish Health and Safety Committees in certain instances. The functioning of this committee should not be confused with that of the social and ethics committee. It is unclear why the issue of health and safety has been included in the mandate of the social and ethics committee if a separate legally required committee is tasked with monitoring the situation regarding occupational health and safety.

<sup>46</sup> Public safety is not defined in the *Regulations* and in this regard it is accepted that public safety includes issues such as product safety, which in turn relates to issues of the environment.

<sup>47</sup> For a discussion of this leading national standard addressing the issue of social responsibility, see Kloppers *Improving Land Reform* 325-339.

<sup>48</sup> Businesses are under an obligation to ensure that their labour practices comply with national legislation and, if national legislation is insufficient, then with international standards. Contributing to employment creation and paying reasonable compensation for services rendered

protecting consumers' health and safety is addressed as a consumer issue which requires businesses to ensure that their products or services are safe to use or consume.<sup>49</sup> The *King Report on Corporate Governance for South Africa 2002*<sup>50</sup> also addresses these issues and requires companies to report on an annual basis on the nature and extent of their policies and practices regarding health and safety and environmental management. This report should form part of the integrated sustainability report, and from this report the company's commitment to improving health and safety should be evident. The Global Reporting Initiative<sup>51</sup> also refers to the issue of occupational health and safety and includes it in the *Labour Practices and Decent Work Performance Indicator* – the indicator requiring reporting businesses to report<sup>52</sup> on their performance *inter alia* in the area of occupational health and safety.<sup>53</sup>

---

by employees are recognised as two of the most prevalent economic and social responsibilities of a business, the absence of which gives rise to various social dilemmas. Socially responsible labour practices are necessary for the achievement of social justice, stability and peace, and consequently the ISO included labour practices as the third core subject of social responsibility (ISO *Guidance on Social Responsibility* 34).

<sup>49</sup> Consumer issues that are linked to social responsibility include fair marketing, protecting consumers' health and safety, sustainable consumption, access to essential services, and education and awareness. Businesses should ensure that when communicating with consumers they do not engage in any practice that is deceptive or misleading. Instead businesses should provide complete and understandable information that would be beneficial to consumers (ISO *Guidance on Social Responsibility* 54). The issue of fair marketing has recently received legislative attention through the enactment of the *Consumer Protection Act* 68 of 2008. S 8 of the Act provides protection against discriminatory marketing, while ss 40 and 41 prohibit the use of physical force against a consumer, coercion, undue influence, pressure, duress or harassment, unfair tactics or any other similar conduct, as well as the making of false, misleading or deceptive representations. S 22 of the Act supports the client or consumer's right to receive information in plain and understandable language. Information will comply with this requirement if it is reasonable to conclude that an ordinary consumer of the class of persons for whom the information is intended, with average literacy skills and minimal experience as a consumer of the relevant goods or services, could be expected to understand the content, significance and import of the information without undue effort.

<sup>50</sup> For a discussion of the leading national instruments addressing corporate governance and CSR, see Kloppers *Improving Land Reform* 339-366. .

<sup>51</sup> For a discussion of the GRI as a prevailing international reporting instrument, see Kloppers *Improving Land Reform* 374-389. Also see Nielsen and Thomsen 2007 *Corporate Communications* 25-40; Buhmann 2006 *Corporate Governance* 186-202; and Isakson and Steimle 2009 *TQM Journal* 168-181.

<sup>52</sup> This reporting should also be done in the integrated sustainability report required by the *King Report on Corporate Governance for South Africa 2002* (Institute of Directors *King Report II*).

<sup>53</sup> It should be noted that the GRI also requires businesses to report on issues relating to product responsibility. Business should report on how their products or services influence their users or customers and with reference to health and safety identify issues which could affect the business (see GRI *Sustainability Reporting Guidelines* 36).

The reference to the environment, health and public safety as matters which the committee should monitor is not misplaced, and is in fact found in various other national and international instruments which the committee is required to regard. However, since the regulations provide no further guidance regarding the definition of these concepts it is probable that social and ethics committees will be uncertain as to what is actually expected of them. A clearer indication regarding the definition of health and public safety is required. This regulation would have served its purpose more precisely if for instance instead of referring to health, the regulation had referred to occupational health or the health of consumers who consume a product of the company. A clearer indication of what is understood by public safety would also greatly assist the committee in knowing what it is required to monitor.

### **3.4 *Consumer relationships***

The fourth issue which the social and ethics committee is required to monitor and report on, addresses consumer relationships, including the company's advertising, public relations and compliance with consumer protection laws. Due to the fact that the *Regulations* provide no guidance on what is actually required by the committee in this regard, the committee will have to refer to *relevant legislation, other legal requirements or prevailing codes of best practice* as instructed by regulation 43(5)(a). The reference to consumer relationships and public relations reflects the stakeholder-inclusive approach advocated by the *King Report on Governance for South Africa*, which requires transparent and effective communication with stakeholders (including consumers or customers).<sup>54</sup> Accordingly the social and ethics committee has a key function to fulfil in ensuring that the company maintains transparent and effective relationships with all of its key stakeholders.

The regulation also requires the committee to monitor compliance with consumer protection laws. The enactment of the *Consumer Protection Act*<sup>55</sup> introduced a new

---

<sup>54</sup> Institute of Directors *King Report III* 202.

<sup>55</sup> *Consumer Protection Act* 68 of 2008. Hereinafter referred to as the *CPA*. A complete discussion of the *CPA* falls outside the scope of this contribution and reference to the Act is made merely to

era in consumer protection in South Africa, providing South African consumers with some of the most comprehensive protection currently available. According to section 3(1) the purpose of the *CPA* is to *promote and advance the social and economic welfare* of consumers through the establishment of a legal framework for the achievement and maintenance of a consumer market that is fair, accessible, efficient, sustainable and responsible for the benefit of consumers generally, by promoting fair business practices and providing consumers with protection against unconscionable and deceptive trade practices and conduct.

From this section it is evident that the *CPA* has a distinct social character and that the Act represents an attempt to educate consumers not only about what their rights are, but also about what is expected of socially responsible businesses. This Act has the potential to become one of the most important drivers<sup>56</sup> of socially responsible behaviour through its attempts to improve consumer awareness and the encouragement of responsible and informed consumer choice and behaviour.<sup>57</sup> The importance of the *CPA* as a potential driver of CSR is further evident in the Act's attempts to promote consumer confidence and the development of a culture of consumer responsibility – which would eventually influence responsibility within the private sector. According to the *CPA*,<sup>58</sup> the culture of consumer responsibility will be strengthened through individual and group education, vigilance, advocacy and activism.<sup>59</sup> The *CPA* has introduced a number of fundamental consumer rights,<sup>60</sup> as it

---

refer to consumer protection legislation, which should be considered by the social and ethics committee.

<sup>56</sup> For a discussion of consumer behaviour as one of the main drivers of CSR, see Smith's discussion in Crane *et al* *Oxford Handbook* 281-302; Auger *et al* 2003 *Journal of Business Ethics* 281-304; Klein and Dawar 2004 *Journal of Research in Marketing* 203-217; and Kloppers *Improving Land Reform* 191-194.

<sup>57</sup> Section 3(1)(e) of the *CPA*.

<sup>58</sup> Section 3(1)(f) of the *CPA*.

<sup>59</sup> According to the preamble of the Act, the *CPA* was enacted *inter alia* to promote and provide for consumer education, including education concerning the social and economic effects of consumer choices, and to facilitate the freedom of consumers to associate and form groups to advocate and promote their common interests. In this regard the preamble consequently provides a clear indication that the South African public should be educated, amongst other things, on the power of consumer activism and become active in consumer protection groups. Ss 77 and 78 of the Act specifically address the issue of civil society's support for consumer's rights.

<sup>60</sup> For a discussion of the fundamental consumer rights established by the *CPA*, see Jacobs, Stoop and Van Niekerk 2010 *PER* 301-406.

addresses equality,<sup>61</sup> privacy,<sup>62</sup> the right to choose,<sup>63</sup> the right to disclosure and information<sup>64</sup> and the right to fair and responsible marketing,<sup>65</sup> all of which have to be considered by the social and ethics committee when monitoring and reporting on issues related to consumer relationships.<sup>66</sup>

From a consumer protection point of view, the second Act which was introduced to provide consumer protection is the *National Credit Act*,<sup>67</sup> the aim of which is to promote a fair and non-discriminatory marketplace for access to consumer credit specifically. The *NPA* is of special importance to businesses which are involved in the credit market or which provide credit as part of their services. All of the major agricultural companies provide credit facilities to their clients and are consequently bound by the *NPA* and, as a result, the social and ethics committee is required to know what is needed to comply with this Act. The purposes of the *NCA* are similar to those of the *CPA* in that both Acts are aimed at promoting and advancing the social and economic welfare of South Africans and protecting consumers. The *NCA* represents an attempt to promote the development of a credit market which is

---

<sup>61</sup> Sections 8-10 of the *CPA* give content to the consumers' right to equality in the market, prohibit discriminatory marketing, and extend the Equality Court's jurisdiction over these sections. For a discussion of this right, see Tait and Tait 2010 *Obiter* 434-445.

<sup>62</sup> Section 11 of the *CPA* provides protection against unwanted direct marketing.

<sup>63</sup> Sections 13-21 of the *CPA* address issues such as the consumer's right to select suppliers (s 13); the consumer's right to a cooling-off period (s 16) and a consumer's right to choose or examine goods (s 18).

<sup>64</sup> Sections 22-28 of the *CPA* make provision for the consumer's right to receive information in plain and understandable language (s 22) as well as the consumer's right to product labelling and trade descriptions. For a discussion of the right afforded to consumers by s 22, see Gouws 2010 *SA Merc LJ* 79-94.

<sup>65</sup> Sections 29-39 of the *CPA* address numerous aspects of the right to fair and responsible marketing including general standards for the marketing of goods or services (s 29); bait marketing (s 30); negative opinion marketing (s 31); direct marketing to consumers (s 32) and catalogue marketing (s 33). The *CPA* also addresses the right to fair, just and reasonable contractual terms and conditions which provide protection against unfair, unreasonable and unjust contract terms. For a discussion of this right see Naude 2009 *SALJ* 505-536 and Naude 2010 *SALJ* 515-547. For a discussion of the consequences of non-compliance with the *CPA* see Meiring 2010 *Without Prejudice* 28-29.

<sup>66</sup> For a more detailed discussion of the *CPA*, see Melville *Know Your Consumer Rights*; Melville *Consumer Protection Act*; and Van Eeden *Guide to the Consumer Protection Act*.

<sup>67</sup> *National Credit Act* 34 of 2005. Hereinafter referred to as the *NCA*. A complete discussion of the *NCA* falls outside the scope of this research and reference to the Act is made merely to refer to further consumer protection legislation which should be considered by the social and ethics committee. For a more detailed discussion of the Act, see Otto *National Credit Act Explained* and Juta's Statutes Editors *National Credit Act*.

equally accessible to all South Africans,<sup>68</sup> which promotes responsibility in the credit market,<sup>69</sup> and which prevents the over-indebtedness of consumers.<sup>70</sup> From a consumer protection point of view some of the most important innovations introduced by the *NPA* include new debt relief measures and a debt counselling process.<sup>71</sup>

These two Acts are only some of the legislation of which the social and ethics committee must have knowledge in terms of this specific regulation. The question arising from this is whether this regulation does not overburden members of the committee? The wider the scope of the committee's duties, the more unlikely it is that individuals would make themselves available to become members of a social and ethics committee, especially when members are expected to have regard to any *relevant legislation, other legal requirements or prevailing codes of best practice*.

### **3.5 Labour and employment issues**

The final issues which the social and ethics committee are required to monitor and report on in terms of regulation 43(5)(a) relate to the company's standing in terms of the International Labour Organisation Protocol on decent work and working conditions,<sup>72</sup> the company's employment relationships, and its contribution toward the educational development of its employees.<sup>73</sup>

By "labour and employment issues" is meant the International Labour Organisation's Protocol on decent work and working conditions. It should be noted that by 6 June 2011 no protocol or international standard had been released by the ILO under this heading, although the ILO does have a Decent Work Agenda with the overarching

---

<sup>68</sup> Section 3(a) of the *NCA*.

<sup>69</sup> Section 3(c) of the *NCA*.

<sup>70</sup> Section 3(g) of the *NCA*.

<sup>71</sup> For a discussion of these aspects, see Roestof 2009 *Obiter* 430-437; Roestof 2010 *Obiter* 782-792; Van Heerden and Boraine 2009 *PER* 22-161; Roestof *et al* 2009 *PER* 246-306; De Villiers 2010 *PER* 128-204; Boraine and Van Heerden 2010 *PER* 83-124; and Boraine and Calitz 2010 *TSAR* 797-807.

<sup>72</sup> Regulation 43(5)(a)(v)(aa) of the *Companies Regulations*, 2011.

<sup>73</sup> Regulation 43(5)(a)(v)(bb) of the *Companies Regulations*, 2011.

goal of effecting positive change in people's lives on the local level.<sup>74</sup> The aim of the Decent Work Agenda is to promote decent work for all, based on

the understanding that work is a source of personal dignity, family stability, peace in the community, democracies that deliver for people, and economic growth that expands opportunities for productive jobs and enterprise development.<sup>75</sup>

However, given the actual wording of this regulation it is unclear which international instrument the social and ethics committee is required to consider. A further possibility is that the drafters mistakenly referred to a non-existing protocol and instead expected the social and ethics committee to have regard to the Global Reporting Initiative's Labour Practices and Decent Work Performance Indicators, in terms of which a business should include in its integrated report information on the size of the workforce, for example, and the percentage of the total workforce taking part in education or training.<sup>76</sup> This statement is, however, pure speculation and it is unclear what is expected of the committee in this regard.

The second matter that is included in the social and ethics committee's mandate concerning labour and employment issues addresses the company's employment relationships and its contribution toward the educational development of its employees. The specific reference to the educational development of employees might refer to the skills development element included in the BEE scorecard<sup>77</sup> or to the *Skills Development Act*, which is aimed at developing the skills of the South African workforce and encouraging employers to use the workplace as an active learning environment where employees acquire new skills to enhance their employment prospects.

<sup>74</sup> ILO Date unknown <http://bit.ly/13TyoQD>.

<sup>75</sup> ILO Date unknown <http://bit.ly/13TyoQD>.

<sup>76</sup> The GRI's indicator on Labour Practices and Decent Work address issues such as employment, occupational health and safety, training and education and diversity and equal opportunities. The Guidelines require a reporting entity to report on its health and safety performance and on injuries, occupational diseases, lost days and absentee rates (GRI *Indicator Protocols* 11).

<sup>77</sup> For a discussion of the skills development element of the generic scorecard, see Kloppers *Improving Land Reform* 271-274.

It is evident from the above that the members of the social and ethics committee will be faced with a daunting task, in the sense that they are required to have sufficient knowledge of a variety of issues, most of which have a strong legal basis. As a result of this it is pertinent to ask whether or not individuals will be willing to expose themselves to having their conduct judged against the requirements, and the consequential liability. This raises the following questions: What is the standard of conduct and liability of members of the committee in instances of non-compliance with the Act or the prescribed regulations, and what are the powers of the committee if it is of the opinion that the company's activities are not conforming to relevant legislation, other legal requirements or prevailing codes of best practice?

#### **4 Standards of conduct and the liability of members of the committee**

The standards of conduct set for members of the social and ethics committee are addressed in section 76 of the Act, while section 77 deals with the liability of the members of the committee for non-compliance with the set standard. Despite the fact that the heading of section 76 is "Standards of directors' conduct", the section is equally applicable to prescribed officers or members of board committees such as the social and ethics committee or the audit committee.<sup>78</sup> In terms of section 76(3) a member of the social and ethics committee is required to exercise the powers and perform the functions of a member of the committee in good faith and for a proper purpose,<sup>79</sup> in the best interest of the company,<sup>80</sup> and with the degree of care, skill and diligence that may be reasonably expected of a person carrying out the same functions in relation to the company as those carried out by the member of the committee.<sup>81</sup> With regard to the duties to act in the best interest of the company and to act with the required degree of care, skill and diligence, a committee member will escape liability if it can be proven that reasonably diligent steps have been taken to become informed on the matter or that he or she had a rational basis for

---

<sup>78</sup> Section 76(1)(a) and (b) *Companies Act* 71 of 2008.

<sup>79</sup> Section 76(3)(a) *Companies Act* 71 of 2008.

<sup>80</sup> Section 76(3)(b) *Companies Act* 71 of 2008.

<sup>81</sup> Section 76(3)(c) *Companies Act* 71 of 2008.

believing and did believe that the decision taken was in the best interest of the company.<sup>82</sup>

For the purposes of the Act, no distinction is drawn between the liability of a director and the liability of a member of a board committee.<sup>83</sup> In terms of section 77(2) of the Act, a member will be held liable

- (a) in accordance with the principles of the common law relating to breach of a fiduciary duty, for any loss, damages or costs sustained by the company as consequence of any breach by the director of a duty contemplated in section 75, 76(2), or 76(3)(a) or (b); or (b) in accordance with the principles of the common law relating to delict for any loss, damages or costs sustained by the company as consequence of any breach by the director of (i) a duty contemplated in section 76(3)(c); (ii) any provision of this Act not otherwise mentioned in this section; or (iii) any provision of the company's Memorandum of Incorporation.

If a member of the social and ethics committee fails to act in good faith or in the best interest of the company, the member will be deemed to have breached the fiduciary duties and will be held liable for any loss, damages or costs sustained by the company as a consequence of the breach. In the same sense a member of the committee will be held open to delictual claims if the member neglects to act with the degree of care, skill and diligence required.<sup>84</sup>

## 5 Powers of the committee

Sections 72(8)(a)-(e) of the Act confer certain powers on the social and ethics committee which are deemed necessary to fulfil its mandate. The most effective tool at the committee's disposal is found in section 72(8)(e) of the Act. This section entitles the committee to address the general shareholders meeting on matters that

---

<sup>82</sup> Section 76(4)(a)(i) and (iii) *Companies Act 71 of 2008*.

<sup>83</sup> The liability of these office bearers is set out in s 78(2)-(5). White 2006 *BSR Occasional Papers 4* identifies three similar pillars that summarise the duties of directors, namely the duty of loyalty, the duty of care, and good business judgement. The duty of loyalty requires a director to act in the best interest of the company, while the duty of care requires a director to equip himself with the necessary information to take responsible business decisions. The duty of good business judgement requires a director to make business decisions that are supportive of the company's long-term goals (White 2006 *BSR Occasional Papers 4*).

<sup>84</sup> For a discussion of a director's fiduciary duty and duty of care and skill, see Bouwman 2009 *SA Merc LJ* 509-534; Bekink 2008 *SA Merc LJ* 95-116; and Cassim *Contemporary Company Law* 463-475 and 504-515.

concern the committee's functions and provides the committee with an opportunity to raise matters at a meeting where the owners of the company (the shareholders) are present.

## 6 Conclusion

The fact that some companies are now legally required to include a social and ethics committee in their governance structures represents a welcome move towards institutionalising and legitimising CSR. Although the Government does not have a formal policy on CSR, the inclusion of the social and ethics committee requirement in both the Act and the *Regulations* serves as an indication that it has taken note of the CSR movement and has taken steps (although not explicit steps such as calling the committee the "CSR committee") toward mainstreaming the notion of CSR. The committee has an important function to fulfil. In future it will be responsible for ensuring that the company acts in a socially responsible manner in order to maintain its social licence to operate. It is, however, unfortunate that the legislature has not provided a more detailed and less ambiguous indication of what is expected of the committee. The current regulations are in many instances vague and refer to international instruments such as the GRI and the UNGC, while more suitable national instruments (which are in line with international instruments) such as the *Guidance on Social Responsibility* or the *King Reports on Governance* are available. The legislature has further missed an opportunity to provide clear terms of reference for the social and ethics committee. The terms of reference of the social and ethics committee should focus on functions such as establishing policies and standards based on the nationally and internally recognised instruments addressing CSR, reviewing CSR issues which could potentially affect the company,<sup>85</sup> monitoring and

---

<sup>85</sup> Some of the risks which could potentially harm the company can be identified early through the process of meaningful stakeholder engagement. Galbreath 2009 *European Business Review* 109-127 supports the approach where CSR is built into the entire business strategy, which according to him consists of the business' mission, its strategic issues, the markets in which it operates, the customers' needs, the business' resources and its competitive advantage. The notion of the total integration of CSR into business strategy implies that the CSR framework should be integrated into the entire business ethos including the business' systems, objectives, targets and performance measures, as well as into the business' governance structures (Castka *et al* 2004 *TQM Magazine* 216-224).

reporting<sup>86</sup> to the full range of stakeholders on compliance against the established policies, standards, rules and regulations, and overseeing the company's CSR initiatives. Through the inclusion of these functions the committee would have the opportunity to further embed CSR into the corporate structure.

Despite its possible shortcomings, the requirement that companies should have a social and ethics committee is a welcome step in the right direction. If, however, it is accepted that companies should be socially responsible, a question which should be raised for future research is whether companies' stakeholders have (or should have) a right to compel companies to act with socially responsibility. Neither the *Companies Act* nor the *Regulations* has given consideration to this issue.

---

<sup>86</sup> The committee should be tasked with the development, implementation and communication of its CSR policies.

**Bibliography**

Auger *et al* 2003 *Journal of Business Ethics*

Auger P *et al* "What will consumers pay for social product features?" 2003 *Journal of Business Ethics* 281-304

Bekink 2008 *SA Merc LJ*

Bekink M "An historical overview of the director's duty of care and skill: From the nineteenth century to the Companies Bill of 2007" 2008 *SA Merc LJ* 95-116

Boraine and Calitz 2010 *TSAR*

Boraine A and Calitz J "Some consequences of the National Credit Act 34 of 2005 on the proof of claims in insolvency law" 2010 *TSAR* 797-807

Boraine and Van Heerden 2010 *PER*

Boraine A and Van Heerden C "To sequestrate or not to sequestrate in view of the National Credit Act 34 of 2005: a tale of two judgements" 2010 *PER* 83-124

Bouwman 2009 *SA Merc LJ*

Bouwman N "An appraisal of the modification of the director's duty of care and skill" 2009 *SA Merc LJ* 509-534

Buhmann 2006 *Corporate Governance*

Buhmann K "Corporate Social Responsibility: What role for law? Some aspects of law and CSR" 2006 *Corporate Governance* 186-202

Cassim *Contemporary Company Law*

Cassim F (ed) *Contemporary Company Law* (Juta Cape Town 2011)

*Cassim Practitioner's Guide*

Cassim F *The Practitioner's Guide to the Companies Act 71 of 2008* (Juta Cape Town 2011)

*Castka et al 2004 TQM Magazine*

Castka P et al "Integrating corporate social responsibility (CSR) into ISO management systems – in search of a feasible CSR management system framework" 2004 *TQM Magazine* 216-224

*Crane et al Oxford Handbook*

Crane A et al (eds) *The Oxford Handbook of Corporate Social Responsibility* (Oxford University Press Oxford 2008)

*De Villiers 2010 PER*

De Villiers D "National Credit Regulator versus Nedbank Ltd and the practice of debt counselling in South Africa" 2010 *PER* 128-204

*DiMaggio and Powel 1983 American Sociological Review*

DiMaggio P and Powel W "The iron cage revisited: Institutional isomorphism and collective rationality in organization fields" 1983 *American Sociological Review* 147-160

*Fritsch 2008 Global Society*

Fritsch S "The UN Global Compact and the global governance of Corporate Social Responsibility: Complex multilateralism for a more human globalisation?" 2008 (22) *Global Society* 1-26

*Galbreath 2009 European Business Review*

Galbreath J "Building corporate social responsibility into strategy" 2009 *European Business Review* 109-127

Gouws 2010 *SA Merc LJ*

Gouws M "A consumer's right to disclosure and information: comments on the plain language provisions of the Consumer Protection Act" 2010 *SA Merc LJ* 79-94

Gqubule "True Meaning of BEE"

Gqubule D "The True Meaning of BEE" in Gqubule D (ed) *Making Mistakes, Righting Wrongs – Insights into Black Economic Empowerment* (Jonathan Ball Cape Town 2006) 1-39

GRI *Indicator Protocols*

Global Reporting Initiative *Indicator Protocols Set Labour Practices: LA* (GRI Amsterdam 2006)

GRI *Sustainability Reporting Guidelines*

Global Reporting Initiative *Sustainability Reporting Guidelines Version 3.0* (GRI Amsterdam 2006)

Hamann, Khagram and Rohan 2008 *Journal of Southern African Studies*

Hamann R, Khagram S and Rohan S "South Africa's charter approach to post-apartheid economic transformation: Collaborative governance or hardball bargaining?" 2008 *Journal of Southern African Studies* 21-37

Institute of Directors *King Report II*

Institute of Directors in Southern Africa *King Report on Governance for South Africa – 2002* (IoD Parklands 2002)

Institute of Directors *King Report III*

Institute of Directors in Southern Africa *King Report on Governance for South Africa – 2009* (IoD Parklands 2009)

Isakson and Steimle 2009 *TQM Journal*

Isakson R and Steimle U "What does GRI-reporting tell us about corporate sustainability?" 2009 *TQM Journal* 168-181

ISO *Guidance on Social Responsibility*

International Standards Organisation *Guidance on Social Responsibility* (ISO Geneva 2010)

Jack *Broad-Based BEE*

Jack V *Broad-Based BEE – The Complete Guide* (Frontrunner Northcliff 2007)

Jacobs, Stoop and Van Niekerk 2010 *PER*

Jacobs W, Stoop P and Van Niekerk R "Fundamental consumer rights under the *Consumer Protection Act* 68 of 2008: a critical overview and analysis" 2010 *PER* 301-406

Janse van Rensburg *Constitutional Framework*

Janse van Rensburg A *The Constitutional Framework for Broad-based Black Economic Empowerment* (LLD-thesis UFS 2010)

Juta's Statutes Editors *National Credit Act*

Juta's Statutes Editors *The National Credit Act 34 of 2005 and Regulations* (Juta Cape Town 2008)

Klein and Dawar 2004 *Journal of Research in Marketing*

Klein J and Dawar N "Corporate Social Responsibility and consumers' attributions and brand evaluations in a product-harm crisis" 2004 *Journal of Research in Marketing* 203-217

Kloppers 2006 *TSAR*

Kloppers H "Enkele lesse vir trustees uit die *Parker*-beslissing" 2006 *TSAR* 414-423

Kloppers *Improving Land Reform*

Kloppers HJ *Improving Land Reform through CSR: A Legal Framework Analysis* (LLD-thesis NWU 2012)

Loubser (Part 1) 2010 *TSAR*

Loubser A "The business rescue proceedings in the Companies Act of 2008: concerns and questions (Part 1)" 2010 *TSAR* 501-514

Loubser (Part 2) 2010 *TSAR*

Loubser A "The business rescue proceedings in the Companies Act of 2008: concerns and questions (Part 2)" 2010 *TSAR* 689-701

Marx and Van der Watt 2011 *Journal for New Generation Science*

Marx B and Van der Watt A "Sustainability and integrated reporting: an analysis of the audit committee's oversight role" 2011 *Journal for New Generation Science* 56-71

Meiring 2010 *Without Prejudice*

Meiring I "Consequences of non-compliance with the Consumer Protection Act 68 of 2008: consumer law" 2010 (10) *Without Prejudice* 28-29

Melville *Consumer Protection Act*

Melville N *The Consumer Protection Act Made Easy* (Book of Life Pretoria 2010)

Melville *Know Your Consumer Rights*

Melville N *Know Your Consumer Rights: Pocket Guide to the Consumer Protection Act* (Book of Life Pretoria 2010)

Naude 2009 *SALJ*

Naude T "The consumer's 'right to fair, reasonable and just terms' under the new Consumer Protection Act in comparative perspective" 2009 *SALJ* 505-536

Naude 2010 *SALJ*

Naude T "Enforcement procedures in respect of the consumer's right to fair, reasonable and just contract terms under the Consumer Protection Act in comparative perspective" 2010 *SALJ* 515-547

Nielsen and Thomsen 2007 *Corporate Communications*

Nielsen A and Thomsen M "Reporting CSR – What and how to say it?" 2007 (12) *Corporate Communications: An International Journal* 25-40

Otto *National Credit Act Explained*

Otto J *National Credit Act Explained* (LexisNexis Durban 2010)

Painter-Morland 2006 *Business Ethics*

Painter-Morland M "Triple bottom-line reporting as social grammar: integrating corporate social responsibility and corporate codes of conduct" 2006 *Business Ethics: A European Review* 352-364

Pitts *Corporate Social Responsibility*

Pitts C (ed) *Corporate Social Responsibility – A Legal Analysis* (LexisNexis Markham, Ont 2009)

Roestof 2009 *Obiter*

Roestof M "Enforcement of a credit agreement where the consumer has applied for debt review in terms of the National Credit Act 34 of 2005" 2009 *Obiter* 430-437

Roestof 2010 *Obiter*

Roestof M "Termination of debt review in terms of section 86(10) of the National Credit Act and the right of a credit provider to enforce its claim" 2010 *Obiter* 782-792

Roestof *et al* 2009 *PER*

Roestof M *et al* "The debt counselling process – closing the loopholes in the National Credit act 34 of 2005" 2009 (12) *PER* 246-306

Rossouw 2005 *Business & Society*

Rossouw GJ "Business ethics and corporate governance in Africa" 2005 *Business & Society* 94-106

Runhaar and Lafferty 2009 *Journal of Business Ethics*

Runhaar H and Lafferty L "Governing Corporate Social Responsibility: An assessment of the contribution of the UN Global Compact to CSR strategies in the telecommunications industry" 2009 *Journal of Business Ethics* 479-495

Rushworth 2010 *Acta Juridica*

Rushworth J "A critical analyses of the business rescue regime in the Companies Act 71 of 2008" 2010 *Acta Juridica* 375-408

Tait and Tait 2010 *Obiter*

Tait M and Tait M "Equality, the Consumer Protection Act and customer-segment pricing strategies: Is there relief for the poor rich tourist?" 2010 *Obiter* 434-445

Utting 2003 *Global Future*

Utting P "Promoting development through Corporate Social Responsibility – Does it work?" 2003 (Third Quarter) *Global Future* 11-13

Van der Linde 2009 *TSAR*

Van der Linde K "The solvency and liquidity approach in the Companies Act 2008" 2009 *TSAR* 224-240

Van Eeden *Guide to the Consumer Protection Act*

Van Eeden E *A Guide to the Consumer Protection Act* (LexisNexis Durban 2009)

Van Heerden and Boraine 2009 *PER*

Van Heerden C and Boraine A "The interaction between the debt relief measures in the National Credit Act 34 of 2005 and aspects of insolvency law" 2009 *PER* 22-161

Weaver, Trevino and Cochran 1999 *Academy of Management Journal*

Weaver G, Trevino L and Cochran P "Integrated and decoupled corporate social performance: Management commitments, external pressures, and corporate ethics practices" 1999 *Academy of Management Journal* 539-552

White 2006 *BSR Occasional Papers*

White A "The stakeholder fiduciary: CSR, governance and the future of boards" 2006 *BSR Occasional Papers* 4

Wood 1991 *Academy of Management Review*

Wood D "Corporate social performance revisited" 1991 *Academy of Management Review* 691-718

## **Register of case law**

*Land and Agricultural Bank of South Africa v Parker* 2005 2 SA 77 (SCA)

*Minister of Water Affairs and Forestry v Stilfontein Gold Mining Company* 2006 5 SA 333 (W)

**Register of legislation**

*Broad-Based Black Economic Empowerment Act 53 of 2003*

*Companies Act 61 of 1973*

*Companies Act 71 of 2008*

*Consumer Protection Act 68 of 2008*

*Employment Equity Act 55 of 1998*

*National Credit Act 34 of 2005*

*National Environmental Management Act 107 of 1998*

*National Environmental Management: Air Quality Management Act 39 of 2004*

*National Environmental Management: Biodiversity Act 10 of 2004*

*National Environmental Management: Protected Areas Act 57 of 2003*

*National Environmental Management: Waste Act 59 of 2008*

*National Water Act 36 of 1998*

*Occupational Health and Safety Act 85 of 1993*

*Skills Development Act 97 of 1998*

**Register of government publications**

GN R351 in GG 34239 of 26 April 2011 (*Companies Regulations, 2011*)

**Register of internet sources**

ILO Date unknown <http://bit.ly/13TyoQD>

International Labour Organisation Date unknown *Decent Work Agenda*  
<http://bit.ly/13TyoQD> [date of use 6 Jun 2011]

India 2011 <http://bit.ly/10SVRRh>

India 2011 *Companies Bill, 2011* <http://bit.ly/10SVRRh> [date of use 6 Jun 2011]

Institute of Directors 2010 <http://bit.ly/16v9xCx>

Institute of Directors of Southern Africa 2010 *Practice Note on Broad-Based Black Economic Empowerment and King III* <http://bit.ly/16v9xCx> [date of use 6 Jun 2011]

OECD 2009 <http://bit.ly/10SZrLh>

OECD 2009 *Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions* <http://bit.ly/10SZrLh> [date of use 6 Jun 2011]

OECD 2011 <http://bit.ly/YbXVAI>

OECD 2011 *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* <http://bit.ly/YbXVAI> [date of use 6 Jun 2011]

OECD Date unknown <http://bit.ly/ZrccIg>

OECD Date unknown *Guidelines for Multi-National Enterprises* <http://bit.ly/ZrccIg> [date of use 6 Jun 2011]

UN 2004 <http://bit.ly/13YAEpX>

United Nations 2004 *Convention against Corruption* <http://bit.ly/13YAEpX> [date of use 6 Jun 2011]

### **List of abbreviations**

BEE	Black economic empowerment
CSR	Corporate social responsibility
GRI	Global Reporting Initiative
ILO	International Labour Organisation
ISO	International Organisation for Standardisation
JSE	Johannesburg Stock Exchange

---

OECD	Organisation for Economic Cooperation and Development
PER	Potchefstroom Electronic Law Journal
SALJ	South African Law Journal
SA Merc LJ	South African Mercantile Law Journal
TSAR	Tydskrif vir die Suid-Afrikaanse Reg / Journal of South African Law
UN	United Nations

**DRIVING CORPORATE SOCIAL RESPONSIBILITY (CSR) THROUGH THE  
COMPANIES ACT: AN OVERVIEW OF THE ROLE OF THE SOCIAL AND  
ETHICS COMMITTEE**

**HJ Kloppers\***

**SUMMARY**

The corporate social responsibility (CSR) movement can be described as a bundle of trends comprising *regulatory frameworks* aimed at improving corporate practices and leading to changes in these practices, the mobilisation of corporate role players to support the development of states, and a management trend the purpose of which is to enhance the legitimacy of a business. Government is regarded as one of the most important driving forces behind the CSR agenda and it has a particularly important role to play in the creation of an enabling CSR environment.

In general, advocates of legislative involvement in framing the CSR policy highlight the failure of existing voluntary systems as one of the main reasons why the state should play a more important role in the facilitation of CSR. Although governments realise the importance of encouraging socially responsible business, it should be noted that CSR should not replace regulation or legislation concerning social rights. Furthermore CSR should not be seen as shifting (or outsourcing) the state's responsibility for the provision of basic services (such as education or the provision of health services) to the private sector and thus "privatising" the state's responsibilities. However, the legacies of apartheid remain firmly entrenched in the social problems facing South Africa and it seems as if the Government is unable to deliver the social and physical infrastructure required to effect the desired transformation, thus necessitating the engagement of the private sector.

---

\* Henk J Kloppers. B Com (law), LLB, LLM (PU for CHE), LLD (NWU), Post Graduate Diploma in Financial Planning (UFS). Senior Lecturer, Faculty of Law, North-West University (Potchefstroom Campus). This contribution stems from the author's LLD thesis entitled "Improving Land Reform through CSR: A Legal Framework Analysis". Email: henk.kloppers@nwu.ac.za.

The role of Government in establishing a CSR policy framework and driving CSR has become increasingly important. The (perceived) failure of the welfare state has given further impetus to the move of governments toward tapping into the resources of the private sector (through their CSR) in order to address socio-economic challenges.

A purely voluntary approach to CSR without any legislative intervention will not succeed – a clear public policy requiring the implementation of socially responsible practices by the entire private sector is a necessity. Governments in general are increasingly beginning to view CSR as cost-effective means to enhance their sustainable development strategies, and as a part of their national competitiveness strategies to attract foreign direct investment. Given South Africa's history, legislation should be viewed as one of the main instruments enabling the Government to address the private sector's social, environmental and economic outreach activities.

Against this background, this contribution identifies the regulations released in terms of the *Companies Act* 71 of 2008 in which the issue of the social and ethics committee is dealt with, as an important measure taken by Government to create a possible CSR platform. This contribution argues that the requirements regarding the creation of a social and ethics committee have the potential to embed the CSR notion in the corporate conscience. The aim of the contribution is to provide an overview of the role of the social and ethics committee, as envisaged by the *Companies Regulations*, 2011, as a potential driver of CSR.

**KEYWORDS:** Corporate Social Responsibility; social and ethics committee; Companies Regulations 2011