The Board's role in Governance

Chapter 3
THE BOARD'S ROLE IN GOVERNANCE

Boards as active and responsible fiduciaries

3.1 OVERVIEW

In an increasingly globalised market where competition and scrutiny are intense, good corporate governance is essential to reinforcing public confidence in companies and their boards. Boards that observe good governance are a critical safeguard against unethical conduct, mismanagement and fraudulent activities.

Boards play the role of stewards and guardians of the company and are key to raising corporate governance standards. They are often the first line of defence against corporate governance infractions given their unique position at the helm of the company.

There is evidence in corporate debacles that boards devote much attention to compliance in form rather than actually doing the right thing. While achieving compliance with the regulatory requirements, boards therefore often fail on the ethics dimensions.

Good corporate governance cannot be legislated. This does not mean that the legal framework is not important. Legislation prescribes the minimum. The ideal board builds on the legal framework to raise standards beyond compliance to a level where the spirit of best practices and their intent are fully embraced. The board is responsible for the internal culture that promotes good corporate governance.

> "...boards to move away from their role as mere advisers to become active and responsible fiduciaries..."

Boards need to recognise that good corporate governance culture adds value to the company. They can no longer be reactive, dependent and accommodating, as there are pressures on boards to accomplish more in a shorter time and in the right way.

In this regard, our overall objective is for boards to move away from their role as mere advisers to become active and responsible fiduciaries. A culture of good governance in the boardroom therefore needs to be inculcated as much as the rules themselves and this requires education and persuasion.

To achieve this objective, the following are five major thrusts that boards must recognise:

1.	Boards must recognise their role in establishing ethical values that support a culture of integrity, fairness, trust, and high performance.	Roles & Responsibilities of the Board
2.	Boards must recognise their role in ensuring that the company not only operates successfully but sustains growth over the long term.	
3.	Boards must ensure that they have no interest or ties in the company that could adversely affect independent and objective judgement and place the interest of the company above all other interests.	→ Independence of the Board
4.	Boards must ensure the right mix of members with the appropriate skills, and experience to cope with the 3Cs – Complexities, Competition and Changes.	→ Composition of the Board
5.	Board members must devote sufficient time and fully commit to drive the company and undertake continuous development of skills to enable fulfillment of their responsibilities to the company.	→ Commitment of Board Members

3.2 ROLES AND RESPONSIBILITIES

3.2.1 State of play

The board's role is to govern and set the strategic direction of the company rather than to manage it. In discharging its governance function, the board must act in the best interest of the company. It is the role of senior management to manage the company in accordance with the strategic direction and delegations of the board. The responsibility of the board is to oversee the activities of management in carrying out these delegated duties. Malaysia has encapsulated the roles and responsibilities of directors under the CA and the CG Code.

Board's fiduciary duties and strategic responsibilities

Legal Obligation	Best Practice
Under common law, the board owes a fiduciary duty to the company. The term 'fiduciary', being derived from the Latin 'fiduciarius' meaning 'of trust' – requires each individual director to act in good faith, with a reasonable degree of care and diligence, without self interest, and in the best interests of the company and its shareholders. The most important of these duties are now contained in section 132 of the CA. These duties of directors, arising both out of common law and statute, are owed to the company as a whole and are the same for each individual director. The CA defines 'officer' to include any director, secretary or employee – it does not distinguish between executive and non-executive directors and holds that all directors owe the same duties to the company.	The CG Code provides that every board should assume the following six specific responsibilities: • Reviewing and adopting a strategic plan for the company; • Overseeing the conduct of the company's business to evaluate whether the business is being properly managed; • Identifying the principal risks and ensuring the implementation of appropriate systems to manage these risks; • Succession planning, including appointing, training, fixing the compensation of and where appropriate, replacing senior management; • Developing and implementing an investor relations programme or shareholder communications policy for the company; and • Reviewing the adequacy and the integrity of the company's internal control systems and information systems, including systems for compliance with applicable laws, regulations, rules, directives and guidelines.

3.2.2 Case for change

While the general roles and responsibilities of boards are well founded, the expectations have evolved significantly owing to changes in the corporate and regulatory landscapes. Driven in part by financial crises and corporate scandals as well as growing shareholder activism and societal expectations, shareholders and the public today are increasingly pressing boards for greater accountability on a wider range of issues.

What shareholders and the public look for most from boards over and above compliance with the rules and regulations is assurance and accountability of a company's integrity in the broadest sense. This includes taking into account the company's continuing viability as an enterprise, its cognisance of risks, values which embrace ethical conduct and creation of sustainable value.

Corporate governance failures are not the result of a lack of rules and regulations but are due to an implementation gap, namely a good corporate governance culture. While certain rules and best practices can be further improved, they are not the main problem as such improvements should be accompanied by a culture which promotes ethical business conduct and sustainable value creation. In practice the ethical dimension of having in place such a culture is lacking.

To address this deficit, there are three critical areas which the boards themselves need to prioritise:

I. Promoting ethical values and standards in the workplace;
II. Overseeing strategies that address sustainability and stakeholder interests; and
III. Setting a general statement of intent and expectations through board charters.

I. Promoting ethical values and standards in the workplace

A key role of the board is to establish a corporate culture which engenders ethical conduct that permeates throughout the company. To integrate this culture in the company, boards need to formalise ethical values through a code of conduct and ensure the implementation of appropriate internal systems to support, promote, and ensure its compliance. This includes having in place appropriate communication channels which facilitate whistleblowing by employees, customers, suppliers or other stakeholders to raise concerns on potential or suspected infractions of the code of conduct, or any failure to comply with the laws and regulations governing the company.

There is no single code or system which works for every board and every company. The onus lies with the board to design its own code and system based on the values it prizes as appropriate business conduct. The code should be actively and effectively communicated across the company, and there should be appropriate training programmes to enable staff to understand the code and apply it effectively. The code should also be disclosed to the shareholders and the public and to ensure the code continues to remain relevant and appropriate, boards should review it regularly.

> “...boards need to formalise ethical values through a code of conduct and ensure the implementation of appropriate internal systems to support, promote, and ensure its compliance.”

II. Overseeing strategies that address sustainability and stakeholder interests

Boards today are expected to take into account longer term considerations and the interests of a wide range of constituents. This is attributable to the rapidly growing nature of businesses and their impact on the environment and the community in which they operate. Boards must recognise that the environmental, social and governance aspects of business can benefit both the company and its operating environment. Navigating and balancing the interests of numerous stakeholders is difficult but essential to enhancing investor perception and public trust.

Businesses globally have to look beyond financial stewardship as the sole means of creating shareholder value. Boards must ensure that the companies they govern remain competitive by having in place a robust strategy that focuses on sustainable value creation. In internalising their strategy, boards must formalise their policies on sustainability and stakeholder management. To enhance accountability, these policies should be disclosed to the public.

III. Setting a general statement of intent and expectations: board charters

Given their expanding roles and responsibilities, boards must adopt a formal charter that sets out their strategic intent, outlining their various functions and responsibilities. In establishing a charter, it is important for the board to set out the key values, principles and ethos of the company, as policies and strategy development are based on these considerations. The charter should also disclose the division of responsibilities and powers between the board, the different committees established by the board, the chairman and CEO.

A BOARD CHARTER

Source: Securities Commission Malaysia, 2011.

In this regard, the charter serves not only as a reminder of the board's roles and responsibilities, but also as a general statement of intent and expectation as to how the board will discharge its duties. It serves as a source reference, providing insights to prospective board members as well as the primary induction literature for new board members and senior managers. The charter will be of assistance to the board in its assessment of its own performance and that of individual directors.

The board should be responsible for reviewing this charter and determining its appropriateness to the needs of the company from time to time. It is also important that such charter be disclosed in the company's annual report as part of the statement of corporate governance.[1] Board committees also play an important role in the governance process and each committee of the board should have a written charter, which has been approved by the board and disclosed in the annual report.

RECOMMENDATIONS

I. Formulate ethical standards and a system of compliance through the company's code of conduct

- Establish and maintain a code of conduct.
- Establish and maintain appropriate systems to support, promote and ensure its compliance.
- Establish and maintain an internal whistleblowing mechanism.

II. Formulate strategies that address sustainability and stakeholder interests through internal policies

- Establish and maintain policies governing the company's relationship with other stakeholders.
- Establish and maintain environmental, occupational health and safety policies.

III. Mandate the formalisation of the board charter in the annual report

- Delineate the roles and responsibilities of the board, chairman and CEO.
- Set out key values, principles and ethos of the company.
- Disclose the charter in the company's annual report.

[1] Chapter 15, Part E *Corporate Governance Disclosure* of the Listing Requirements.

3.3 INDEPENDENCE OF THE BOARD

3.3.1 State of play

Boards are expected to be active and responsible fiduciaries in the exercise of their oversight responsibilities. It is essential for the company to be able to rely on the independent judgement of their boards. Independence allows directors to be objective and to evaluate the performance of the company without any conflict of interest or undue influence from interested parties.

Persons appointed as independent directors must satisfy the definition of independent director set out in Paragraph 1.01 and Practice Note 13 of the Listing Requirements. There are seven criteria for an independent director under the Listing Requirements. In summary, a director needs to be independent of management and free from any business or other relationship which could interfere with the exercise of independent judgement or the ability to act in the best interests of the company.

Although defined by regulatory standards, independence in thought and action should always be evaluated qualitatively and on a case-by-case basis by the collective board. The Listing Requirements states that boards have to give effect to the spirit, intention and purpose of the independence definition. When a person satisfies the said definition, it does not mean that the person will automatically qualify to be an independent director. The director concerned as well as the board must still apply a subjective or qualitative test of whether the said director is able to exercise independent judgement and act in the best interest of the company.

The basis for the presence of an independent voice on the board is to ensure that objectivity in decision-making of the board is achieved and that no single party can dominate such decision-making in the company. To achieve this, each board must have a sufficient number of independent directors which is prescribed by the Listing Requirements as being at least two board members or one-third of the board members, whichever is higher.

The requirement on the number of independent directors is consistent with the rules and requirements set by other Asian countries. The general trend in more developed markets is skewed towards a majority independent composition and is recommended as best practice.

Rules on the number of independent directors on boards of companies in Asia

Country	Exchange Rules/Requirements
Singapore	At least two independent directors
Hong Kong	At least three independent directors
India	At least one-third of the board
Thailand	At least one-third and no less than three

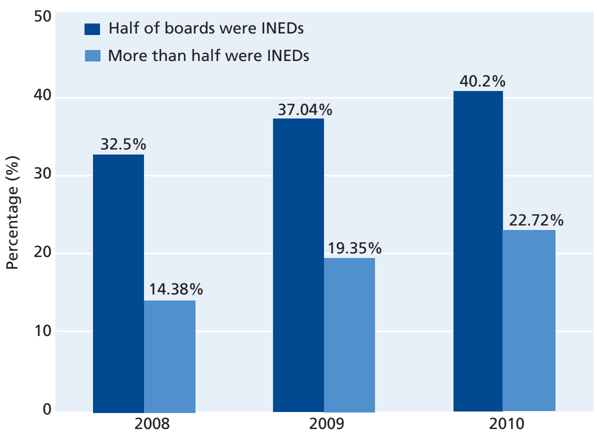
Source: Asian Corporate Governance Association (ACGA) 2010.

Number of independent directors in other jurisdictions

Country	Best Practices
UK	The Combined Code recommends that at least half the board, excluding the chairman, comprises independent non-executive directors (INEDs)
Australia	A majority of the board should be independent directors – 2nd edition, ASX Corporate Governance Council

From the MSWG CG Report, over 40% of our companies have gone beyond the minimum requirements set by Bursa Malaysia. Of this 40%, 22.72% have a majority of independent directors on their boards. The Report observes that the figures have been on an uptrend for the last three years.

Chart 1
MSWG Malaysian Corporate Governance Report 2010
Trend of independence of boards



There is no absolute approach to determining the ideal independent composition of boards. Given the encouraging trend, the one-third independent requirement as the prescribed minimum is maintained and boards are encouraged to exercise judgement in determining the appropriate number of directors which will fairly reflect the interests of their shareholders and other stakeholders.

3.3.2 Case for change

Whether a director is independent is inherently situational and is, more than anything, a state of mind. It is not possible to anticipate all situations in which independence may be compromised as reliance on the qualitative aspects of independence takes it beyond the regulatory standards. In considering independence, it is necessary to focus beyond a director's background, current professional activities, and economic and family relationships. The review should take into account whether the individual can perform a director's duties without being subject to the influence of management.

While the quantitative aspects have been dealt with under the Listing Requirements, the qualitative aspects rest mainly with the boards themselves to assess. The challenge of the qualitative aspects lies in the high degree of subjectivity. Boards in their assessment will have to consider various factors including character, values, and skills of the individual director as well as the given situation.

The board must establish a formal process in the selection of independent directors. The goal is to ensure that the board remains independent and that, collectively, it has the right skills to steer and oversee the company. The process is also intended to ensure that there is no concentration of power in any one group.

There are a significant number of companies with independent directors who have served on boards for long durations of time. This may compromise the independence of the directors. It also raises the question of whether the length of service of an independent director should be considered in an assessment of the board's independence.

Based on the MSWG CG Report, few boards carried out evaluations on independent directors, and amongst those few that did, there is little public disclosure on board assessments.

Intrinsic to our Asian context, there is a sizeable number of companies in the hands of founding families. Given the proximity of controlling shareholders and management of these family-owned companies, issues of related-party transactions and independence can arise. Of particular concern are the strong familial ties between the chairman who helms the board and board members with executive powers.

In order to address these challenges and issues, we have focused our efforts on the following areas:

I. Tenure of independent directors;
II. Independent assessment and disclosure; and
III. Separation of the role of the chairman and the CEO.

I. Tenure of independent directors

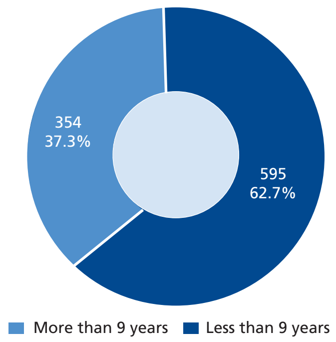
There is no limit imposed by law or recommended as best practice on a director's term of appointment. Under Paragraph 7.26 of the Listing Requirements, every director appointed by the board is subject to re-election by shareholders at the next annual general meeting and each director is subject to re-election at least once every three years.

The *SC Survey on Malaysian Boards 2009* (Survey) reveals that 37.3% of companies had independent directors who served on boards for more than nine years. Long stretches of service may prejudice a director's ability to act independently and in the best interest of the company.

THE SC SURVEY ON MALAYSIAN BOARDS 2009
Tenure of independent non-executive directors (INEDs)

Tenure	No. of companies		Total
	Main	ACE	
INEDs serving more than 9 years	350	4	354
INEDs serving less than 9 years	482	113	595
Total	832	117	949

Main Market and ACE Market



Other jurisdictions generally mandate tenure limits on independent directors serving on financial institutions with an average tenure of nine years. India proposed a six-year ceiling on any persons serving as independent director on a company's board. It also proposed a cooling-off period of three years for an independent director to be reinducted in a company.[2] The Survey reveals that over 60% of our companies have independent directors who have served on boards for less than nine years, while the average length of service across all companies was approximately six years.[3]

Given the potential adverse effects of tenure on independence and the practice of a majority of companies which already recognise this, as well as trends in other jurisdictions, we are of the view that a cumulative term of up to nine years should be imposed on independent directors.

While the position of the independent director is subject to a cumulative term limit of up to nine years, this does not preclude the director from continuing to serve on the board subject to the director's redesignation to non-independent director. In any event, the continuance of service by any director should always be subject to the prior assessment by the board.

2 *India's Companies Bill 2009.*
3 *SC Survey on Malaysian Boards 2009.*

II. Independent assessment and disclosure

While regulatory standards provide an objective definition of independence, it is incumbent on every board to annually assess the status of the independent directors. In our view, true independence emanates from intellectual honesty, manifested through a genuine commitment to serve the best interests of the company.

Boards themselves should establish a set of criteria for the assessment of all directors including independent directors. In establishing these criteria, attention should be given to the values, principles and skills required for the company. These criteria will serve as a source of reference for prospective and incumbent directors for board assessment. These criteria should also be reviewed regularly to maintain their relevance. This set of criteria should be encapsulated in the board charter.

Boards should be responsible for assessing independence annually, upon readmission and when any new interest or relationship develops. In keeping with transparency, boards should disclose they had carried out the assessment in the company's proxy form and annual report.

III. Separation of the role of the chairman and the CEO

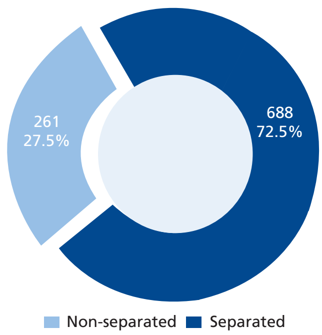
The underlying principle of the division of responsibilities in boards is to ensure a balance of power and authority such that no one has unfettered power of decision. The CG Code recommends the separation of the roles of chairman and CEO and recognises that where the roles are combined there should be a strong independent element on the board and a decision to combine those roles should be publicly explained. Currently, there is no regulatory requirement for the roles of chairman and CEO to be separated.

The Survey found that 72.5% of all the companies reviewed had the role of the chairman and CEO separated.

THE SC SURVEY ON MALAYSIAN BOARDS 2009
Separation of the chairman & CEO

Status	No. of companies		Total
	Main	ACE	
Separated	609	79	688
Non-separated	223	38	261
Total	832	117	949

Main Market and ACE Market



> “The separation of the roles between the chairman and CEO will allow them to focus on their respective responsibilities.”

While a large majority of companies have complied with the CG Code, 100 or approximately 15% of those companies have strong family presence and direct familial relationships between the chairman and the executives. Combining these positions concentrates too much power in a single person, often the CEO. The cultural holdover from Asia's history has seen CEOs across the region regarded as the highest authority in the company when the CEO is a member of the controlling shareholder's family. This raises concerns on whether the potential for real conflicts of interest exist when the roles are combined and whether there is an appropriate balance of power between the CEO and the independent board members. These situations also give rise to the perception that the independent directors are beholden to the management and are therefore not capable of exercising independent judgement. To reduce the possibility of this occurring, the position of chairman and CEO must be separated and the Chairman must be a non-executive.

Accordingly, the division of responsibilities between the chairman and CEO must be clearly defined and disclosed in the board charter. The separation of the roles between the chairman and CEO will allow them to focus on their respective responsibilities. This is crucial for corporate performance where the chairman focuses on governance and compliance while the CEO focuses on the business and the day-to-day operations of the company.

Directing an enterprise through a board is a more difficult form of governance than is commonly supposed. It is a fundamental error to regard committees of any kind as natural forms of governance or to believe that if you sit competent people of goodwill around a boardroom table, they will function as an effective board. Building an effective board takes time and patience on the part of board members, but especially on the part of their chairs. It is the chair's task to weld a group of capable individuals into an effective board team.

Source: Cadbury, Sir A. (2002), Corporate Governance and Chairmanship. A personal view, Oxford: Oxford University Press.

Strong independent leadership of the board is critical to striking the right balance between ownership and control. An independent chairman will be in a position to marshal the board's priorities more objectively and provide a voice for the independent directors. Encouragingly, the practice of independent chairmanship is gaining wider acceptance among the business community. The MSWG CG Report revealed that 30% of companies had chairs who were independent non-executive directors. Given the trend, a consultation on mandating independent chairmanship will be undertaken.

RECOMMENDATIONS

I. Mandate the limit on the tenure of independent directors

- A cumulative term limit of up to nine years will be imposed on independent directors. Directors may continue to serve thereafter, but will be redesignated as non-independent directors.

II. Mandate assessment on independence and its disclosure

- Boards must undertake an assessment on independence annually, upon readmission and when any new interests or relationships surface – based on a set of criteria established by the boards.
- Boards must disclose in the company's proxy form and annual report that such an assessment has been carried out.

III. Mandate the separation of the position of the chairman and the CEO

- The position of chairman and CEO must not reside with the same person.
- The chairman must be a non-executive member of the board.
- A consultation on mandating independent chairmanship will be carried out.

3.4 COMPOSITION OF THE BOARD

3.4.1 State of play

Boards should comprise directors with the requisite range of skills, competence, knowledge and experience as well as diversity of perspectives, to set the context for appropriate board behaviour and to enable them to discharge their duties and responsibilities effectively.[4] Companies which take a strategic view of their board composition will recognise the importance of bringing a wide range of skills and experience to mirror the direction and aspirations of the company.

Companies have to respond to growing complexities, competition and changes to the financial and regulatory landscapes by expanding the expertise of their boards. The CG Code provides the criteria which a Nominating Committee should consider when recommending candidates for directorships as well as places importance on the process carried out by the Nominating Committee in evaluating members of the board, including the independent directors, chairman and the CEO.

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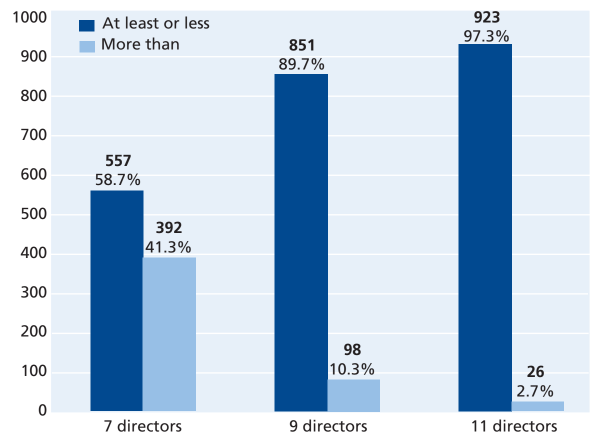
4 ICGN *Global Corporate Governance Principles: Revised (2009).*

Chart 2
SC Survey on Malaysian Boards 2009
Board size



An optimal board size needs to accommodate the necessary skill sets and competencies, while promoting cohesion, flexibility, and effective participation. In Malaysia, size varies from board to board, depending on factors such as the nature of business, the size of the company and the board culture. Based on the Survey, the average board size of a Main Market company was seven (7.4) while on the ACE Market it was six (6.4).

Boards need to regularly examine their size in the context of effective decision-making and define their optimal range or number depending on the type of expertise required and group dynamics. Board size does not seem to be an area of concern. On governance issues, size may be a contributory factor but not the root cause.

3.4.2 Case for change

An ideal board will benefit from a diverse mix of knowledge, background and expertise in its composition. Driven by a progressively complex market place, boards must have the ability to draw on a wide range of viewpoints, skills, expertise and background to make the best decisions.

Experiences drawn from past financial crises and corporate scandals demonstrate that strong boards are distinguished by their calibre, integrity and values. The degree to which a director participates in board deliberations depends to a large extent on the balance between collegiality and creative tension that members of a diverse board bring to bear amongst each other. Judgement is dependent to a large extent on the willingness of the chairman, CEO and other members of the board to hear all points of view. It also depends on the willingness, commitment and courage of the individual directors to speak up. The challenge for companies is to find those directors who are skilled and experienced to provide a healthy scepticism to board deliberations. This is not a straightforward task, for two main reasons.

Firstly, boards in practice do very little to widen their composition. Boards tend to draw members from a close circle of friends or supporters. Often a network of individuals dominates the board resulting in directors' reluctance to question the performance of their peers. As a result, boards have a propensity for 'group think'. The nominating process from within the board could serve to arrest this to achieve a positive outcome and change of attitude on the part of those boards.

Secondly, companies find it increasingly difficult to recruit qualified and competent directors due to a limited pool of such candidates. This issue deserves to be pursued quickly and more appropriately through the private sector. The other contributing factor arises from the much wider recognition of liability associated with being directors today and compensation that does not commensurate with the responsibilities of a director.

To address these issues and challenges, efforts must be directed at the following:

I. Mandating the Nominating Committee;
II. The creation of a directors' registry;
III. A diversity agenda; and
IV. A study on directors' compensation.

I. Mandating the Nominating Committee

Over 90% of companies have established Nominating Committees since it was introduced as best practice. Since then, more attention is being focused on the independence, recruitment, assessment, training, composition and diversity of boards. Given the integral role that the Nominating Committee plays in the assessment of the quality, performance and recruitment of members of the board, there is a need to entrench its position more firmly in the company. As such, the Nominating Committee must be made mandatory.

We also believe that the chair of the Nominating Committee should be an independent director, and where a senior independent director position exists, the senior independent director should assume the position of chair of the Nominating Committee.[5] The senior independent director is best suited to facilitate the Nominating Committee's deliberations on board performance including the succession of the chairman and evaluation of the CEO.

The CG Code encourages companies to identify a senior independent director whose primary function is to facilitate any concerns of the shareholders. Almost 50% of all companies have a senior independent director.[6] Given the increasing demands on the board, chairman and CEO, the senior independent director serves to strengthen a company's relationship and interactions with shareholders.

The Nominating Committee must focus on recruitment, assessment and training. It needs to develop, maintain and periodically review the criteria to be used in the recruitment and screening process that takes into account the diversity of prospective directors including the CEO. The Nominating Committee must conduct an assessment on independent directors annually, upon a director's readmission to the board and when any new interest or relationship surfaces, as well as review the individual director's time commitment and ability to fulfil their responsibilities. The Nominating Committee should also look into the training needs of directors.

II. The directors' registry

Boards must add value by bringing independent and fresh perspectives, setting and meeting goals, and enhancing individual contributions. This can be attained by recruiting board members beyond conventional sources.

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5 The CG Code states that the Nominating Committee should comprise exclusively of non-executive directors, a majority of whom are independent.
6 MSWG CG Report 2010.

An approach to address this is through the creation of a directors' registry. Such registries existing in other countries are administered by the private sector. These bodies manage the registry and offer matching and referral services to companies looking to populate their boards of directors. Strict screening criteria are employed to ensure only qualified candidates are listed in the registry. Consistent with practices in other jurisdictions such an approach can be adopted in Malaysia, driven by the private sector rather than by government or regulators.

III. A diversity agenda

Diversity is a critical attribute of a well-functioning board and an essential measure of good governance. A diverse board facilitates optimal decision-making by harnessing different insights and perpectives and challenging conventional wisdom to enable companies to maximise business and governance performance. Thus diversity signals that the company is well positioned to meet the needs of a diverse market, improving the company's reputation as well as its financial performance.

Board diversity includes experience, skills, competence, race, gender, culture and nationality to ensure that different perspectives are brought to bear on issues. A balanced board in this regard can help dispel stereotyping, make commercial decisions that are aligned to customer and investor needs and catalyse efforts to recruit, retain and promote the best people, including women.

Gender is not the only aspect of board diversity but it has received global attention as an important component of inclusive growth. Investors today are paying more attention to corporate performance in terms of gender diversity. For example, investment funds such as Calpers (US) or Amazone (Europe) include gender diversity among their investment criteria. It has been shown that a company with a critical mass of women leaders is more likely to be well-governed.[7] A 2010 survey of directors[8] concluded that buy-in to corporate governance is significantly more widespread amongst women compared to men.

The MSWG CG Report revealed that over 56% of listed companies did not have any women directors while the remaining had at least one. A closer examination revealed that only 36% of those companies had women on the board as independent directors. The pool of women candidates with a wide range of skills and experience in Malaysia is not small. However, the figures on boards reveal that women continue to remain under-represented forming only 8.2% of all directors on boards of listed companies.[9]

Given the increasing importance of boardroom diversity, boards may wish to establish a policy formalising their approach to diversity. Specifically, boards through their Nominating Committee should take steps to ensure that women candidates are sought as part of their recruitment exercise. In addition, boards should explicitly disclose in the annual report their gender diversity policies and targets, and the measures taken to meet those targets. The goal is for women participation on boards to reach 30% by 2016 and the progress towards this goal will be monitored and assessed in 2013.

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7 *Women Matter,* 2007, McKinsey & Company.
8 Commissioned by Women Corporate Directors (WCD) and Heidrick & Struggles.
9 MSWG CG Report 2010.

IV. A study on directors' compensation

Directors should be adequately compensated for the risks and responsibilities they assume. The compensation information we reviewed suggests that compensation levels in Malaysia lag behind our regional peers.[10]

Remuneration packages should remain competitive to attract and retain talent while being linked to performance. This issue deserves to be pursued and a study undertaken on directors' compensation in Malaysia. Such a study would be appropriately undertaken by the private sector, professional bodies or academia who are proponents of corporate governance.

RECOMMENDATIONS

I. Mandate the Nominating Committee

- All boards must establish a Nominating Committee.
- The chair of the Nominating Committee must be an independent director, and where a senior independent director position exists, the senior independent director is encouraged to assume the chair of the Nominating Committee.
- The role of the Nominating Committee must be enhanced – specific focus areas include recruitment, assessment, training and diversity.

II. Create a directors' registry

- A registry of directors should be created and driven by the private sector. To ensure quality recruits, it should adopt a robust screening criteria, and have in place a process and criteria for registering and deregistering candidates.

III. Mandate the formulation and disclosure of gender diversity policies and targets

- Companies must disclose in their annual reports' policies and targets with respect to composition of women on their boards.

IV. Carry out a study on directors' compensation

- A study to be undertaken on directors' compensation in Malaysia by the private sector.

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10 PricewaterhouseCoopers (PwC) Malaysia: *Board Remuneration & Practices 2007*.

3.5 COMMITMENT OF BOARD MEMBERS

3.5.1 State of play

The law requires that each director must act in good faith, with a reasonable degree of care and diligence, without self interest, and in the best interests of the company. Similarly the onus is on directors to upgrade their skills set because failure to do so would run the risk of them being liable for failing to exercise reasonable care and skill in directing the affairs of the company.

The law does not prescribe the amount of time that directors need to devote to overseeing the affairs of the company. However the onus is on directors to ensure that they spend sufficient time, for failing to do so can result in directors being in breach of their fiduciary duties.

The Listing Requirements provides the number of directorships that individual directors can hold, and requires disclosure of those directorships. This provides guidance to directors on the time commitment expectation. The Listing Requirements also recognises that directors need to continuously upgrade their skills set, through continuous training.

Over the years, the legal landscape has seen a rising trend in litigation involving directors. This is further underscored by Bursa Malaysia taking increased enforcement action against companies and directors who have breached the Listing Requirements. In 2010, the total number of sanctions was 280 and included reprimands and fines amounting to nearly RM7.5 million.

These responsibilities are not simply about meeting the regulatory requirements. Regulations are by nature not exhaustive and therefore cannot address every conceivable situation. We believe that embracing the law, both in letter and in spirit, is the foundation on which boards' ethical standards can be built.

3.5.2 Case for change

As a result of the increased responsibility of the director, serving on a board has become a significant and onerous commitment, both in terms of time and attention required. Not only must directors participate in board meetings and be willing to serve on committees, they are also expected to dedicate time to reviewing relevant materials and preparing a thoughtful contribution to the discussion and deliberation process.

While a director must be aware of the legal parameters that define their duties in law, individual directors are also expected to commit themselves to ethical and lawful conduct, including the proper use of authority and appropriate boardroom decorum when acting as board members.

Overcommitted directors with multiple directorships are likely to compromise their ability to devote sufficient time to their duties. The lack of attention and focus by directors is a contributing factor to non-compliance with regulatory requirements in a number of enforcement actions. The enforcement actions also revealed that some directors were neither aware of their legal obligations nor understood how to discharge their fiduciary duties.

In our view, there are two major components that need to be addressed:

I. Multiple directorships in listed companies; and
II. Continuing professional development for directors.

I. Multiple directorships in listed companies

Membership on boards represents a significant time commitment and it is expected that directors allocate sufficient time to the company to perform their duties effectively. Under the Listing Requirements, a director is prohibited from holding more than 10 directorships in listed companies.[11] The following table shows that a large number of individual directors hold no more than five directorships.

Number of Directorships	Number of Individuals
1	4,192
2	848
3	245
4	76
5	35
6	22
7	10
8	5
9	3
10	1

Source: Bursa Malaysia December 2010

From the statistics, it appears that the directors have found their own comfort level as the number of directors holding more than five directorships is extremely small. This issue is therefore not about multiplicity of directorships held, but of capacity and commitment by directors. Taking both these points into account, we believe that the number of directorships held in listed companies should be limited to a maximum of five.

A director must also seek the approval of the board which will assess the director's incumbent responsibilities before accepting an invitation to serve on another listed company's board. In tandem with this, the Nominating Committee of the prospective board will be assessing the director's appointment based on its own selection criteria. Boards must disclose that they had carried out the assesment in the company's proxy form and annual report. While it is not necessary to disclose the results of this assessment, there should be disclosure that an assessment has been carried out.

Given that the objective is for individual directors to commit to the board as a whole, the boards should set out their expectations on time commitment and protocols for accepting other external appointments in their board charter.

[11] 15.06 of the Listing Requirements – to be read in conjunction with Part III of Practice Note 13.

II. Continuing professional development for directors

It cannot be overemphasised that today's pace of change is rapid, the complexities of modern business are increasing, and that continuing education and lifelong learning are critical for directors.

The Listing Requirements states that companies must continuously evaluate and determine the training needs that are relevant to their directors. It requires boards to disclose the training programmes they have attended for the financial year in the annual report. Where a director has not attended training, the reasons for non-attendance must be stated.

One of the defining characteristics of professional directors is intellectual honesty. This calls for sustained intellectual and active participation on the part of the director, to remain relevant in the changing business environment. An individual director's commitment to continuing development will foster intellectual honesty which is a crucial part of good governance and is by extension a part of each director's fiduciary duties. Continuing development will equip directors to best serve the interests of the company. The mandatory Continuing Education Programme for directors will be reintroduced.

We believe that it is important to emphasise the significance of continuing education for directors and the urgent need to reintroduce the Continuing Education Programme as a requirement.[12] However, to ensure that progress is evolutionary, we intend for these recommendations to take effect in phases; to first apply to only all new initial public offering (IPO) directors, chairmen and CEOs as well as to all newly appointed directors. It is our expectation that eventually all boards will comply with the above requirements by 2016.

“One of the defining characteristics of professional directors is intellectual honesty. This calls for sustained intellectual and active participation on the part of the director, to remain relevant in the changing business environment.”

[12] The mandatory Continuing Education Programme was repealed in 2005. Since then continuing education for directors has been a self-directed process.

RECOMMENDATIONS

I. Limit the number of directorships held by individual directors

- Directors are permitted to serve up to only five listed companies in Malaysia.
- Directors must advise the chairman or senior independent director in advance of accepting any invitation to serve on another company board.
- Assessment through the Nominating Committee, and approval of the existing board is required prior to accepting any new appointments on boards of other listed companies.
- The board must disclose in the company's proxy form and annual report, that such an assessment has been carried out by its Nominating Committee.

II. Set out expectations on time commitment including protocols for accepting other external appointments

- Boards should set out their expectations on time commitment including protocols for accepting other external appointments in their board charter.

II. Mandate continuing professional education for directors

- Reintroduce the mandatory Continuing Education Programme on a phased basis.