

**CORPORATE GOVERNANCE - A CRITICAL ANALYSIS OF THE
EFFECTIVENESS OF BOARDS OF DIRECTORS IN PUBLIC ENTITIES IN
ZIMBABWE**

by

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DEDICATION

To my children; Nyasha, Faith, Primrose and Isheanesu, my late beloved father Rabson Poswo and late dear brother Herbert Poswo

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DECLARATION

I Nomusa Jane Moyo declare that **‘Corporate Governance - A Critical Analysis of the Effectiveness of Boards of Directors in Public Entities in Zimbabwe’** is my own work and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references.

N. J Moyo

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Signature

Date

ABSTRACT

The degree to which a country's public entities observe basic principles of good corporate governance is an increasingly important factor for attracting investment capital, maintaining economic stability and encouraging growth. Zimbabwe is faced with the challenge of restructuring for greater efficiency and creating an investment-friendly environment, therefore practicing good corporate governance in public entities is crucial for success and economic growth. As business entities, public entities need to be managed effectively by a competent board, which is able to construct and implement strategies that are in the best interests of the entity and all stakeholders.

This study focuses on the corporate governance initiatives, laws and regulations aimed at enhancing the effectiveness of boards of public entities in Zimbabwe. The key question addressed is whether or not the corporate governance initiatives and legal and regulatory reforms in Zimbabwe are sufficient to enable boards of public entities to effectively discharge their duties and meet internationally accepted corporate governance standards. A comparative analysis of Zimbabwe's public entities corporate governance framework to that of South Africa (a developing country like Zimbabwe) and Australia (a developed country with similar common law heritage) is also conducted. Recommendations are made on how best to enhance the effectiveness of boards of public entities in order to promote good corporate governance practices in Zimbabwean public entities.

The research established that the existing corporate governance framework has not been effective in improving the effectiveness of Zimbabwe public entity boards due to lack of commitment and consistency, political interference, weak enforcement mechanisms, corruption and general disregard for the rule of law. The research found that South Africa and Australia have performed better than Zimbabwe in terms of creating conducive environments for boards of public entities to effectively discharge their duties.

To improve the effectiveness of public entity boards, it was found that boards should be properly empowered, government intervention should be minimised, board appointment processes should be transparent and merit-based, boards should be properly composed, board

remuneration should be fair and performance related, the performance of the board should be regularly evaluated and effective enforcement mechanisms should be put in place.

KEY TERMS

board composition, board effectiveness, board evaluation, board remuneration, board selection and appointment, corporate governance, corruption, directors' duties, parent ministry, public entity boards, regulatory framework, shareholder interference, weak enforcement.

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LIST OF ABBREVIATIONS

AfDB	African Development Bank
AICD	Australian Institute of Company Directors
AGF	Africa Governance Forum
AGI	Africa Governance Inventory
ACGN	African Corporate Governance Network
AGM	Annual General Meeting
AGSA	Auditor-General of South Africa
AIMA	Australian Investment Managers' Association
AMSCO	African Management Services Company
ANAO	Australian National Audit Office
APRM	African Peer Review Mechanism
ASIC	Australian Securities and Investments Commission
ASX	Australian Stock Exchange
CAGG	Commonwealth Association for Corporate Governance
CCG	Centre for Corporate Governance
CEO	Chief Executive Officer
CGC	Corporate Governance Council
CGF	Corporate Governance Framework
DPE	Department of Public Enterprises
DTI	Department of Trade and Industry
GBE	Government Business Enterprise
GCGF	Global Corporate Governance Forum
GMB	Grain Marketing Board
IFC	International Finance Corporation
IFSA	Investment and Financial Services Association

ICGN	International Corporate Governance Network
IoDZ	Institute of Directors of Zimbabwe
IoDSA	Institute of Directors of South Africa
JCPAA	Joint Committee of Public Accounts and Audit
JSE	Johannesburg Stock Exchange
MMCZ	Minerals Marketing Corporation of Zimbabwe
NEPAD	New Partnership for Africa's Development
OACG	Office of the Comptroller and Auditor General
OECD	Organisation for Economic Co-operation and Development
PFMA	Public Finance Management Act
PGPA	Public Governance, Performance and Accountability Act
RBM	Results-Based Management System
SEBI	Securities and Exchange Board of India
SOE	State Owned Enterprise
UN	United Nations
UK	United Kingdom
ZACC	Zimbabwe Anti-Corruption Commission
ZMDC	Zimbabwe Mining Development Corporation
ZSE	Zimbabwe Stock Exchange

CHAPTER 1

INTRODUCTION

1.1 CORPORATE GOVERNANCE AND PUBLIC ENTITIES

Corporate governance¹ is a multi-faceted subject. It has an important theme of concurrently improving corporate performance and accountability of individuals involved in the management of an organisation² with the aim of attracting financial and human resources on the best possible terms as well as to prevent corporate failure through pursuing objectives that are in the interests of the company and all stakeholders.³ Corporate governance has become an increasingly interesting subject, partly due to collapses of high profile international corporations,⁴ the demand for transparency and accountability in the utilisation of shareholders' funds and also due to the growing awareness of the need for good corporate practice to attract investment capital and achieve organisational strategic goals over the long-term. As a result, all enterprises, whether they are in the private⁵ or public⁶ sector, should

¹ The *Cadbury Report* defines corporate governance "as the system by which companies are directed and controlled" thus referring to all aspects of the control and management of companies (Cadbury A *Report of the Committee on the Financial Aspects of Corporate Governance* (United Kingdom 1992) 14 available at <http://www.ecgi.org/codes/documents/cadbury.pdf>). More corporate governance definitions are referred to in Chapter 2, para 2.2 below.

² Corporate governance seeks to ensure that organisations are properly directed and controlled through mechanisms that try to reduce or eliminate the challenges associated with synchronising the sometimes diverse interests of the principals (shareholders) and agents (directors or managers) (Crowther D and Seifi S *Corporate Governance and International Business* (Ventus Publishing ApS 2011) 11-12).

³ Organisation for Economic Co-operation and Development (OECD) *Principles of Corporate Governance* (OECD Publishing 2004) 11 available at <http://www.oecd.org/corporate/ca/corporategovernanceprinciples/31557724.pdf> (accessed on 12 August 2013). See also Crowther D and Seifi S *Corporate Governance and International Business* (2011) 11-12.

⁴ The collapses of large corporations have had overwhelming consequences on society including the loss of jobs and investments. Examples of some of the corporate collapses which have resulted in wider attention being drawn towards company directors' actions, skill and diligence are Enron Corporation and Worldcom in the United States of America, Fidentia and LeisureNet in South Africa, Rothwells Ltd and HIH Insurance Ltd in Australia and ENG Asset Management and Trust Bank in Zimbabwe.

⁵ For private enterprises, maximisation of profit, return on investment and shareholders' wealth are the primary objectives, while maximisation of productivity and sales, organisational growth, socio-economic goals, among others, are the secondary objectives (Bosch JK, Tait M and Venter E *Business Management – An Entrepreneurial Perspective* (Cape Town, Van Schaik 2006) 8-11).

⁶ While striving to achieve more or less similar objectives to private companies, public entities have the added responsibility to deliver various services to the public in the most effective and efficient manner (Currstine T, Lonti Z and Joumard I "Improving Public Sector Efficiency: Challenges and Opportunities" (2007) 7(1) *OECD Journal on Budgeting* 2-3).

always endeavour to accomplish and uphold business success through good corporate governance.⁷

Good corporate governance is as critical to public entities⁸ or state-owned enterprises as it is to private companies and non-profit organisations. It is necessary to ensure that public entities contribute positively to a “country’s overall economic efficiency and competitiveness”.⁹ Ineffective corporate governance may lead to poor financial performance, lack of accountability and transparency in the entities with the potential of causing business failures and losses that, unfairly so, are eventually borne by tax payers.¹⁰ In trying to establish the main causes of failures of corporate entities, researchers have concluded that, more often than not, government officials, management and the board of directors¹¹ are responsible and accountable for ineffective corporate governance structures and the poor performance of public entities.¹² Thus, to achieve the desired effectiveness and business success, boards in

⁷ OECD *Principles of Corporate Governance* (2004) 11. See also Crowther D and Seifi S *Corporate Governance and International Business* (2011) 11-12.

⁸ Public entities (also known as parastatals, state-owned enterprises, government-owned corporations, government business enterprises) are independent legal entities partially or wholly owned by a government or state and created to perform commercial activities on behalf of the government. They perform specific functions (for example investment promotion and employment creation) and operate in accordance with a particular Act. They are mostly formed to provide goods or services where for economic, social, political or strategic reasons; privatisation would present challenges (Arries C *Comparative Study on Specific Governance Elements in the State-Owned Entities Overseen by the Department of Public Enterprises (DPE) and the Department of Transport (DOT) in South Africa* Unpublished Thesis (Stellenbosch University 2014) 1. See also *Collins English Dictionary - Complete & Unabridged* 10th ed (HarperCollins Publishers) available at http://dictionary.reference.com/browse/public_ownership (accessed on 10 August 2013). Public enterprises are also defined as institutions or organisations which are organised by the state, or in which the state owns a majority interest (Adeyemo D and Salami A “A Review of Privatisation and Public Enterprise Reform in Nigeria” (2008) 4(4) *Contemporary Management Research* 401-418). The words “public entities”, “parastatals” and “state-owned enterprises” have the same meaning and are used interchangeably throughout the thesis. More definitions are referred to in Chapter 3, para 3.2 below.

⁹ OECD *Guidelines on Corporate Governance of State-Owned Enterprises* (OECD Publishing 2005) 9 available at <http://www.oecd.org/daf/ca/corporategovernanceofstate-ownedenterprises/34803211.pdf>. (accessed on 13 November 2013).

¹⁰ Robinett D *The Challenge of SOE Corporate Governance for Emerging Markets* (World Bank Corporate Governance Department 2006) 1-3 available at <http://www.rru.worldbank.org/Documents/Other/CorpGovSOEs.pdf> (accessed on 1 September 2013).

¹¹ A board of directors (hereinafter referred to as “the board”) is a body of elected or appointed members who jointly oversee the activities of a company or organisation. Generally, the board serves as a link through which shareholders exercise control of the company’s affairs. The board makes decisions on shareholders’ behalf through guiding long-term corporate strategy, putting the key agents in place to implement it and monitoring performance against the strategy set out (Azar C and Griminger A *Achieving Effective Boards* (Global Corporate Governance Forum & OECD 2011) 1 available at www.oecd.org/countries/peru/48510039.pdf (accessed on 8 August 2013)). A board of directors is also viewed as a team of individuals with fiduciary responsibilities of leading and directing a firm, with the primary objective of protecting the firm’s shareholders’ interests (Abdullah SN “Board Composition, CEO Duality and Performance among Malaysian Listed Companies” (2004) 4 *Corporate Governance* 47-61).

¹² Mwaura K “The Failure of Corporate Governance in State Owned Enterprises and the Need for Restructured Governance in Fully and Partially Privatized Enterprises: The Case of Kenya” (2007) 31(1) *Fordham International Law Journal* 34-75. See also *OECD Guidelines on Corporate Governance of State-Owned Enterprises* (2005) 47.

public entities need to effectively discharge their duties and observe good corporate governance.

Good corporate governance is accordingly a necessity for the modern complex and dynamic business environment to ensure long-term sustainability, attract investment capital, maintain economic stability and encourage growth.¹³ It should, as a result, be cultivated and constantly practiced by both private and public entities. In an economy such as Zimbabwe's, which is faced with the challenge of restructuring for greater efficiency and attracting investment for economic growth, this is particularly important. Consequently, ways of improving the efficiency and effectiveness¹⁴ of boards of public entities should continue to be investigated in the context of corporate governance, to lessen the burden on taxpayers and to ensure that the public obtains maximum benefits from the entities.

Establishing the causes of the ineffectiveness of boards and finding possible solutions to the existing challenges are the objectives this study seeks to achieve. The effectiveness of Zimbabwe's public entity boards in discharging their duties is analysed and it is attempted to identify the major constraints boards encounter in seeking to effectively perform their mandates within the existing corporate governance framework. Thereafter, possible solutions are proffered to improve the effectiveness of public entity boards in promoting good corporate governance practices.¹⁵

1.2 PROBLEM STATEMENT

The increase in corporate scandals has led to global acknowledgement of the profound impact of corporate governance practices on the survival of companies and indeed of public entities in the international economy.¹⁶ A number of recent studies suggest that public entities have

¹³ Atacik MC and Jarvis M *Better Corporate Governance: More Value for Everyone* (World Bank Discussion Paper No. 2 of February 2006) 1-2 available at http://www.siteresources.worldbank.org/CGCSRLP/Resources/paper_02.pdf (accessed on 12 August 2013).

¹⁴ Board effectiveness has been defined as the degree to which a board of directors achieves the purpose of its existence. It refers to the proper performance of the tasks by the board as well as the ability to cohesively work together (Forbes DP and Milliken FJ "Cognition and Corporate Governance: Understanding Board of Directors as Strategic Decision-Making Groups" (1999) 24(3) *The Academy of Management Review* 489-505).

¹⁵ See Chapter 8, para 8.4 below.

¹⁶ Crowther D and Seifi S *Corporate Governance and International Business* (2011) 12-13. Corporate failures such as that of Enron and World Com were inspirational to the development of renewed interest in the role of the board of directors.

not used their resources efficiently and that they have imposed a burden on public finances due to a number of reasons, the most significant of which is a lack of good corporate governance.¹⁷ Some of the cited reasons for the poor performance by public entities are a lack of clarity and conflicts in their objectives; the requirements to accomplish conflicting economic and social objectives without adequate guidance on how to resolve this divergence; the use of public entities for political reasons; the absence of sufficient decision making powers by the board and management making it difficult to hold them accountable for the entity's performance; a lack of appropriate monitoring and remuneration systems to motivate the board and management to effectively perform; board and management incompetence and corruption; failure to expeditiously adapt to technological advances and government interference with operational decisions.¹⁸ In this regard, the role and effectiveness of the board of directors have emerged as very important when examining the causes of poor corporate governance, corporate collapses and inefficiencies in public entities.¹⁹

A number of corporate governance initiatives have been introduced to govern the operations of public entities and their boards. But, empowering directors to effectively discharge their obligations and enforcing compliance with good corporate governance practices have proved to be major challenges. Although substantial research has been undertaken on the effectiveness of boards of private enterprises, inadequate attention has been given to the challenges being faced by boards of public entities in effectively discharging their duties and promoting good corporate governance.²⁰ This is so especially in developing African

¹⁷ Mwaura K "The Failure of Corporate Governance in State Owned Enterprises and the Need for Restructured Governance in Fully and Partially Privatized Enterprises: The Case of Kenya" (2007) 34-75.

¹⁸ Ibid. See also Indreswari M *Corporate Governance in the Indonesian State Owned Enterprises* Unpublished Thesis (Massey University, New Zealand 2006) 106-107 and Swanson D and Wolde-Semait T *Africa's Public Enterprise Sector and Evidence of Reforms* (World Bank Technical Paper Number 95, Washington, D.C 1989) 2.

¹⁹ Many of the corporate collapses have been attributed to "self seeking" activities of too powerful directors, their apparent lack of personal and business ethics, lack of relevant expertise, lack of commitment and the inability of their contemporaries on the board to restrict them from acting improperly (Coyle B *Corporate Governance* (ICSA Publishing Ltd, London 2003) 8-10). Furthermore, in public entities, state ownership and government control present inherent governance challenges that contribute to poor performance by boards thus resulting in poor performance by the entities (Robinett D *The Challenge of SOE Corporate Governance for Emerging Markets* (2006) 3-4).

²⁰ Ashe PA *Governance in Antigua and Barbuda: A Qualitative Case Study of Five State Owned Enterprises* Unpublished Thesis (University of Phoenix 2012) 48. See also Sifile O *et al* "Corporate Board Failure in Zimbabwe: Have Non – Executive Directors Gone to Sleep?" (2014) 17(6) *IOSR Journal of Business and Management* 78-86 and Maune A "Corporate Governance in Zimbabwe: An Overview of Its Current State" (2015) 5(1) *Asian Economic and Financial Review* 167-178.

countries.²¹ Furthermore, there has not been much meaningful research on the effectiveness of boards of public entities in Zimbabwe.²² It is also questionable whether research results obtained from other regions or countries can be extended and applied without further investigation to Zimbabwe given the differences in the country contexts.²³

It is therefore crucial to analyse and evaluate the effectiveness of boards in promoting good corporate governance in public entities in Zimbabwe. These entities are of significant importance to the national economy for the role they play in socio-economic transformation, employment creation and economic growth. This research particularly focuses on the corporate governance initiatives, laws and regulations aimed at enhancing the effectiveness of boards of public entities in Zimbabwe with a view to establish the nature and level of compliance with best practices. The key question to be addressed is whether or not boards of public entities have been able to effectively discharge their duties and promote good corporate governance. The second question is whether the corporate governance initiatives and legal and regulatory reforms in Zimbabwe are sufficient to enable boards of directors of public entities to effectively discharge their duties and meet internationally accepted corporate governance standards.

Zimbabwe's corporate governance framework for public entities is compared to the frameworks of South Africa and Australia. South Africa and Australia were chosen because of the similarities they share with Zimbabwe. For example, all three countries' company laws have historically borrowed heavily from the United Kingdom's company law and their corporate governance systems consist of both mandatory and self-regulating attributes.²⁴ The comparative analysis with South Africa aims to establish how well Zimbabwe is performing

²¹ It has been noted that corporate governance has not been studied by scholars in developing countries with the "same intensity as in developed countries" (Ashe PA *Governance in Antigua and Barbuda: A Qualitative Case Study of Five State Owned Enterprises* (2012) 48. For further confirmation of this assertion, see Maasen GF *An International Comparison of Corporate Governance Models* 3rd ed. (Spencer Stuart 2002), Moloi STM *Assessment of Corporate Governance Reporting in the Annual Reports of South African Listed Companies* Unpublished Thesis (UNISA 2008) 95-97 and Shliefer A and Vishny RW "A Survey of Corporate Governance" (1997) 52(2) *The Journal of Finance* 737-783.

²² According to Sifile *et al*, there is limited literature on this aspect (Sifile O *et al* "Corporate Board Failure in Zimbabwe: Have Non – Executive Directors Gone to Sleep?" (2014) 78-86).

²³ This is based on the observation by the King Committee that companies are governed within the framework of the laws and regulations of the country in which they operate. Therefore, laws, regulations and practices in one country cannot be directly applied to another country (See "Introduction and Background" to the *King III Report on Corporate Governance* (King Committee on Corporate Governance 2009) available at www.iodsa.co.za.pdf (accessed on 11 September 2013)).

²⁴ See Chapter 4, para 4.2.1, Chapter 5, para 5.2.1 and Chapter 6, para 6.2.1 below.

in comparison to neighbouring and other developing countries and what good practices it can emulate to improve corporate governance in its public entities.²⁵ Australia was chosen for the main reason that it is a developed country with a shared common law heritage from which Zimbabwe can learn certain good corporate governance practices.²⁶ Thereafter, recommendations are made on how best the existing initiatives and the legal and regulatory frameworks can be improved and how boards of public entities may be assisted to perform their duties diligently whilst adhering to and promoting good corporate governance practices.

Within the context of corporate governance, the objectives of the research are to answer/determine the following questions:²⁷

1. Does a company's performance improve by adopting good corporate governance practices?
2. To what extent do boards of directors effectively fulfil their functions in enhancing good corporate governance in public entities?
3. Are public entity boards appropriately constituted and empowered to deliver their mandate?
4. Are public entity boards remunerated adequately to motivate them to effectively discharge their duties?
5. How effective are board performance evaluation tools in assessing boards' and individual directors' performance?
6. What practices, arrangements and/or structures should help to promote the independence and effectiveness of boards of public entities?
7. Is Zimbabwe's current legal and regulatory environment conducive to and adequate for the realisation and effective application of principles of good corporate governance by boards in public entities?

²⁵ The proximity of South Africa to Zimbabwe and the social, cultural and economic similarities makes the former jurisdiction suitable for the comparative analysis. Moreover, Zimbabwe has significant trade relations with South Africa and the two countries subscribe to a number of similar institutions, for example, the African Union (AU) and Southern African Development Community (SADC).

²⁶ In conducting the comparative analysis, it was borne in mind that the two countries' social, cultural and economic conditions may be different hence the reason why their levels of corporate governance compliance may differ. However, it was assumed that Zimbabwe could learn from Australia's corporate governance reforms and experiences.

²⁷ The questions seek to establish the general position but make specific reference to Zimbabwe.

1.3 SIGNIFICANCE OF THE STUDY

Public entities continue to play an important role in all economies; particularly developing countries where there is a greater need to facilitate economic growth and sustainable development.²⁸ For that reason, government administrators and the general public in these countries need to appreciate the major causes of poor corporate governance in the public entities. In particular, they need to understand and address why boards have not been as effective as they should be in promoting good corporate governance in public entities. Determining this was the main objective of this study.

The research should be of interest to government administrators and the general public who have a vested interest in the assets and overall performance of public entities. The results from this study may influence the formulation of policies for the enhancement of efficiencies and corporate governance structures in public entities in Zimbabwe and in other developing and neighbouring countries. Exchange of good practices is beneficial amongst jurisdictions that are engaged in trade and other collaborative enterprises.²⁹ Trade facilitation provides vital opportunities for countries “by increasing the benefits from open trade, and contributing to economic growth and poverty reduction”.³⁰

It is hoped that the research will contribute to the debate on interventions required by Zimbabwe and other developing countries to accomplish the objective of enhancing the

²⁸ Smith DAC and Trebilcock MJ “State Enterprises in Less Developed Countries: Privatization and Alternative Reform Strategies” (2001) 12 *European Journal of Law and Economics* 217-252 available at link.springer.com/article/10.1023%2FA%3A1012817825552 (accessed on 17 August 2013). See also OECD *Guidelines on Corporate Governance of State-Owned Enterprises* (2005) 6-7.

²⁹ Trade negotiations and agreements have assisted in the removal of trade barriers and contributed to the expansion of global trade, e.g., the Uruguay Round and the World Trade Organization (WTO) (Rippel B *Why Trade Facilitation is Important for Africa* (World Bank Policy Note No: 27 of 2011) available at <http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/...html> (accessed on 25 March 2014).

³⁰ Ibid. Africa has also benefited from exchange of information and trade facilitation arrangements between countries. Examples are African Trade Agreements are Common Market for Eastern and Southern Africa (COMESA), Preferential Trade Area for Eastern and Southern African States (PTA) and Southern Africa Development Community (SADC). COMESA enables its members to enjoy preferential access to markets within the European Union and aims to pool its members' collective resources to support the economic development efforts of its member countries. The PTA was established in 1981 to promote economic cooperation between member states, particularly in the areas of agriculture, industry, transportation, and communications. It also aims to facilitate international trade through the lowering of tariff barriers between states. SADC was formed in 1992 to promote economic development among southern African states (Visit http://africaecon.org/index.php/trade_agr/view_trade_agreement/22/0/_/5 for more information). Also see *The Africa Competitiveness Report 2013* prepared by World Economic Forum, the World Bank, the African Development Bank and the Ministry of Foreign Affairs of Denmark, available at <http://www.worldbank.org/...dam/Worldbank/doc/Africa/Report/africa-competitiveness-report-2013-main-report-web.pdf> (accessed on 17 March 2015).

effectiveness of boards in promoting good corporate governance within public entities. In particular, the research may assist policymakers, legislatures, board members and other scholarly researchers. The policymakers would be assisted to create policies on future direction of corporate governance reform in public entities. The legislatures may be assisted to develop laws and regulations which will capacitate directors to effectively discharge their duties and improve the compliance of public entities with good corporate governance practices. The boards of public entities may benefit from the research in that they may be enabled to better understand and handle challenges they encounter when performing their duties.³¹ Lastly, other scholarly researchers may build on the findings of this research and expand to cover other aspects of public entities that need attention other than the inefficiency of boards.

1.4 RESEARCH METHODS

The envisaged research involves a literature study of books, electronic/internet sources, journal articles, theses and dissertations, case law and legislation. The research also entails circulation of questionnaires³² and conducting interviews³³ with some key people in selected public entities.

There are principally two research methods, a positivistic and a phenomenological approach.³⁴ The positivistic approach is referred to as quantitative research mostly because it explains social phenomena by establishing a relation between variables which are information converted into numbers.³⁵ In terms of the quantitative approach, clearly constructed hypotheses are formulated about the relationship between two or more

³¹ Ibid. More often than not, government initiatives have failed because the people involved in implementing them lack an understanding of the issues and the need to solve the issues based on empirical information.

³² A questionnaire is defined as a data collection instrument used in survey research where people answer questions by recording their own answers (Zohrabi M “Mixed Method Research: Instruments, Validity, Reliability and Reporting Findings” (2013) 3(2) *Theory and Practice in Language Studies* 254-262).

³³ Cooper and Schindler describe an interview as a purposeful discussion between two or more people meant to extract primary data responses through direct questioning (Cooper M and Schindler P “Managers’ Innovations and the Structuration of Organizations” (2003) 35(3) *Journal of Management Studies* 263–284).

³⁴ Collis J and Hussey R *Business Research: A Practical Guide for Undergraduate and Postgraduate Students* 3rd ed. (New York, Palgrave MacMillan 2003) 55-57.

³⁵ Chetty L *The Influence of Leadership on the Organisational Effectiveness of Saps Precincts* Unpublished Thesis (Nelson Mandela Metropolitan University 2011) 17.

variables.³⁶ Data about these variables are collected through methods such as questionnaires, focus groups, interviews, case studies and experiments.³⁷ A positivist approach to research is thus based on knowledge gained from “positive” verification of observable experience rather than, for example, introspection or intuition.³⁸ Scientific methods or experimental testing are the best way of achieving this knowledge.³⁹

The phenomenological approach, on the other hand, pays considerable regard to the subjective or qualitative state of the individual, hence the reference to this approach as qualitative research.⁴⁰ The qualitative research approach involves “gathering information and perceptions through inductive, qualitative methods such as interviews, discussions and participant observation, and representing it from the perspective of the research participant(s)”.⁴¹ Phenomenological methods are thus particularly effective at bringing to fore the experiences and perceptions of individuals from their own perspectives, and therefore at challenging structural or normative assumptions.⁴²

The research objective of the present study is to investigate how successful the existing corporate governance framework has been in enabling boards of public entities to effectively perform their duties. The nature of the investigation dictates that the phenomenological or qualitative approach be used. However, this study involves a mixture of methods, dominated by doctrinal research methodology. Doctrinal research is concerned with “analysis of the legal doctrine and how it has been developed and applied”.⁴³ It systematically examines what the law is on a particular issue and analyses the relationship between rules. The method

³⁶ Ibid.

³⁷ Struwig FW and Stead GB *Planning, Designing and Reporting Research* (Cape Town, Pearson Education 2004) 5-10.

³⁸ Collis J and Hussey R *Business Research: A Practical Guide for Undergraduate and Postgraduate Students* (2003) 55-57.

³⁹ Ibid.

⁴⁰ Dawson C *Practical Research Methods* (UBS Publishers’ Distributors, New Delhi 2002) 14-23.

⁴¹ Lester S *An Introduction to Phenomenological Research* (Taunton UK, Stan Lester Developments 1999) 1-2 available at www.sld.demon.co.uk/resmethy.pdf, (accessed on 10 August 2013). See also Struwig FW and Stead GB *Planning, Designing and Reporting Research* (2004) 11-16.

⁴² Lester S *An Introduction to Phenomenological Research* (1999) 1. See also Hale S and Napier J *Research Methods in Interpreting: A Practical Resource* (A & C Black 2013) 84.

⁴³ Razak AA “Understanding Legal Research” (2009) 4 *Integration and Dissemination* 19-24 available at econ.upm.edu.my/researchbulletin/artikel/.../19-24%20Adilah.pdf (accessed on 29 August 2015). See also Hutchinson T and Duncan NJ “Defining and Describing What We Do: Doctrinal Legal Research” (2012) 17(1) *Deakin Law Review* 83-119.

consists of an evaluation of legal sources (primary and secondary) and “study of legal institutions through legal reasoning or rational deduction”.⁴⁴

Specifically, data is collected through literature analysis as well as interviews conducted with and questionnaires circulated to participants from four public entities in Zimbabwe.⁴⁵ The aim is to assess corporate governance issues and challenges facing the public entities from the perspectives of their respective board members, senior managers, company secretaries, chief executive officers and selected shareholder representatives. The data collected particularly seeks to establish the effectiveness of boards in promoting good corporate governance in these public entities in light of the prevailing regulatory and statutory frameworks. Furthermore, to establish the extent to which Zimbabwe has tried to harmonise its corporate governance framework with other international players, a comparison of its corporate governance reforms is made to reforms that have been carried out in South Africa and Australia.

1.5 SCOPE OF THE RESEARCH

The research focuses on Zimbabwean public entities in general. A sample of four entities was selected to assist with addressing the research issues.⁴⁶ The four public entities are Minerals Marketing Corporation of Zimbabwe (MMCZ),⁴⁷ Zimbabwe Mining Development Corporation (ZMDC),⁴⁸ National Railways of Zimbabwe (NRZ)⁴⁹ and Grain Marketing

⁴⁴ Ibid. See also Van Gestel R and Micklitz H *Revitalizing Doctrinal Legal Research in Europe: What about Methodology?* (European University Institute Working Papers, Law 2011/05) 26-27 available at http://cadmus.eui.eu/bitstream/handle/1814/16825/LAW_2011_05.pdf?sequence=1 (accessed on 18 July 2015).

⁴⁵ See Chapter 2 below for a detailed discussion on the various approaches and methodologies used in the study.

⁴⁶ Interviews are conducted with and questionnaires circulated to representatives from the selected entities. The basis for selecting the four entities is discussed below (para 1.6.2 and Chapter 2, para 2.3.4).

⁴⁷ MMCZ is a state owned enterprise that was established in terms of the MMCZ Act 2 of 1982 to control and regulate the export, sale and stockpiling of all minerals. MMCZ is a body corporate that is capable of suing and being sued and subject to the provisions of the Act. See <http://www.mmcz.co.zw/>, for more information.

⁴⁸ ZMDC is a public entity which was established in terms of the Zimbabwe Mining Development Corporation Act 31 of 1982. Its main functions are to, on behalf of the state, invest in the mining industry in Zimbabwe, plan, co-ordinate and implement mining development projects and engage in prospecting, exploration, mining and mineral beneficiation programmes, among other things. See <http://www.zmdc.co.zw/>, for more information.

⁴⁹ NRZ is a state owned enterprise that was established in terms of the Railways Act 41 of 1972 to “provide, operate and maintain within its area of operation, either by itself or through its agents or jointly with others” an efficient system of public transport of goods and passengers by rail and by road. See <http://www.nrz.co.zw/>, for more information.

Board (GMB).⁵⁰ The thesis analyses the corporate governance reforms in Zimbabwe as contained in the codes of corporate governance, statutory instruments and other guidelines⁵¹ and examines their effectiveness in addressing corporate governance challenges experienced by boards in the country's public entities.⁵²

The study also covers the principles of good corporate governance as they have come to be widely accepted by making a comparative analysis of Zimbabwe's corporate governance framework to those of South Africa and Australia.⁵³ The comparison is on the four countries' corporate governance frameworks for public entities, specifically focusing on the role of a board, its appointment, composition, remuneration and performance evaluation. In addition, the comparative analysis examines how effective the existing systems have been in enabling boards to effectively carry out their duties and comply with good corporate governance practices.

Reference is also made to other internationally recognised corporate governance principles which are relevant to Zimbabwe, namely the OECD *Principles of Corporate Governance*,⁵⁴ Commonwealth Association for Corporate Governance (CACG) Guidelines (hereinafter referred to as *CACG Guidelines*),⁵⁵ International Corporate Governance Network (ICGN) *Global Principles of Corporate Governance* (hereinafter referred to as *ICGN Principles*),⁵⁶

⁵⁰ GMB was established as a wholly-owned government entity in terms of the Grain Marketing Act 20 of 1966 to regulate and control the prices and marketing of certain agricultural products and their derivatives. See <http://www.gmbdura.co.zw/>, for more information.

⁵¹ See Chapter 4, para 4.2.1 below for details of the codes of corporate governance, statutory instruments and other guidelines. This thesis includes the law as at 28 February 2016.

⁵² The codes of corporate governance, statutory instruments and other guidelines are discussed in para 1.5 below.

⁵³ See chapters 5 and 6 below for the comparative analysis. The main aim of the comparative analysis is to establish how well Zimbabwe performs as an international competitor with regard to observing good corporate governance practices.

⁵⁴ The *OECD Principles of Corporate Governance* were first endorsed by OECD Ministers in 1999, updated in 2004 and have since become an international benchmark for policy makers, investors, corporations and other stakeholders. They have advanced the corporate governance agenda and provided specific guidance for legislative and regulatory initiatives in both OECD and non OECD countries ("Foreword" and "Preamble" to the *OECD Principles of Corporate Governance* (2004)).

⁵⁵ *CACG Guidelines* were initially established in 1998 "in response to the Edinburgh Declaration of the Commonwealth Heads of Government meeting in 1997". Their main objectives are to promote good standards in corporate governance and business practice throughout the Commonwealth and facilitate the development of appropriate institutions which will be able to advance, teach and disseminate such standards. The *CACG Guidelines* are available at www.ecgi.org/codes/documents/cacg_final.pdf (accessed on 29 August 2013).

⁵⁶ The ICGN was founded in 1995 as an initiative by major institutional investors and it represents various stakeholders interested in the development of global corporate governance practices. The *ICGN Principles* were last revised in 2009.

United Nations Global Compact Guidelines (hereinafter referred to as UN *Guidelines*)⁵⁷ and other widely referred to country specific corporate governance codes like the South African *King Reports on Corporate Governance*,⁵⁸ Malawian *Code of Best Practice for Corporate Governance*⁵⁹ and the United Kingdom *Corporate Governance Code* (formerly the *Combined Code*).⁶⁰

Below is an elaboration on the main themes of corporate governance that this thesis deals with namely; the role, selection and appointment, composition, remuneration and performance evaluation of the board.

1.5.1 Role of Board of Directors

Recurring corporate failures and the general changing nature of the business environment have been inspirational to renewed interest in and increased scrutiny of the role of the board of directors.⁶¹ A frequent criticism of boards, and especially of non-executive directors, is

They highlight the expectations and concerns of international investors with regard to the “governance of companies in which they invest and also express their commitment to play their role in the governance of those companies”. The ICGN *Principles* are accessible at www.ecgi.org/codes/documents/icgn_principles.pdf (accessed on 17 October 2014).

⁵⁷ The UN Global Compact is said to be the largest corporate citizenship and sustainability initiative in the world. It consists of corporations and civil society organisations from more than 140 countries that are “working together to help align business practices with ten universally accepted principles in the areas of human rights, labour, environment and anti-corruption”. The UN Global Compact is a call to companies globally to voluntarily align their operations and strategies with the ten universally accepted principles and to “take actions in support of UN goals, including the Millennium Development Goals” The UN *Guidelines* are accessible at <https://www.unglobalcompact.org/aboutthegc/TheTenprinciples/index.html>. (accessed on 7 November 2013).

⁵⁸ The *King Report on Corporate Governance* was spearheaded by the Institute of Directors in Southern Africa and the King Committee on governance. The *King Reports* have progressively developed from *King I* in 1994, *King II* in 2002 and subsequently *King III* in 2009. Currently, efforts are under way to develop *King IV Report*. The *Reports* seek to encourage the highest standard of corporate governance in South Africa by recommending standards of conduct for directors and emphasising the need for responsible corporate conduct. The *Reports* are available at www.iodsa.co.za.pdf.

⁵⁹ The *Code of Best Practice for Corporate Governance in Malawi* was first developed in 2001 and revised in 2010. The *Code* is a voluntary code aimed at providing corporate governance guidelines to “directors, managers and stakeholders in enterprises” in Malawi. It was developed by Malawi National Corporate Governance Review Committee (NCGRC) in consultation with other stakeholders and is available at www.ecgi.org/codes/code.php?code_id=341 (accessed on 15 December 2014).

⁶⁰ The *Combined Code* was first developed in 1998 to encourage corporate governance within the United Kingdom (UK). The *Code* was a result of the amalgamation of the *Cadbury* and *Greenbury Reports*. In 2003, following the Enron and WorldCom scandals in the US, the *Combined Code* was updated to incorporate recommendations from the *Higgs Report* and the *Smith Report*. The *Code* is accessible at www.fsa.gov.uk/pubs/ukla/lr_comcode2003.pdf. Recently, the UK published a *Corporate Governance Code* (the UK *Corporate Governance Code 2014*) that replaced the *Combined Code* and is available at <https://www.frc.org.uk/Our-Work/Publications/Corporate-Governance/UK-Corporate-Governance-Code-2014.pdf> (accessed on 17 November 2014).

⁶¹ Nicholson GJ and Newton CJ “The Role of the Board of Directors: Perceptions of Managerial Elites” (2010) 16(2) *Journal of Management and Organization* 201-218. See also Adams R, Hermalin BE and Weisbach MS “The Role of

that they do not have adequate time to dedicate to the business of the companies they serve, resulting in them not having sufficient knowledge of the company's business, the industry environment and their responsibilities as directors.⁶² Another line of argument has been that the requirement that non-executive directors should be fully independent can result in them not being completely informed and lacking adequate knowledge of the industry and business.⁶³

To assess if a board is performing effectively, there is a need to first understand what a board of directors is and what it ought to be achieving.⁶⁴ Louden defines the board of directors as:

a legal and accountable group responsible for all the corporation's actions and the results of those actions. It is appointed by shareholders and serves as trustee for the shareholder's interest. This being so, the Board of directors must, accordingly, act in essence as the owners of the business.⁶⁵

According to Louden's definition, the board is a legally constituted group of people whose role is to collectively act on behalf of the shareholders by directing the affairs of the business to ensure its prosperity. Cadbury summarises the board's main functions as to define the company's purpose, agree on strategies and plans for achieving that purpose, establish the company's policies, appoint the chief executive officer (CEO), monitor and assess the performance of the executive team and to assess their own performance.⁶⁶ In order to fulfil

Boards of Directors in Corporate Governance: A Conceptual Framework and Survey" (2008) 48(1) *Journal of Economic Literature*, *American Economic Association* 58-107 available at <http://www.nber.org/papers/w14486> (accessed on 12 November 2014) and Dembinski PH *et al Enron and World Finance: A Case Study in Ethics* (Palgrave Macmillan 2006) 29-30.

⁶² Bosch H *The Director at Risk: Accountability in the Boardroom* (Pearson Professional, Melbourne 1995) 106.

⁶³ Kakabadse NK, Yang H and Sanders R "The Effectiveness of Non-Executive Directors in Chinese State Owned Enterprises" (2010) 48(7) *Management Decision* 1063-1079.

⁶⁴ Experience has it that challenges have been experienced in trying to precisely define what the role of the board is given the diverse views on this subject (Adams R, Hermalin BE and Weisbach MS "The Role of Boards of Directors in Corporate Governance: A Conceptual Framework and Survey" (2008) 58-107).

⁶⁵ Indreswari M *Corporate Governance in the Indonesian State-Owned Enterprises* (2006) 62-63. According to Vagliasindi, the main responsibility of the board is to "ensure that management is acting in the interests of the shareholders, through an advisory and monitoring role" (Vagliasindi M *The Effectiveness of Boards of Directors of State Owned Enterprises in Developing Countries* (World Bank Policy Research Working Paper 4579 of 2008) 2 available at <https://ideas.repec.org/p/wbk/wbrwps/4579.html> (accessed on 17 October 2014)).

⁶⁶ Cadbury A *Corporate Governance and Chairmanship: A Personal View* (Oxford University Press, New York 2002) 35-36. See also OECD *Principles of Corporate Governance* (2004) 24-25 for more board responsibilities.

this strategic role, the board needs to have an understanding of the company's fundamental business, competitors and industry environment.⁶⁷ Similarly, Thynne argues that in performing its role, the board is guided by specific company law requirements, the nature and significance of the company's business and the degree to which the government sees the necessity to constantly monitor the operations of the entity.⁶⁸ On the other hand, Carter and Lorsch⁶⁹ suggest that the role that a board adopts will be dependent on the board structure,⁷⁰ board composition⁷¹ and board processes.⁷²

In this thesis, directors' roles and responsibilities are initially considered from a general law perspective⁷³ and are then discussed in a Zimbabwean public entities context.⁷⁴ In particular, the investigation seeks to establish to what extent the board of directors of the selected entities are knowledgeable about their role, the extent to which they have managed to perform their duties and exercise their powers as expected of them and the challenges that they have experienced in effectively discharging their duties. An evaluation of how

⁶⁷ CAAG *Guidelines* (1999) 8-9. See also Kennerley M and Neely A "Measuring Performance in a Changing Business Environment" (2003) 23(2) *International Journal of Operations & Production Management* 213-229 available at <http://www.emeraldinsight.com/0144-3577.htm> (accessed on 17 December 2014) and Boulton WR *Strategic Analysis Model* (Auburn University's Strategic Management Course Paper 1996-2001) available at http://www.auburn.edu/~boultwr/html/strategic_analysis_model.htm (accessed on 17 December 2014).

⁶⁸ Wicaksono A *Corporate Governance of State-Owned Enterprises: Investment Holding Structure of Government-Linked Companies in Singapore and Malaysia and Applicability for Indonesian State-Owned Enterprises* Unpublished Thesis (University of St. Gallen Graduate School of Business Administration, Economics, Law and Social Sciences HSG 2009) 119.

⁶⁹ Carter CB and Lorsch JW *Back to the Drawing Board: Designing Corporate Boards or a Complex World* (Boston, Harvard Business School Press 2004) 8.

⁷⁰ Carter and Lorsch define board structure as the number of the board members, the split between executive and non-executive directors, use of alternate directors, the number and duties of board committees, leadership arrangements and the flow of information between board structures. See also Ngoe AO *The Effect of Board Structure on the Performance of Quoted Companies at the Nairobi Stock Exchange* Unpublished Thesis (University of Nairobi 2011) 3-5 for a similar definition.

⁷¹ Board composition is defined as the mix of experience, skills, degree of affiliation the directors have with the entity and other attributes of its members. See also Naidoo R *Corporate Governance: An Essential Guide for South African Companies* 2nd ed. (LexisNexis, Durban 2009) 108, for a similar definition.

⁷² Board processes are defined as including how the board gathers information, builds knowledge and makes decisions, the formality on board proceedings and board culture on evaluation of directors. See also McNulty T, Florackis C and Ormrod P *Corporate Governance and Risk: A Study of Board Structure and Process* (Certified Accountants Educational Trust, London, 2012) 4-5 available at <http://www.accaglobal.com/content/dam/accaglobal/PDF-technical/corporate-governance/tr-129-001.pdf> (accessed on 12 December 2014).

⁷³ See Chapter 3, para 3.6.1 below.

⁷⁴ See Chapter 4, para 4.2.2 below.

supportive existing policy and legislative frameworks have been in enabling boards to effectively discharge their duties is conducted with a view to recommending improvements.

1.5.2 Selection and Appointment of Board Members

The ability of a board to provide effective governance is dependent on the selection and appointment of directors who possess the necessary skills and experience to effectively carry out board responsibilities.⁷⁵ This, therefore, calls for a transparent and objective way of selecting and appointing board directors who are experienced or appropriately skilled in order to obtain the best results from the board and the entity itself.⁷⁶ In the selection and appointment process, consideration should first be given to the qualities of possible appointees which could include “the ability for critical thought, objectivity, wisdom gained through appropriate experience, authority and the ability to exercise judgment”.⁷⁷ Subsequently, consideration should be given to the skills that will be beneficial to the board.⁷⁸ For instance, considering the fact that boards are involved in the oversight of compliance with the law and financial management, it may be beneficial to have board members with legal as well as financial skills and experience.⁷⁹

The process of appointing boards in Zimbabwe’s public entities is considered to establish whether it is sufficiently transparent, credible and objective to enable boards to effectively discharge their duties and achieve the goals of the entities they represent.⁸⁰ Existing policy and legislative frameworks are also evaluated to determine how effective they have been in

⁷⁵ Part Two (VI) of the OECD *Principles of Corporate Governance*, Chapter 2 of the *King III Report*, Principle 2 of Commonwealth Association for Corporate Governance (CAGG) *Guidelines* and section B of the UK *Corporate Governance Code*.

⁷⁶ Ibid.

⁷⁷ Uhrig J *Review of the Corporate Governance of Statutory Authorities and Office Holders* (Commonwealth of Australia 2003) 98 available at <http://www.finance.gov.au/sites/default/files/Uhrig-Report.pdf> (accessed on 29 November 2013).

⁷⁸ Kiel GC and Nicholson GJ “Evaluating Boards and Directors” (2005) 13(5) *Corporate Governance: An International Review* 613-631.

⁷⁹ Ibid. However, it should be noted that such skills are a secondary consideration as specialist advice can be accessed by the board as and when necessary. See also Dutia SG *Primer for Building an Effective Board for Growing Start-up Companies* (Ewing Marion Kauffman Foundation 2014) 2-4 available at http://www.kauffman.org/~media/kauffman_org/research%20reports/ (accessed on 29 November 2014).

⁸⁰ See Chapter 4, para 4.2.2 below.

ensuring that appropriately experienced persons are appointed to the boards of public entities.⁸¹

1.5.3 Composition of the Board

A key principle of good corporate governance is that there should be a sufficient number of independent,⁸² non-executive⁸³ directors on the board to create a suitable balance of power and prevent the dominance of the board by one individual or by a small number of individuals.⁸⁴ It is also generally accepted that board diversity is important with a mix of different directors' demographics, relevant skills and experience being required to enable the board to effectively discharge its duties.⁸⁵ Board effectiveness is thus said to greatly depend

⁸¹ See Chapter 7 below.

⁸² An independent non-executive director is defined in the *King III Report* as a non-executive director who is not a representative of a shareholder, has not been employed by the company/group for the preceding three financial years, is not a professional advisor or significant supplier or customer to the company/group, has no significant contractual relationship with the company/group, is free from any business or other relationship which could influence his independence, does not have a direct or indirect interest in the company and does not receive performance based remuneration (Principle 2.18 of the *King III Report*). A similar definition is provided in the South African Companies Act which, in the context of the composition of an Audit Committee, requires an independent director to meet four minimum requirements. First, the person should not be "involved in the day-to-day management of the company's business or have been so involved at any time during the previous financial year". Secondly, he should not be "a prescribed officer, or full-time employee, of the company" or a related company, or has been employed in such capacity "at any time during the previous three financial years". Thirdly, the person should not be a "material supplier or customer of the company", such that it could reasonably be concluded that "the integrity, impartiality or objectivity of that director is compromised by that relationship". Lastly, the person should not be related to any person who falls within any of the criteria set out above (Section 94(4) of Companies Act 71 of 2008). See also paras 114-115 of Zimbabwe's *National Code on Corporate Governance*, para 2.4.3 of the ICGN *Global Principles of Corporate Governance* and section B of the UK *Corporate Governance Code* for similar characteristics of an independent director.

⁸³ A non-executive director is an individual not involved in the day to day management of the company and not a full time employee receiving a salary (Principle 2.18 of the *King III Report* and paras 114-115 of Zimbabwe's *National Code on Corporate Governance*). See also Barlow J *Directors' & Officers' Liability: The Legal Position in the United Kingdom* (Chadbourne & Parke 2009) 2 available at <http://www.chadbourne.com/files/upload/DandOLiability.pdf> (accessed on 17 December 2014) and Chapter 4 of the *Report for Corporate Governance for Mauritius* (2004) 66 available at http://www.ecgi.org/codes/documents/cg_code_mauritius_apr2004_en.pdf (accessed on 17 December 2014).

⁸⁴ Coyle B *Corporate Governance* (2003) 68-69.

⁸⁵ Board diversity is generally, described as the variation among board members with regard to educational background, professional experience, gender, age, race, national origin and personalities, among others (Carter D *et al* "The Gender and Ethnic Diversity of US Boards and Board Committees and Firm Financial Performance" (2010) 18(5) *Corporate Governance: An International Review* 396-414). See also Wachudi EJ and Mboya J "Effect of Board Gender Diversity on the Performance of Commercial Banks in Kenya" (2009) 8(7) *European Scientific Journal* 128-148 available at <http://ejournal.org/index.php/esj/Wachudi/view/120> (accessed on 19 December 2014), section B.1 of the UK *Corporate Governance Code*, para 2.4 of the ICGN *Global Principles of Corporate Governance* and Principle 2.18 of the *King III Report*.

on experience, skill, gender and judgments of individual executive and non-executive directors and the ways in which they combine to shape board conduct and relationships.⁸⁶

An examination of the composition of the boards of the selected public entities is conducted to ascertain whether or not the existing framework allows for boards that are properly composed and balanced in terms of, *inter alia*, independence, skills and gender.⁸⁷ The structures and composition of the boards of the selected public entities are further interrogated to establish whether they have enabled the directors to effectively discharge their obligations as well as to find out how significantly they have contributed to the practice of good corporate governance in the entities.

1.5.4 Directors' Remuneration

The structure and level of board remuneration has also been a contentious area.⁸⁸ Directors themselves believe that the level of their remuneration does not reveal the increased focus on their responsibilities, potential liability risks and company performance.⁸⁹ On the other hand, the general public and investors have criticised some directors for being paid far more money than they are worth and for receiving ever-increasing benefits even when their entities are performing poorly.⁹⁰

⁸⁶ Roberts J *et al* "Beyond Agency Conceptions of the Work of the Non-Executive Director: Creating Accountability in the Boardroom" (2005) *Special Edition British Journal of Management* 16.

⁸⁷ Although board composition entails a number of factors, the research limits the examination to board independence (whether director is executive or non-executive), educational background, professional experience and gender.

⁸⁸ Talha M, Sallehuddin A and Masoud S "Corporate Governance and Directors' Remuneration in Selected Asian Countries" (2009) 25(1) *Journal of Applied Business Research* 31-40 available at <http://www.cluteinstitute.com/ojs/index.php/JABR/article/viewFile/1034/1018> (accessed on 2 December 2014). See also Kirkpatrick G *The Corporate Governance Lessons from the Financial Crisis* (OECD Publication 2009) 12 available at www.oecd.org/dataoecd/32/1/42229620.pdf (accessed on 5 December 2014) and Ferrarini G, Moloney N and Ungureanu MC "Executive Remuneration in Crisis: A Critical Assessment of Reforms in Europe" (2010) 10(1) *Journal of Corporate Law Studies* 73-118.

⁸⁹ A survey by Ernst & Young and the Australian Institute of Company Directors (AICD) indicated that 63 % of respondents believed that they were underpaid (Australian Institute of Company Directors October 2003) available at <http://www.aicd.com.au/mediareleases> (accessed on 10 November 2014). Similarly, in a survey conducted by PriceWaterhouseCoopers (PwC) in South Africa "respondents across the spectrum agreed that directors should be paid more" implying that the current remuneration is considered insufficient (PwC *Non-Executive Directors' Practices and Fees Trends Report* of January 2014) 14 available at http://www.pwc.co.za/en/assets/pdf/ned_report_january_2014.pdf (accessed on 27 December 2014)).

⁹⁰ The public is of the view that directors are acting contrary to the principle of good corporate governance that provides that remuneration should be linked to some extent to company performance, so that a director will earn more if the company does well, but less if it does badly (Talha M, Salim ASA and Masoud S "A study on Directors' Remuneration and Board Committee in Malaysia" (2009) 5(1) *USA Journal of Modern Accounting and Auditing* 34-35). See also McCahery J and Renneboog L "Managerial Remuneration: The Indirect Pay-For-Performance Relation" (2001) 2 *Journal of Corporate Law*

Despite the conflicting views, it has been universally accepted that all business enterprises, including public entities, need to attract and retain the right caliber of board members required to run the organisations successfully.⁹¹ To achieve this, it is essential that the level of remuneration for members of the board should be sufficient, reasonably fair and performance related.⁹² At the same time, the structure of an individual's remuneration package should take into account the experience and expertise of the individual director as well as the responsibilities and risks associated with the role.⁹³

The remuneration structures in Zimbabwe's public entities are examined to establish whether or not directors' remuneration is adequate and whether or not the level of remuneration has an impact on the directors' commitment to their role and the effective discharge of their duties or responsibilities. Furthermore, international best practice concerning directors' remuneration is reviewed, with a view to making recommendations that would motivate Zimbabwean directors to apply their best efforts in performing their duties.

1.5.5 Evaluation of Board Performance

Public entities do not only have similar problems to private entities in terms of separation of control and ownership⁹⁴ but they also encounter "additional challenges that can severely undermine their efficiency".⁹⁵ Unlike a privately owned company, a public entity generally

Studies 317-332 and Institute of Chartered Secretaries and Administrators (ICSA) *Directors' Remuneration* (ICSA 2009) 194 available at http://www.icsa.org.uk/.../n_CorpGov_6thEd_StudyText_Chapter9.pdf (accessed on 20 December 2013).

⁹¹ Bhattacharya S, Boot AWA and Thakor AV "The Economics of Bank Regulation" (1998) 30 *Journal of Money and Banking* 745-770. See also Principle 2.25 of the *King III Report*, section D1 of the UK *Corporate Governance Code* and para 5 of the ICGN *Principles*.

⁹² Coyle B *Corporate Governance* (2003) 133. See also Principle 2.25 of the *King III Report*, section D1 of the UK *Corporate Governance Code* and para 5 of the ICGN *Global Principles of Corporate Governance*.

⁹³ Section D of the UK *Corporate Governance Code*, Principle 8 of the Australian Stock Exchange (ASX) Corporate Governance Council (CGC) *Corporate Governance Principles and Recommendations* 3rd ed. (ASX Corporate Governance Council 2014) and para 5 of the ICGN *Global Principles of Corporate Governance*.

⁹⁴ This is referred to as the principal-agent doctrine. It arises when one person or entity (the agent) has the capacity to make decisions on behalf of or that impact, another person or entity (the principal). This relationship sometimes presents challenges where the agent decides to act in his own best interests instead of those of the principal (Dalley PJ "Theory of Agency Law" 2011 72(495) *University of Pittsburgh Law Review* 495-547).

⁹⁵ Robinett D *The Challenge of SOE Corporate Governance for Emerging Markets* (2006) 23-24. See also Jensen MC and Meckling WH "Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structure" (1976) 3 *Journal of Financial Economics* 305-60.

cannot have its board changed through a takeover or proxy contest,⁹⁶ and it cannot be declared insolvent.⁹⁷ The absence of external control mechanisms like potential takeovers and proxy contests, lack of competition and nonexistence of mechanisms to capacitate the public to assess the performance of directors and managers, reduce the incentives of board members and managers to maximise the value of the organisation.⁹⁸ The decreased likelihood of insolvency can also reduce pressure to manage costs.⁹⁹ Hence, some of the most important checks on underperformance are absent. The need to monitor and measure board performance has thus become more acute mainly because the board is increasingly held accountable for corporate performance and there is an increase in shareholder activism¹⁰⁰ with investors demanding more from boards due to limited investment opportunities and potentially high risks of losing on investments.¹⁰¹

This research considers the framework that has been put in place to promote the evaluation of the performance of boards of Zimbabwean public entities. It further analyses the evaluation methods with a view to determine whether the methods are being properly implemented, the results of the board evaluations are reliable and whether the evaluations have assisted the

⁹⁶ Ibid. The shareholding or ownership structure of public entities presents significant challenges in terms of governance and makes takeovers or proxy contests difficult or almost impossible (OECD *Guidelines on Corporate Governance of State-Owned Enterprises* (2005) 20-21 and Menozzi A and Vannoni D “Political Connections in Boards of Directors” (2014) 16(3) *Network Industries Quarterly* 8-10 available at <http://mir.epfl.ch/.../NIO2014-3/Political%20connections%20in%20boards%20of%20directors.pdf> (accessed on 17 January 2015)).

⁹⁷ This is because, in most jurisdictions, the legal framework, e.g., the bankruptcy law does not cover public entities hence creditors sometimes encounter difficulties in enforcing their contracts and in obtaining payments. Other examples are the competition laws of a number of countries that exclude public entities (OECD *Guidelines on Corporate Governance of State-Owned Enterprises* (2005) 21 and Menozzi A and Vannoni D “Political Connections in Boards of Directors” (2014) 8).

⁹⁸ Robinett D *The Challenge of SOE Corporate Governance for Emerging Markets* (2006) 4. See also Ashe PA *Governance in Antigua and Barbuda: A Qualitative Case Study of Five State Owned Enterprises* (2012) 47.

⁹⁹ In addition, the absence of profit-orientation and the compensation for low revenues through government subsidies prevents public entities from discovering ways to improve efficiency and performance (Meyer KE *et al* “Overcoming Distrust: How State-Owned Enterprises Adapt Their Foreign Entries to Institutional Pressures Abroad” (2014) 45 *Journal of International Business Studies* 1005-1028). See also Robinett D *The Challenge of SOE Corporate Governance for Emerging Markets* (2006) 4.

¹⁰⁰ Madden JJ *The Evolving Direction and Increasing Influence of Shareholder Activism* (Harvard Law School Forum on Corporate Governance and Financial Regulation of 23 December 2013) available at <http://corpgov.law.harvard.edu/2013/12/23/the-evolving-direction-and-increasing-influence-of-shareholder-activism/> (accessed on 28 August 2015). However, research has shown that shareholders, due to their own limitations and priorities, have little or no influence over managerial decision-making hence they have not been as effective as they should be (Othman S and Borges WG “Shareholder Activism in Malaysia: Is it Effective?” (2015) 172 *Procedia - Social and Behavioral Sciences* 427-434 available at www.sciencedirect.com (accessed on 28 August 2015)). See also McCahery J and Renneboog L “Managerial Remuneration: The Indirect Pay-For-Performance Relation” (2001) 2 *Journal of Corporate Law Studies* 317-332.

¹⁰¹ Kiel GC and Nicholson GJ “Evaluating Boards and Directors” (2005) 613-631. See also Kiel GC *et al* *Board, Director and CEO Evaluation* (McGraw-Hill, Australia 2005) 4.

boards in effectively discharging their duties and promoting good corporate governance. Recommendations are then made on how best the evaluation of the performance of directors can be improved to promote board effectiveness and good corporate governance.¹⁰²

1.5.6 Zimbabwe's Corporate Governance Framework

There have been concerted efforts to enhance corporate governance in Zimbabwe in recent years.¹⁰³ This was partly encouraged by international social and economic developments as well as a reaction to the increase in the number of corporate collapses within the country.¹⁰⁴

In the main, the legal and regulatory framework of corporate governance in Zimbabwe is determined by the Constitution,¹⁰⁵ the *Corporate Governance Manual*,¹⁰⁶ various Acts of Parliament governing public entities, for example, the Companies Act,¹⁰⁷ Acts creating public entities,¹⁰⁸ the Public Finance Management Act (PFMA),¹⁰⁹ common law¹¹⁰ and the

¹⁰² See Chapter 8, para 8.4 below.

¹⁰³ This is shown by the numerous initiatives that have been undertaken to promote good corporate governance practices, e.g., the revision of the Constitution and the adoption of corporate governance codes like the *Corporate Governance Framework for State Enterprises and Public Entities* and the *Zimbabwe National Code of Corporate Governance*.

¹⁰⁴ Examples of corporate collapses that occurred in Zimbabwe are ENG Asset Management, Trust Bank in Zimbabwe, Karina Textiles and AfrAsia Bank Zimbabwe Ltd (Chitemba B *Zimbabwean Business Collapsing (The Zimbabwe Independent* of 1 November 2013) available at <http://www.theindependent.co.zw/2013/11/01/zimbabwean-businesses-collapsing/> (accessed on 22 September 2014). National Railways of Zimbabwe (NRZ), Grain Marketing Board (GMB) and Zimbabwe United Passenger Company (ZUPCO) are examples of public entities that have failed to perform efficiently to the extent of almost collapsing due to poor corporate governance (Moyo G *The State of Corporate Governance in Zimbabwe's State Enterprises: Can the Situation be Rescued?* (Keynote Address by The Minister of State Enterprises and Parastatals, Honourable Gordon Moyo (M.P) at IIA Annual Conference at Victoria Falls in Zimbabwe on 13 September 2012) available at gordenmoyo.blogspot.com/.../the-state-of-corporate-governance-in.html (accessed on 19 October 2013)).

¹⁰⁵ Constitution of Zimbabwe Amendment (No. 20) Act 1 of 2013. The Constitution states that Zimbabwe is founded on respect for internationally accepted principles of good corporate governance (Section 3 (1) (h) and (2) (g) of the Constitution).

¹⁰⁶ Minor CA *Principles for Corporate Governance in Zimbabwe: Manual of Best Practices* (African Management Services Company (AMSCO) 2001) (hereinafter referred to as the *Manual*).

¹⁰⁷ Companies Act 47 of 1951. The Act was promulgated in 1951 and last amended in 2003.

¹⁰⁸ For example, the Minerals Marketing Corporation of Zimbabwe Act 2 of 1982, Zimbabwe Mining Development Corporation Act 31 of 1982 and the Grain Marketing Act 20 of 1966.

¹⁰⁹ Section 50 of the Public Finance Management Act 11 of 2009 requires every state enterprise or parastatal to adhere to and implement the principles of sound corporate governance policies, procedures and practices.

¹¹⁰ Naidoo defines common law as “a law which is not legislated in the statute books of a country, but which nevertheless over time and through wide acceptance gains the force of a law.” (Naidoo R *Essentials for Corporate Governance for South African Companies* (Cape Town: Double Storey 2002) 11). Lewis defines common law as “the body of customary law, based upon judicial decisions and embodied in reports of decided cases” (Lewis ADE *Common Law Encyclopaedia*

Zimbabwe Stock Exchange *Listings Requirements*.¹¹¹ The country also launched the *Corporate Governance Framework (CGF) for State Enterprises and Public Entities* in November 2010. The main objective of this document is to improve efficiency and effectiveness and to fulfill the goals of profitability and affordable service provision in state enterprises and parastatals.¹¹² The *Zimbabwe National Code of Corporate Governance* (hereinafter referred to as the *National Code*), which is unique and specific to Zimbabwe's corporate needs and history, was adopted in April 2015.¹¹³ Furthermore, in April 2014, Zimbabwe came up with a draft *Corporate Governance and Remuneration Policy Framework* to govern the operations of state-owned enterprises and local authorities with regard to remuneration and corporate governance practices.¹¹⁴ It is also important to note that organisations in Zimbabwe have adopted, in addition to the above instruments, corporate

Britannica Online Article of 2013 available at <http://www.britannica.com/EBchecked/topic/128386/common-law> (accessed on 26 December 2014)). Common law is also defined as that body of law that is unwritten and is applicable and binding to the entire society and to all people regardless of their "inherent differences in background, level of education, custom and affiliations". The common law in Zimbabwe is a combination of "Roman-Dutch Common Law and English law as well as many other legal principles including International Law" (Dube B "Roman-Dutch and English Common Law: The Indispensable Law in Zimbabwe" (2014) V(4) *Afro Asian Journal of Social Sciences* 1-18 available at <http://www.onlineresearchjournals.com/aajoss/art/164.pdf> (accessed on 25 September 2015)). See also Madhuku L *An Introduction to Zimbabwean Law* (Weaver Press and Friedrich-Ebert-Stiftung 2010) 15-17.

¹¹¹ The ZSE *Listing Rules* incorporate principles of the *Cadbury Report* and *King I Report*. The *Rules* compel companies to include a statement in their annual reports indicating the extent to which they comply to enable shareholders and potential investors to evaluate how the corporate governance principles have been applied. In cases where the recommended governance structures were not applied, the company is expected to provide an explanation for the noncompliance in the annual reports to shareholders (Section 7.F.5 of ZSE *Listing Rules* (2002)). It is important to note that the ZSE *Listing Rules* were last officially amended in 2002 hence the lack of reference to more recent reports. However, the Zimbabwe Stock Exchange, in consultation with stakeholders, is in the process of reviewing the *Listing Rules* (*The Newsway* of 13 March 2014 11 (available at <https://www.newsway.co.zw>), *The Herald* of 14 July 2013 B4 (available at www.herald.co.zw) and *The Financial Gazette* of 17-23 September 2015 C2 (available at www.fingaz.co.zw). Also worth noting is that currently very few of Zimbabwe's public entities are listed on the Stock Exchange hence the minimal applicability of the *Listing Rules*.

¹¹² The *Corporate Governance Framework for State Enterprises and Parastatals* is applicable to both public entities established through an Act of Parliament and to state enterprises registered under the Companies Act (para 1.4.3 of the *Zimbabwe Corporate Governance Framework for State Enterprises and Parastatals* 2010). In crafting and adopting the *CGF*, the Government took cognisance of the need to provide for a code of governance that would "foster a culture of observance and adherence to regional and international best practices in organisational governance". In this regard, the policy makers considered the "Malawi Code, the King III Code of Governance for South Africa, the Organization for Economic Co-operation and Development (OECD) *Guidelines on Corporate Governance of State Owned Enterprises*, the United States Corporate and Auditing Accountability and Responsibility Act (Sarbanes-Oxley) of 2002 and subsequent revisions to the Act following the global economic crisis..." (para 1.1.6 of the *CGF*). Although public entities are expected to comply with the *CGF*, it is not legally binding on the public entities as it is not law.

¹¹³ The *National Code* is an initiative of the combined efforts of the Zimbabwe Leadership Forum (ZIMLEF), the Institute of Directors of Zimbabwe (IoDZ) and the Standards Association of Zimbabwe (SAZ). The initiative was motivated by the desire to promote sound corporate governance in Zimbabwe ("Introduction and Background" to the *National Code*).

¹¹⁴ *The Zimbabwe Mail* of 16 April 2014 13 (available at www.thezimmail.co.zw) and *The Herald* of 16 April 2014 1. It is anticipated that the adopted policy framework will be promulgated into an Act of Parliament so that it can legally be implemented and defaulters can be punished accordingly.

governance principles as outlined in other internationally recognised corporate governance codes and guidelines to promote good corporate governance.¹¹⁵

From the above, it can be concluded that Zimbabwe has put substantial efforts into developing a corporate governance framework that promotes good corporate governance. Despite having a very strong regulatory framework, Zimbabwe is still faced with challenges in achieving good corporate governance, especially in public entities.¹¹⁶ The research therefore, assesses the level of compliance with the corporate governance framework and the challenges encountered by the public entities in complying with the framework. Furthermore, the efficacy of the existing legal and regulatory frameworks in enhancing the effectiveness of boards of Zimbabwean public entities and in upholding good corporate governance principles is evaluated. Finally, possible areas of improvement are identified and specific recommendations made.

1.5.7 Comparison of Zimbabwe’s Corporate Governance Legal and Regulatory Frameworks to those of South Africa and Australia

Corporate governance initiatives continue to endeavour to keep abreast with developments in the world and the changing business environment.¹¹⁷ As a result, developing and emerging economies can derive a number of lessons in the way their developed counterparts have practiced corporate governance.¹¹⁸ It is thus critically important that whenever a country decides to put enabling legislation in place, the legislation is compatible with international corporate governance best practice.¹¹⁹

¹¹⁵ A significant number of Zimbabwean organisations report that they are guided by other internationally recognised corporate governance principles. For example, the *MMCZ 2009 Annual Report* states that “the Board regularly reviews the Corporation’s policies and procedures to ensure compliance and consistency with the principles enshrined in the *King III Report* and other reports on corporate governance” (*MMCZ 2009 Annual Report*) 7. See also section 7.F.5 of *ZSE Listing Rules* (2002).

¹¹⁶ Moyo G *The State of Corporate Governance in Zimbabwe’s State Enterprises: Can the Situation be Rescued?* (2012). See also Okpara JO “Corporate Governance in a Developing Economy: Barriers, Issues, and Implications for Firms” (2011) 11 (2) *Corporate Governance* 184–199.

¹¹⁷ “Preface” to the *CAGG Guidelines*, “Preamble” to the *OECD Principles of Corporate Governance* and “Preamble” to the *ICGN Principles*.

¹¹⁸ Ho KL *Reforming Corporate Governance in Southeast Asia: Economics, Politics and Regulations* (ISEAS Publications 2005) 38.

¹¹⁹ “Preamble” to the *OECD Principles of Corporate Governance* and “Preamble” to the *ICGN Principles*.

However, as the South African King Committee on Corporate Governance and the OECD observed, companies are governed within the framework of the laws and regulations of the country in which they operate.¹²⁰ In view of the fact that countries differ in culture, regulation, law and generally the way business is conducted, there can be no single generally applicable corporate governance model.¹²¹ Although it is necessary for countries to have laws and regulations that match their individual circumstances, there are certain international standards¹²² that every country is required to comply with taking into consideration the fact that investors invest across many countries. It is, therefore, desirable that Zimbabwe should harmonise its corporate governance framework with those of other jurisdictions, especially those of its trading partners, to reduce the cost of compliance and to increase certainty both for international companies and investors, and for the benefit of local companies involved in international trade and investment.¹²³

In assessing the country's corporate governance reforms and to establish whether they are in harmony with reforms in other jurisdictions, Zimbabwe's corporate governance framework is compared to those of South Africa and Australia.¹²⁴ A comparative analysis is undertaken of the legal, institutional and regulatory framework for corporate governance in the three countries with a view to recommend areas of improvement in Zimbabwe. It should be noted that this comparative analysis is restricted to specific corporate governance aspects which have a bearing on the effectiveness of boards of public entities. As mentioned before, the focus will be on the board's role, selection and appointment, composition, remuneration and performance evaluation. It is therefore, not the purpose of this study to set out and analyse comprehensively all the corporate governance principles and guidelines in the three countries.

¹²⁰ "Introduction and Background" to the *King III Report* and "Preamble" to the *OECD Principles of Corporate Governance*.

¹²¹ *Ibid.*

¹²² International guidelines have been developed by, among others, the OECD, ICGN and CACG to guide member and non-member countries in developing the legal, institutional and regulatory framework for corporate governance in their countries that match their individual developmental experiences.

¹²³ These are the benefits of practising good corporate governance as highlighted in the "Preamble" to the *OECD Principles of Corporate Governance*. See also Tumuheki J *Towards Good Corporate Governance: An Analysis of Corporate Governance Reforms in Uganda* Unpublished Thesis (University of Cape Town 2008) 5-7.

¹²⁴ See para 1.2 above for the reasons why the two countries were chosen.

1.6 POINTS OF DEPARTURE AND ASSUMPTIONS

1.6.1 Points of Departure

Public entities contribute a substantial component of revenue to the national economy¹²⁵ and therefore require proper and effective management. Moreover, the fact that most public entities are funded from taxpayers' funds and are expected to render essential public services necessitates that these entities be properly governed.¹²⁶ Failure to do so may have adverse social and economic effects on the citizens of a country. If directors of those entities do not observe good corporate governance and do not effectively discharge their duties, public entities are not able to successfully carry out their mandates thus resulting in loss of revenue, poor service delivery and sometimes collapse of the entities.¹²⁷

1.6.2 Assumptions

The research makes the following assumptions:

- 1.6.2.1 A well composed and structured board is essential for the effective discharge of directors' duties.
- 1.6.2.2 Appropriately trained, empowered and adequately remunerated directors are motivated to effectively discharge their duties.
- 1.6.2.3 Evaluating board performance has the tendency to identify non-performers, allow for corrective action and thus increase board effectiveness.
- 1.6.2.4 Legal and regulatory mechanisms are essential to the effective and efficient running of public entities from the perspective of good corporate governance.
- 1.6.2.5 The sample of four public entities and the selected participants is a fair representation of the Zimbabwean entities' experiences considering the fact that most, if not all, public entities are governed by a similar corporate governance framework.

¹²⁵ "Preamble" to the OECD *Guidelines of Corporate Governance of State-owned Enterprises* (2005) 9. In Zimbabwe, it is estimated that public entities have the potential to contribute approximately 40% of the Gross Domestic Product ("Foreword" to the *CGF*).

¹²⁶ Indreswari M *Corporate Governance in the Indonesian State Owned Enterprises* (2006) 103-104.

¹²⁷ Corrigan T *Corporate Governance in Africa's State-owned Enterprises: Perspectives on an Evolving System* (African Peer Review Mechanism's (APRM) Country Review Report of September 2014) available at <http://www.eldis.org/go/home&id=69503&type=Document#.VKEbYoDY> (accessed on 27 December 2014).

1.6.2.6 The participants are honest and prepared to share their true experiences rather than the experiences that they think the researcher may want to hear.

1.6.3 Limitations

Limitations are defined as potential weaknesses in a study.¹²⁸ This study includes (but is not restricted to) a sample of four public entities from which directors, chief executive officers, company secretaries and senior manager representatives are interviewed or requested to complete structured questionnaires.

Like any other research, this research may have its own limitations.¹²⁹ The first limitation of the research is that the majority of empirical studies examining the effectiveness of boards of public entities have relied on data obtained from developed nations.¹³⁰ It is therefore doubtful whether these results can be directly extended and applied to other parts of the world, particularly developing markets such as Zimbabwe. Secondly, the scarcity of data and the difficulty of verifying primary data on governance mechanisms as well as low response rates may limit the richness of the data to be used for analysis.¹³¹

It is also possible to have other data limitations owing to inherent deficiencies of questionnaire and interview surveys.¹³² Another limitation is that it is difficult to ascertain “whether corporate governance codes are capable of exerting a positive influence over financial performance” and to determine the exact level of corporate governance compliance

¹²⁸ Simon MK *Dissertation and Scholarly Research: Recipes for Success* 2nd ed. (CreateSpace Independent Publishing Platform 2010) 277.

¹²⁹ See Chapter 2, para 2.4 below for a discussion on the limitations of the search.

¹³⁰ The challenge of relying on data obtained from developed nations when conducting studies on developing countries was confirmed by a number of studies. See Swartz NP and Frier S “Board Structure and Intellectual Capital Performance in South Africa” (2005) 13(2) *Meditari Accountancy Research* 145–166 and Tusiime I, Nkundabanyanga SK and Nkote IN “Corporate Governance: Ownership Structure, Board Structure and Performance of Public Sector Entities” (2011) 3(9) *Journal of Public Administration and Policy Research* 250-260.

¹³¹ Such challenges have been found to commonly exist by a number of researchers (McLeod SA *Questionnaires* (Research Conducted in 2014) available at <http://www.simplypsychology.org/questionnaires.html> (accessed on 27 December 2014)). See also Beiske B *Research Methods: Uses and Limitations of Questionnaires, Interviews, and Case Studies* (Manchester School of Management 2002) 3-7 available at <http://www.grin.com/en/e-book/15458/research-methods> (accessed on 27 December 2014).

¹³² *Ibid.* For a detailed discussion on the limitations of questionnaire and interview surveys, see Chapter 2, para 2.3.5 below.

by companies.¹³³ As a result, it has been argued that research on corporate governance issues can determine procedural compliance but is not able to actually measure substantial compliance.¹³⁴

1.7 FRAMEWORK OF THE THESIS

The remainder of the thesis is organised into chapters as outlined below.

Chapter 2 outlines the research methodological perspective, which includes the research approach, sample selection, data collection methods as well as limitations of the research. In essence, this chapter describes the methods used to obtain research data.¹³⁵ This study involves a mixture of methods although it is predominantly extensive desktop literature analysis (doctrinal methodology). To assist in achieving the research objectives, information relating to the subject is also sourced and collected through interviews with and questionnaires circulated to directors and senior representatives drawn from the four selected public entities. The interviews and questionnaires are carried out in such a way as to allow for flexible discussions, issue-focusing and probing which enable the collection of multiple perspectives on the subject. The chapter ends with a discussion on the possible limitations of the research.¹³⁶

In Chapter 3, the theoretical frameworks regarding the definition and importance of corporate governance and international initiatives on corporate governance are discussed.¹³⁷ An overview of public entities is also given.¹³⁸ Thereafter, an analysis of literature on the role, selection and appointment, composition, remuneration and performance evaluation of the

¹³³ MacNeil I and Li X “Comply or Explain: Market Discipline and Non-Compliance with the Combined Code” (2006) 14(5) *Corporate Governance, An International Review* 486-497.

¹³⁴ Ibid.

¹³⁵ Chapter 2, para 2.3 below.

¹³⁶ Chapter 2, para 2.4 below.

¹³⁷ Chapter 3, paras 3.3 and 3.4 below.

¹³⁸ Chapter 3, para 3.2 below.

board is made.¹³⁹ The chapter ends with an examination of the global mechanisms put in place to enforce compliance with good corporate governance practices.¹⁴⁰

Chapter 4 analyses Zimbabwe's corporate governance legal and regulatory frameworks. In this chapter, a theoretical analysis and evaluation of the Zimbabwean legal and regulatory framework aimed at promoting the effectiveness of public entity boards is carried out.¹⁴¹ The analysis and evaluation focuses on the role, selection and appointment, composition, remuneration and performance evaluation of the board.¹⁴² The main objective of analysing the regulatory and legislative frameworks is to assess whether they provide sufficient powers and direction to enable directors to effectively discharge their duties and achieve good corporate governance. Furthermore, the enforcement mechanisms provided for in the existing corporate governance frameworks to enhance the effectiveness of boards of public entities and promote corporate governance are examined.¹⁴³

In Chapter 5, a comparative analysis between Zimbabwe and South Africa's corporate governance frameworks is done with the major focus being on the five identified key aspects considered necessary in promoting board effectiveness.¹⁴⁴ In this chapter, the main objective is to establish how Zimbabwe's corporate governance framework compares with other developing and neighbouring countries, especially South Africa. The mechanisms put in place by both countries to enforce compliance with good corporate governance practices are also analysed and compared.¹⁴⁵

Chapter 6 compares Zimbabwe's corporate governance framework to that of Australia.¹⁴⁶ The main objective is to establish how Zimbabwe's corporate governance framework compares

¹³⁹ Chapter 3, para 3.6 below.

¹⁴⁰ Chapter 3, para 3.7 below.

¹⁴¹ Chapter 4, para 4.2.1 below.

¹⁴² Chapter 4, paras 4.2.2-4.2.6 below.

¹⁴³ Chapter 4, para 4.2.7 below.

¹⁴⁴ Chapter 5, paras 5.2.1-5.2.6 below.

¹⁴⁵ Chapter 5, para 5.2.7 below.

¹⁴⁶ Chapter 6, paras 6.2.1-6.2.6 below.

with developed countries like Australia with a view to establish how their corporate governance systems can serve as models for enhancing corporate governance standards in Zimbabwe. The chapter further examines and compares the mechanisms put in place by both jurisdictions to enforce compliance with good corporate governance practices.¹⁴⁷

In chapter 7, the empirical results are presented, interpreted and summarised and implications are discussed.¹⁴⁸ The chapter ends by comparing the results obtained in respect of public entities in Zimbabwe to those found by other researchers on South Africa and Australia to establish how well Zimbabwe's public entities have performed in comparison to those of South Africa and Australia.¹⁴⁹

In Chapter 8, a summary and conclusion of the research is provided.¹⁵⁰ Based on the findings, recommendations are made on how the effectiveness of public entities boards can be enhanced.¹⁵¹

1.8 REFERENCE TECHNIQUES

For the purpose of this research, company directors are referred to in the masculine form. Sources of reference are cited in full when first quoted¹⁵² and thereafter in abbreviated form in the footnotes. Full references are shown in the bibliography at the end of the thesis.

¹⁴⁷ Chapter 6, para 6.2.7 below.

¹⁴⁸ Chapter 7, para 7.2.2-7.2.7 below.

¹⁴⁹ Ibid.

¹⁵⁰ Chapter 8, paras 8.2 to 8.3 below.

¹⁵¹ Chapter 8, para 8.4 below.

¹⁵² Where the quoted source has more than three authors, only the first author is cited in the main document and the rest are shown in the bibliography.

CHAPTER 2

RESEARCH METHODOLOGY

2.1 INTRODUCTION

As was stated above, the underlying research problem of this study is to critically analyse how effective boards of Zimbabwean public entities have been in discharging their duties and to identify the major constraints faced by the boards in effectively performing their mandates within the existing corporate governance framework. The main objective of the research, therefore, is to assess the effectiveness of the Zimbabwean corporate governance initiatives, laws and regulations in enhancing the effectiveness of boards of public entities and promoting good corporate governance practices in the entities. The research also aims to establish how successful Zimbabwe has been in promoting internationally accepted corporate governance standards in its business entities and how well it has performed in comparison to other countries.¹

This chapter discusses the research methodology used in the study and the rationale for the method adopted. The chapter discusses the research problem, research approach, sample selection, data collection methods and limitations of the research.

2.2 RESEARCH PROBLEM

Although considerable research has been undertaken with regard to the effectiveness of boards of private enterprises, not enough attention has been given to the challenges being faced by boards of public entities in undertaking their responsibilities.² This is so especially in African developing countries where public entity boards have experienced challenges in

¹ To enable the assessment, Zimbabwe's corporate governance framework is compared to that of South Africa and Australia (Chapters 5, 6 and 7).

² See Chapter 1, para 1.3 above, Sifile O *et al* "Corporate Board Failure in Zimbabwe: Have Non – Executive Directors Gone to Sleep?" (2014) 78-86 and Maune A "Corporate Governance in Zimbabwe: An Overview of Its Current State" (2015) 167-178.

discharging their duties and promoting good corporate governance.³ Moreover, there has not been significant research on the effectiveness of boards of public entities and adequacy of the corporate governance framework in Zimbabwe specifically, hence the need for more research on this crucial subject.⁴ The research aims to find answers to the questions asked in chapter 1 above⁵ with the major focus being on Zimbabwe.

2.3 RESEARCH APPROACH

2.3.1 Research Design

Research design refers to the overall strategy chosen and applied to answer the research question.⁶ It therefore, constitutes a coherent sequence of determining the research question and the methods to be adopted to collect relevant data to answer the research question and how this will be accomplished. Key aspects of research design include: research methodology, research method, sample collection and data collection procedures and instruments.⁷

To answer the research questions, the research involved a literature study of books, electronic/internet sources, journal articles, theses/dissertations, case law, legislation, newspaper, annual and other reports. This stage focused on literature analysis and collection of preliminary data which served as sources of information to develop the questionnaires and interview questions. To supplement the information gathered from the above, questionnaires were circulated and face-to-face interviews were conducted with some key people in selected

³ Ibid.

⁴ Ibid.

⁵ See Chapter 1, para 1.2 above.

⁶ Kelly K *et al* "Good Practice in the Conduct and Reporting of Survey Research" (2003) 15(3) *International Journal for Quality in Health Care* 261-266 available at <http://intqhc.oxfordjournals.org/content/intqhc/15/3/261.full.pdf> (accessed on 17 December 2014). Yin defines research design as a blueprint for conducting research that seeks to address four problems, namely the research question as well as what data are relevant, the identification of data for collection, and what data for analysis (Yin RK *Case Study Research: Design and Methods* 4th ed. (Thousand Oaks, Sage Publications 2008). See also Osano B O *The Effect of Investment Strategies on Financial Performance of Investment Funds in Kenya* Unpublished Thesis (University of Nairobi 2013) 21.

⁷ Ibid. See also Punch K *Introduction to Social Research: Quantitative and Qualitative Approaches* (SAGE Publications 2005) 250 available at www.sagepublications.com/ (accessed on 20 December 2014).

public entities. The final stage of the research involved data analysis, presentation and interpretation of results.

2.3.2 Research Methodology

Research methodology is “a way to systematically solve the research problem” and has many dimensions of which research methods constitutes a part.⁸ Research methodology does not only refer to the research methods but also considers the reason behind the methods used in the context of the research study, explains why a particular method or technique has been used and clarifies why other methods have not been used so that the research results are capable of being assessed either by the researcher himself or by others.⁹

The experiences of four public entities with regard to board effectiveness in the implementation of good corporate governance standards are examined. A review of the rationale for the selection of the research method adopted and the appropriateness of the research design is conducted. Also included in this chapter is a discussion on the procedures for data sampling and data collection.

2.3.3 Research Method

Research methods refer to the techniques employed in collecting relevant research materials and processing such materials into answers to the research question(s).¹⁰ Generally, the use of a particular research method depends on the researcher’s personal skills, the scope, purpose and target population of the study and the resources available to conduct the research.¹¹ A number of methods can be employed in collecting the requisite research material required to answer the research question.

⁸ Kothari CR *Research Methodology: Methods and Technique* 2nd ed. (New Age International (P) Ltd Publishers 2004) 7-8.

⁹ Kumar R *Research Methodology* (APH Publishing 2012) 5. Whilst research methods focus at finding solutions to research problems, research methodology concentrates more on the employment of the correct procedures to find out solutions (Sridhar MS *Introduction to Research Methodology: Problem Selection, Formulation and Research Design* (Lulu.com 2010) 9-10 available at http://www.researchgate.net/profile/M_S_Sridhar/publication/39168208_Research_Methodology (accessed on 29 January 2015)).

¹⁰ Kothari CR *Research Methodology: Methods and Technique* (2004) 7-9.

¹¹ Wilkinson D *The Researcher’s Toolkit* (Routledge Falmer 2000) 9-11.

As indicated above,¹² there are two major methods of research, that is a positivistic and a phenomenological approach.¹³ The positivistic approach, also referred to as quantitative research, explains social phenomena by assigning numeric values to observed phenomena and counting the frequency of those phenomena with a view to deduce some conclusions about the characteristics of the populations.¹⁴ In terms of this approach, clearly constructed hypotheses are formulated about the relationship between two or more variables.¹⁵ In addition, the positivist position is based on the “theoretical belief that there is an objective reality that can be known to the researcher, if she or he uses the correct methods and applies those methods in a correct manner”.¹⁶

To ascertain the aptness of the method, the positivistic approach is evaluated using three criteria namely; validity, reliability and generalisability.¹⁷ Validity is defined as the degree to which a measurement process “measures what it purports to measure” or the degree to which it gives the correct answer.¹⁸ Reliability refers to the extent to which a questionnaire, test, observation or any measurement procedure produces the same results on repeated trials. Generalisability is defined as the extent to which the findings of a study can be applied externally or more broadly outside of the study context or the degree to which the findings from the study sample can be extended to make predictions about the entire population.¹⁹

¹² Chapter 1, para 1.4 above.

¹³ Collis J and Hussey R *Business Research: A Practical Guide for Undergraduate and Postgraduate Students* 3rd ed. (Palgrave MacMillan, New York 2003) 55-57. See also Wilkinson D *The Researcher's Toolkit* (2000) 8-9.

¹⁴ Ibid. See also Chetty L *The Influence of Leadership on the Organisational Effectiveness of Saps Precincts* Unpublished Thesis (Nelson Mandela Metropolitan University 2011) 17.

¹⁵ The relationships between the variables are measured by means of statistical methods such as multiple regression analysis, structural equation analysis and the Pearson product-moment correlational analysis (Struwig FW and Stead GB *Planning, Designing and Reporting Research* (Pearson Education, Cape Town 2004) 5-10).

¹⁶ Khakpour A “Methodology of Comparative Studies in Education” (2012) 1 *Contemporary Educational Researches Journal* 20-26. See also Thomas PY *Towards Developing A Web-Based Blended Learning Environment at the University of Botswana* Unpublished Thesis (UNISA 2010) 294 and Cohen D and Crabtree B *Qualitative Research Guidelines Project* of July 2006 available at <http://www.qualres.org/> (accessed on 17 August 2014).

¹⁷ Ibid.

¹⁸ Miller MJ *Graduate Research Methods* (Western International University Lecture Notes) available at http://michaeljmillerphd.com/res500_lecturenotes/Reliability_and_Validity.pdf (accessed on 17 August 2014).

¹⁹ Myers M “Qualitative Research and the Generalizability Question: Standing Firm with Proteus” (2000) 4(3/4) *The Qualitative Report* available at <http://www.nova.edu/ssss/QR/QR4-3/myers.html> (accessed on 17 August 2014).

The positivistic approach has advantages and disadvantages. One of the main advantages of a quantitative approach to data collection is the relative ease, economy and speed with which the research can be conducted.²⁰ The other advantages are wide coverage of the range of situations and the relevance to policy decisions when statistics are exaggerated in large samples.²¹ The disadvantages are that the methods tend to be too flexible and artificial, are not very effective in understanding processes or the significance people attach to actions, are not very helpful in generating theories and that it is difficult for policy makers to infer what future actions should take place because of its main focus on what is or what has been recently.²²

On the other hand, the phenomenological approach (also referred to as qualitative research) has been defined as “an inquiry approach which is useful to exploring and understanding the central phenomenon. To learn about the central phenomenon the researcher asks broad and general questions.”²³ The approach is particularly interested in the idea that human experience is a valuable source of data, as opposed to the idea that true research or discovery lies in simply measuring the existence of physical phenomena.²⁴ Qualitative research concerns itself with approaches such as ecological psychology,²⁵ symbolic interactionism²⁶

²⁰ Garbarino S and Holland J *Quantitative and Qualitative Methods in Impact Evaluation and Measuring Results* (Governance and Social Development Resource Centre (GSDRC) Issues Paper March 2009) 11-13 available at <http://www.gsdr.org/docs/open/EIRS4.pdf> (accessed on 7 September 2014).

²¹ Lin AC “Bridging Positivist and Interpretivist Approaches to Qualitative Methods” (1998) 26(1) *Policy Studies Journal* 162-180 available at <http://faculty.washington.edu/swhiting/pols502/Lin.pdf> (accessed on 5 November 2014). See also Zawawi D *Quantitative Versus Qualitative Methods in Social Sciences: Bridging the Gap* (Paper prepared by University of Putra, Malaysia) 3-4 available at <http://psasir.upm.edu.my/809/1/Quantitativeversusqualitativemethodssocialsciences.pdf> (accessed on 5 November 2014).

²² Cohen L, Manion L and Morrison K *Research Methods in Education* 6th ed. (Routledge 2007) 17-19.

²³ Creswell J *Educational Research: Planning, Conducting, and Evaluating Quantitative and Qualitative Research* (Upper Saddle River, NJ: Merrill Prentice Hall 2002) 596.

²⁴ Dawson C *Practical Research Methods* (UBS Publishers’ Distributors, New Delhi 2002) 14-23.

²⁵ Ecological psychology is defined as the analysis of behaviour settings with a view to envisage behaviour patterns that occur in particular settings. The focus is on the role of social and physical elements in the setting (Psychology Dictionary available at <http://psychologydictionary.org/ecological-psychology/> (accessed on 18 August 2014). See also Morris EK “Behavior Analysis and Ecological Psychology: Past, Present and Future: A Review of Harry Heft’s Ecological psychology in Context” (2009) 92(2) *A Journal of the Experimental Analysis of Behaviour* 275-304.

²⁶ Symbolic interactionism relies on the symbolic meaning that people develop and rely upon in the process of social interaction. In particular, the theory states that the meaning of objects, events, and behaviors comes from the interpretation people give them, and interpretations vary from one group to another (Berg BL *Qualitative Research Methods for the Social Sciences* 4th ed. (Allyn & Bacon, Pearson Education Company 2000) 7-9).

and postmodernism²⁷ and employs statistical methods, such as participant observation, archival source analysis, conversations, interviews, focus groups and content analysis.²⁸ Generally, when one applies the phenomenological approach he tends to focus more on the meaning rather than the measurement of social problems.²⁹ Phenomenological methods are particularly effective at expressing the experiences and perceptions of individuals from their own personal knowledge and subjectivity.³⁰

The advantage of a qualitative research approach is that it enables the researcher to obtain elaborate and comprehensive information.³¹ Another strength of phenomenology is that the results of the research are derived from the data collected, “instead of being imposed by a structured statistical analysis”.³² The main disadvantage of phenomenological research is that it creates huge volumes of interview notes, tape recordings or other records all of which have to be analysed.³³ Also, data analysis is not usually easy because the collected data does not squarely fit into orderly categories and there can be various conclusions to be made from different parts of discussions or observations.³⁴ Other disadvantages of using phenomenology for research are the subjectivity of the data which leads to difficulties in establishing reliability and validity of approaches and information, the difficulty in detecting or

²⁷ Postmodernism is defined as a “reaction to the assumed certainty of scientific, or objective, efforts to explain reality. In essence, it stems from a recognition that reality is not simply mirrored in human understanding of it, but rather, is constructed as the mind tries to understand its own particular and personal reality”. Postmodernism is said to rely on actual “experience over abstract principles, knowing always that the outcome of one's own experience will necessarily be fallible and relative, rather than certain and universal” (Sarlak MA *The New Faces of Organizations in the 21st Century: A Management and Business Reference Book* (NAISIT Publishers 2010) 30). See also Stiefel BL and Wells JC *Preservation Education: Sharing Best Practices and Finding Common Ground* (University of Press, New England 2014) 6.

²⁸ Arnolds CA and Venter DJL “The Strategic Importance of Motivational Rewards for Lower-Level Employees in the Manufacturing and Retailing Industries” 2007 33(3) *SA Journal of Industrial Psychology* 15-23. See also Young PV *Scientific Social Surveys and Research: An Introduction to the Background, Content, Methods, Principles, and Analysis of Social Studies* 3rd ed. (Prentice-Hall 2011) 29-41.

²⁹ Ibid.

³⁰ Lester S *An Introduction to Phenomenological Research* (Stan Lester Developments, Taunton UK 1999) 1-2 available at www.sld.demon.co.uk/resmethy.pdf, (accessed on 10 June 2013).

³¹ Strauss A and Corbin J *The Bases of Qualitative Researchers: Grounded Theories, Procedures and Techniques* (Newburg Park, CA: Sage 2004).

³² Kohlbacher F “The Use of Qualitative Content Analysis in Case Study Research” (2006) 7(1) *Forum: Qualitative Social Research* 1-90 available at <http://nbn-resolving.de/urn:nbn:de:0114-fqs0601211> (accessed on 15 February 2015).

³³ Hoepfl MC “Choosing Qualitative Research: A Primer for Technology Education Researchers” (1997) 9(1) *Journal of Educational Technology* 47-63 available at <http://scholar.lib.vt.edu/ejournals/JTE/v9n1/hoepfl.html> (accessed on 13 January 2015).

³⁴ Berg BL *Qualitative Research Methods for the Social Sciences* 4th ed. (Allyn & Bacon, Pearson Education Company 2000) 2-4.

preventing researcher induced bias and the possible difficulties of participants fully expressing themselves.³⁵

From the above, it can be concluded that both methods of research are effective but in different ways. What determines the type of approach that is appropriate is the nature of the research problems under investigation, the amount of knowledge the researcher already has in the research field, the target population of the study and resources available to the researcher.³⁶ It was essential, therefore, that in order to achieve this research's objectives, the right methodology had to be adopted and the right data collection techniques had to be selected to collect the required data within the available resources. As a result, a mixture of methods which included the doctrinal research method,³⁷ questionnaires and interviews was adopted.

Doctrinal research method comprises of either a straightforward research that focuses at finding a precise statement of the law or a more complicated and comprehensive analysis of legal reasoning.³⁸ Doctrinal research has been found to possess aspects of both quantitative (positivistic) and qualitative (phenomenological) methodologies within it. This is because, like the quantitative methodologies, doctrinal research is "underpinned by positivism and a view of the world where the law is objective, neutral and fixed".³⁹ As a result, other researchers are able to imitate the research involved in locating the sources of the law without difficulty. On the other hand, due to the fact that many facets of the law are dependent on the circumstances and need to be interpreted and analysed for meaning, which brings in elements of subjectivity, the method also has qualitative aspects.⁴⁰

³⁵ Punch K *Introduction to Social Research: Quantitative and Qualitative Approaches* (2005) 235-238.

³⁶ Gill J and Johnson P *Research Methods for Managers* 4th ed. (Sage Publications Ltd 2010) 6-8 available at <http://www.sagepub.com/booksProdDesc.nav?prodId=Book232326>. (accessed on 20 August 2014).

³⁷ This method has been considered as the most accepted methodology in the discipline of law (Hutchinson T and Duncan NJ "Defining and Describing What We Do: Doctrinal Legal Research" (2012) 83-119).

³⁸ Ibid. See also Chynoweth P *Legal Research* (Wiley-Blackwell 2008) 29-30.

³⁹ Ibid.

⁴⁰ According to Hutchinson "Synthesising the law and, where necessary, applying the law to the facts and context is a highly subjective process. Therefore the analytical, legal reasoning aspect of the process is necessarily a qualitative one" (Hutchinson T and Duncan NJ "Defining and Describing What We Do: Doctrinal Legal Research" (2012) 83-119).

The doctrinal research method involves location and analysis of the various sources of law (e.g. statutes and decided cases) in order to establish the nature and parameters of the law.⁴¹ The doctrinal research method focuses on finding out what the law is in a particular context. It is concerned with “analysis of the legal doctrine⁴² and how it has been developed and applied”.⁴³ The doctrinal method is more than simply a literature review because it involves initial location of the sources of the law and then interpretation and analysis of the text.⁴⁴ The degrees of complexity within doctrinal legal research method range from practical problem-solving,⁴⁵ straightforward descriptions of laws to innovative theory building.⁴⁶

Given the aforementioned qualities of the doctrinal research method, it was considered the most appropriate for this study. With regard to questionnaires and interviews, the researcher sought to understand how corporate governance is implemented and the challenges faced by boards in four Zimbabwean public entities from the perspectives of their respective board members, chief executive officers, company secretaries, senior management and shareholder representatives.⁴⁷ The data collected particularly sought to establish the effectiveness of boards of directors in promoting good corporate governance in these public entities in light of the prevailing regulatory and statutory mechanisms.

⁴¹ Chynoweth P *Legal Research* (2008) 30.

⁴² Doctrine has been defined as a “synthesis of various rules, principles, norms, interpretive guidelines and values. It explains, makes coherent or justifies a segment of the law as part of a larger system of law. Doctrines can be more or less abstract, binding or non-binding” (Hutchinson T and Duncan NJ “Defining and Describing What We Do: Doctrinal Legal Research” (2012) 83-119).

⁴³ Razak AA “Understanding Legal Research” (2009) 19-24.

⁴⁴ Ibid.

⁴⁵ The problem-solving facet is directed to solving a specific legal problem and normally includes assembling relevant facts; identifying the legal issues; analysing the issues with a view to searching for the law; reading background material (e.g. legal dictionaries, textbooks, law reform and policy papers, journal articles); locating primary material (e.g. legislation, case law); synthesising all the issues in context and a conclusion (Hutchinson T and Duncan NJ “Defining and Describing What We Do: Doctrinal Legal Research” (2012) 83-119).

⁴⁶ Ibid. Generally innovation has been defined as “a sequential two-part process of idea generation (i.e. exploration) and commercialisation (i.e. exploitation) of the most promising ideas into useful products or services (Edgell RA and Vogl R “A Theory of Innovation: Benefit, Harm, and Legal Regimes” (2013) 5(1) *Law, Innovation and Technology* 21-53 available at ssrn.com/abstract=2506360 (accessed on 5 September 2015)). In the context of legal research, innovative theory building would entail generation of something new to the body of legal knowledge that may benefit lawmakers, other researchers and the general society in the globalised world where there is a rise of new laws and technological innovation (Van Gestel R, Micklitz H and Maduro MP *Methodology in the New Legal World* (European University Institute Working Papers, Department of Law 2012/13) 7-8 available at cadmus.eui.eu/.../LAW_2012_13_VanGestelMicklitzMaduro.pdf? (accessed on 29 August 2015)).

⁴⁷ It was considered that focusing on participants from a single public entity would not be a good sample for the attainment of a deeper understanding of how corporate governance is implemented and monitored in public entities. Similarly, focusing on too many cases was considered unnecessary given the similarities in how the public entities are operated and the framework within which they operate.

2.3.4 Sample Selection

Zimbabwe has approximately eighty six (86) public entities, sixty three (63) of which are under the governance of specific legislations and twenty three (23) are government owned entities registered under the Companies Act.⁴⁸ The statutes forming the public entities contain similar provisions and only differ in terms of the objective of establishing the entity, its mandate and powers.⁴⁹ Given this scenario, a sample⁵⁰ of four public entities was selected through purposive sampling to provide the possibility of understanding the corporate governance practices in public entities. The main reasons for sampling were the huge costs that would be involved in terms of time and other resources to test the entire population.⁵¹ Secondly, it was impossible to test the entire population due to difficulties that were likely to be encountered in getting access to all public entities. The third reason for sampling was the generally accepted fact that testing the entire population often produces errors and may be destructive.⁵²

The purposive sampling technique (also known as judgmental, selective or subjective sampling) was adopted. Purposive sampling embodies a group of different non-probability sampling techniques which allow the researcher to purposely select a small number of cases which represent a broader number of cases as close as possible.⁵³ The method relies on the

⁴⁸ Para 1.4 of the *CGF*. Visit <http://www.zim.gov.zw/index.php/parastatals> for more details.

⁴⁹ This is confirmed if, for example, one compares and contrasts the provisions of the Postal and Telecommunication Act (Chapter 12:05) (No. 4 of 2000), Zimbabwe Investment Authority Act (Chapter 14:30) (No. 4 of 2006) and Zimbabwe Mining Development Corporation Act.

⁵⁰ A sample is a segment of the population selected to represent the population as a whole. Ideally, the sample should be representative and allow the researcher to make accurate estimates of the thoughts and behaviour of the larger population (Onwuegbuzie AJ and Collins KMT "A typology of Mixed Methods Sampling Designs in Social Science Research" (2007) 12(2) *The Qualitative Report* 281-316 available at <http://www.nova.edu/ssss/QR/QR12-2/onwuegbuzie2.pdf> (accessed on 28 August 2014)).

⁵¹ Barreiro PL and Albandoz JP *Population and Sample; Sampling Techniques* (University of Seville 2001) 2-3 available at http://optimierung.mathematik.uni-kl.de/mamaesch/veroeffentlichungen/ver_texte/sampling_en.pdf (accessed on 28 August 2014). See also Emmel N *Sampling and Choosing Cases in Qualitative Research: A Realist Approach* (SAGE Publications 2013) 47-48.

⁵² Emmel N *Sampling and Choosing Cases in Qualitative Research: A Realist Approach* (2013) 47-48.

⁵³ Ibid. See also Teddlie C and Yu F "Mixed Methods Sampling: A Typology with Examples" (2007) 1(1) *Journal of Mixed Methods Research* 77-100 available at <http://mmr.sagepub.com/cgi/content/abstract/1/1/77> (accessed on 17 August 2014). The availability of a wide range of sampling techniques provides the researcher with the justification to make generalisations from the sample that is being studied.

researcher's judgement when it comes to selecting the elements that are to be studied.⁵⁴ Usually, the sample being investigated is quite small, especially when compared with probability sampling techniques.⁵⁵ The purposive sampling technique enables the researcher to focus on specific qualities of a population that are relevant in assisting him to answer research questions.⁵⁶ There are a wide range of purposive sampling techniques that one can use but it is not within the scope of this research to discuss the techniques in detail.⁵⁷

The sample for this study was derived from board members, chief executive officers, company secretaries, senior management and shareholder representatives from each selected entity. From each of the four selected entities, the board chairman, three board members, chief executive officer, company secretary, four senior managers and two senior representatives of the parent ministry⁵⁸ were requested to participate in the study.⁵⁹ The main reason for selecting the above-named participants was their position and experience in the development and implementation of corporate governance principles and their significant involvement in the operations of the entities. It was also considered that, more often than not, people appointed to such high levels normally have relevant experience and a reasonable understanding of corporate governance hence would provide better knowledgeable and

⁵⁴ Berg BL *Qualitative Research Methods for the Social Sciences* (2000) 30-32. However, this judgemental, subjective component of purpose sampling becomes a major shortcoming when such judgements are "ill-conceived or poorly considered; that is, where judgements have not been based on clear criteria, whether a theoretical framework, expert elicitation, or some other accepted criteria" (Mohammed AR *Procurement Practices in Ghana: The Challenges Faced by Takoradi Polytechnic* Unpublished Thesis (Ghana Telecom University College 2012) 31-33.

⁵⁵ It is generally accepted that the sample being studied may not be 100% representative of the population, but for researchers pursuing qualitative research designs, this is not considered to be a major weakness. In addition, there is no specified number of cases given the fact that the size of the sample is the decision of the researcher (Emmel N *Sampling and Choosing Cases in Qualitative Research: A Realist Approach* (2013) 47-48). See also Mohammed AR *Procurement Practices in Ghana: The Challenges Faced by Takoradi Polytechnic* (2012) 31-33.

⁵⁶ Berg BL *Qualitative Research Methods for the Social Sciences* (2000) 30-33. See also Punch K *Introduction to Social Research: Quantitative and Qualitative Approaches* (2005) 250-252. However, it is important to note that the subjectivity and non-probability based nature of sample selection in purposive sampling may sometimes make it difficult to defend the representativeness of the sample.

⁵⁷ Examples of some of the techniques are, maximum variation sampling, homogeneous sampling, typical case sampling, extreme (or deviant) case sampling, critical case sampling, total population sampling and expert sampling (Patton M *Qualitative Evaluation and Research Methods* (Beverly Hills, CA: Sage 1990) 169-186 available at legacy.oise.utoronto.ca/research/field-centres/ross/.../Patton1990.pdf (accessed on 17 August 2014). See also Teddlie C and Yu F "Mixed Methods Sampling: A Typology with Examples" (2007) 77-100.

⁵⁸ The terms "parent" or "shareholder" ministry will be used interchangeably in this thesis to refer to the ministry that the public entity reports to or that oversees the operations of the entity.

⁵⁹ 50 questionnaires were distributed to cater for some participants who would not respond. Of the potential interviewees, six were women and ten were men. Of those who were given questionnaires nine were women and twenty five were men. The sample was considered a fair reflection of the executive management profile in Zimbabwe. Most of the participating managers were males, well qualified and have been working for a long time in the public sector.

comprehensive answers to the research questions. Their perspectives on the issues under research would thus provide significant outcomes to the research results.

Below are brief backgrounds of the four selected public entities.

2.3.4.1 Minerals Marketing Corporation of Zimbabwe (MMCZ)

MMCZ is a public entity that was established in terms of the MMCZ Act to control and regulate the export, sale and stockpiling of all minerals. MMCZ is a body corporate that is capable of suing and being sued and, subject to the provisions of the Act, “of performing all such acts as bodies corporate may by law perform”.⁶⁰ Its main functions are to act as the sole marketing and selling agent for all minerals, investigate or cause to be investigated marketing conditions, locally and internationally, for minerals in general or for any particular mineral, purchase and acquire any minerals for its own account and to sell or dispose of such minerals, encourage the local beneficiation and utilisation of any minerals and advise the Minister on all matters connected with the marketing and selling of minerals.⁶¹

2.3.4.1.1 MMCZ Governance Arrangements

The public entity is controlled by a board, known as the MMCZ Board, constituted in terms of the Act.⁶² In terms of the Act, the Minister has to consult other key stakeholders and the country’s President before appointing board members.⁶³ Furthermore, the Act obliges the Minister to choose one of the appointed members as chairman of the board and another as deputy chairman of the board.⁶⁴ The board members have to meet certain minimum requirements which include professional qualifications and “knowledge and experience in the field of mineral production or international commodity marketing”.⁶⁵ In addition, the Act

⁶⁰ Section 3 of the MMCZ Act.

⁶¹ Section 20 of the MMCZ Act.

⁶² Section 3 of the MMCZ Act.

⁶³ Section 5 of the MMCZ Act.

⁶⁴ Section 3 of the MMCZ Act.

⁶⁵ Section 5 of the MMCZ Act. In addition, the appointed member should, among other requirements, be a citizen of Zimbabwe permanently resident in Zimbabwe, have no direct or indirect financial interest in any business which is likely to interfere with the impartial discharge of his duties as a member, not have been adjudged or otherwise declared insolvent or

limits the number of directors to not fewer than six and not more than ten non-executive board members including the General Manager⁶⁶ of the public entity as part of the board.⁶⁷ The Act also limits the period that a director may hold office to a period not exceeding three years although a retiring member may be eligible for reappointment as a member.⁶⁸

To enable the board to effectively exercise its functions and powers, the Act empowers the board to establish one or more committees in which may be vested and on which may be imposed some of the functions and powers of the board.⁶⁹ However, the establishment of the committees does not divest the board of such functions and powers. As such the board is required to stipulate terms of reference for the committees as well as amend or withdraw any decision of any such committee in the exercise of its functions and powers.⁷⁰ The Act also provides for how the board is expected to conduct its meetings, how its remuneration is determined and the consequences for poor performance. The Act requires the board to cause minutes of all proceedings of and decisions taken at board or committee meetings to be recorded in books kept for this purpose.⁷¹ The board remuneration should be determined and fixed by the Minister.⁷² Where the board or an individual director does not perform duties as expected by the shareholder, the Minister is empowered to request the board member to leave his office.⁷³ It is important to note that MMCZ is subjected to all legislation and regulatory

bankrupt and been rehabilitated or discharged in terms of a law in force in any country or been sentenced in any country to a term of imprisonment of or exceeding six months imposed without the option of a fine and has not been freely pardoned within the period of five years immediately preceding the date of his proposed appointment.

⁶⁶ In Zimbabwe, the majority of the heads of public entities (CEOs) are referred to as the ‘General Manager’ (see section 24 of the MMCZ Act and GMB Act).

⁶⁷ Section 5 of the MMCZ Act.

⁶⁸ Section 3 of the MMCZ Act.

⁶⁹ Section 9 of the MMCZ Act.

⁷⁰ Ibid.

⁷¹ Section 13 of the MMCZ Act.

⁷² Section 13 of the MMCZ Act.

⁷³ Section 9 of the MMCZ Act. Some of the grounds for dismissal are improper conduct as a member; failure to comply with the terms and conditions of his appointment or is mentally or physically incapable of efficiently performing his duties as a member.

instruments governing the operations of public entities, for example, the PFMA, *Manual*, *National Code* and *CGF*.⁷⁴

2.3.4.2 Zimbabwe Mining Development Corporation (ZMDC)

ZMDC is a public entity which was established in terms of the Zimbabwe Mining Development Corporation Act.⁷⁵ The main functions of ZMDC are stated in the ZMDC Act as; to invest in the mining industry in Zimbabwe on behalf of the State, plan, co-ordinate and implement mining development projects on behalf of the State, engage in prospecting, exploration, mining and mineral beneficiation programmes, encourage and undertake the formation of mining co-operatives, render assistance to persons engaged in or about to engage in mining, review annually the general economic conditions and prospects of the mining industry and in particular investment schemes, advise the Minister of Mines and Minerals Development on all matters connected with corporate investments in the mining industry and make recommendations for the proper co-ordination of all investment programmes.⁷⁶

2.3.4.2.1 ZMDC Governance Arrangements

ZMDC is directed by a board, known as the ZMDC Board, constituted in terms of the ZMDC Act.⁷⁷ The board is appointed by the Minister after consulting other key stakeholders and the country's President.⁷⁸ The people to be appointed as board members should have the ability and experience in the mining industry or administration.⁷⁹ The Act limits the number of directors to a minimum of six and not more than ten non-executive board members including

⁷⁴ This is because all public entities are obliged to comply with the provisions of the PFMA (section 4) and the *CGF* (para 1.4.3). However, the *Manual* and *National Code* are voluntary codes which public entities can choose to comply with or proffer explanations for non-compliance.

⁷⁵ Act 31 of 1982 (Chapter 21:08).

⁷⁶ Section 20 of the ZMDC Act.

⁷⁷ Section 3 of the ZMDC Act.

⁷⁸ Section 5 of the ZMDC Act. The Act obliges the Minister to choose one of the appointed members as chairman of the board and another as deputy chairman of the board.

⁷⁹ See section 5 of the ZMDC Act which has the same wording as that of MMCZ Act.

the General Manager of the public entity.⁸⁰ The Act further limits the period that a director may hold office to a period not exceeding three years although a retiring member may be reappointed as a member.⁸¹

The Act requires the board to establish one or more committees to perform the functions and powers of the board on its behalf.⁸² The board should specify terms of reference for the committees as well as amend or withdraw any decision of any such committee in the exercise of its functions and powers.⁸³ The ZMDC Act requires the board to cause minutes of all proceedings of and decisions taken at board or committee meetings to be recorded and kept safely.⁸⁴ Board remuneration should be determined and fixed by the Minister.⁸⁵ Where the board or an individual director commits acts of misconduct or fails to comply with the terms and conditions of his appointment, the Minister is empowered to request the board member to leave his office.⁸⁶ ZMDC is subjected to all legislation and regulatory instruments governing the operations of public entities, for example, the PFMA, *Manual*, *National Code* and *CGF*.⁸⁷

2.3.4.3 National Railways of Zimbabwe (NRZ)

NRZ is a public entity that was established in terms of the Railways Act.⁸⁸ Its main objective is to provide, operate and maintain an efficient system of public transport of goods and passengers by rail and by road. For the better exercise of its functions, the NRZ is empowered to work through agents or jointly with others.⁸⁹ The NRZ functions under the ambit of Ministry of Transport and Energy.

⁸⁰ Section 5 of the ZMDC Act. The General Manager is appointed in terms of section 24 of the ZMDC Act.

⁸¹ Section 6 of the ZMDC Act.

⁸² Section 9 of the ZMDC Act.

⁸³ Ibid.

⁸⁴ Section 13 of the ZMDC Act.

⁸⁵ Section 13 of the ZMDC Act.

⁸⁶ Section 9 of the ZMDC Act.

⁸⁷ This is because all public entities are obliged to comply with the provisions of the PFMA (section 4) and the *CGF* (para 1.4.3).

⁸⁸ Section 3 of the Railways Act.

⁸⁹ Sections 17-18 of the Railways Act.

2.3.4.3.1 NRZ Governance Arrangements

The public entity is controlled by a board, known as the NRZ Board, constituted in terms of the Act.⁹⁰ In terms of the Act, the board should be appointed by the Minister in consultation with and in accordance with any directions given by the country's President.⁹¹ The Act also obliges the Minister to choose one of the appointed members as chairman of the board and another as deputy chairman of the board.⁹² The board should be composed of not less than six and not more than nine members of whom one should be the General Manager and the rest non-executive board members.⁹³ The Act further limits the period that a director may hold office to a period not exceeding three years although a retiring member may qualify for reappointment as a member.⁹⁴

The Act also provides for how the board is expected to conduct its meetings, how its remuneration is determined and the consequences for poor performance.⁹⁵ The board is required to keep records of all proceedings of and decisions taken at board meetings.⁹⁶ The board remuneration to meet any reasonable expenses incurred by a board member in connection with the business of the NRZ Board should be determined and fixed by the Minister, in consultation with the Minister responsible for finance.⁹⁷ The Minister is empowered to request a board member to leave his office or to suspend him if he does not perform his duties as expected by the shareholder or commits any act of misconduct.⁹⁸ Like

⁹⁰ Section 5 of the Railways Act.

⁹¹ Section 5 of the Railways Act.

⁹² Section 5 of the Railways Act.

⁹³ Ibid.

⁹⁴ Section 6 of the Railways Act.

⁹⁵ Section 11-12 of the Railways Act.

⁹⁶ Section 13 of the Railways Act.

⁹⁷ Section 12 of the Railways Act.

⁹⁸ Section 9 of the Railways Act. The Minister may suspend an appointed member against whom criminal proceedings are instituted for an offence in respect of which a sentence of imprisonment without the option of a fine may be imposed or who has been sentenced by a court to imprisonment after conviction of an offence pending determination of the question whether he is to vacate his office and whilst that appointed member is on suspension he shall not carry out any duties or be entitled to any remuneration as an appointed member.

all other public entities, NRZ is required to comply with all legislation and regulatory instruments governing the operations of public entities, for example, the PFMA, *Manual*, *National Code* and *CGF*.⁹⁹

2.3.4.4 Grain Marketing Board (GMB)

GMB was established as a wholly-owned government entity in terms of the Grain Marketing Act to regulate and control the prices and marketing of certain agricultural products and their derivatives. Its main functions are to buy and sell any controlled agricultural product which is delivered to or acquired by it under the provisions of the Act, provide storage, handling and processing facilities for controlled products, to maintain stocks of controlled products as it may consider necessary, import or export controlled products as it may consider necessary and to do all things necessary and consistent with the provisions of the Act to ensure the orderly marketing of controlled agricultural products within any prescribed area.¹⁰⁰ In carrying out its mandate, GMB is expected to comply with all legislation and regulatory instruments governing the operations of public entities, for example, the PFMA, *Manual*, *National Code* and *CGF*.

2.3.4.4.1 GMB Governance Arrangements

The public entity is directed by a board, known as the Grain Marketing Board.¹⁰¹ The board is appointed by the Minister, in consultation with the country's President.¹⁰² The potential board members should be professionally qualified and have "ability and experience in agriculture, business or administration."¹⁰³ The Act limits the number of directors to not fewer than six and not more than nine non-executive board members.¹⁰⁴ In addition, the Act also limits the period that a director may hold office to a period not exceeding three years although a retiring

⁹⁹ See para 2.3.4.1 above.

¹⁰⁰ Section 26 of the Grain Marketing Act.

¹⁰¹ Section 4 of the Grain Marketing Act.

¹⁰² Section 5 of the Grain Marketing Act.

¹⁰³ Section 5 of the Grain Marketing Act which is similarly worded to the MMCZ and ZMDC Acts.

¹⁰⁴ *Ibid*.

member is eligible for reappointment as a member.¹⁰⁵ Furthermore, the Act also obliges the Minister to choose one of the appointed members as chairman of the board and another as deputy chairman of the board.¹⁰⁶

To enable the board to effectively exercise its functions and powers, the Act empowers the board to establish one or more committees.¹⁰⁷ However, the board is expected to guide the operations of the committees through provision of clear terms of reference and regular monitoring of the activities and decisions of any such committee.¹⁰⁸ More so, the Grain Marketing Act requires the board to maintain minutes of all proceedings of and decisions taken at board or committee meetings.¹⁰⁹ Like in the majority of public entities, the remuneration of the GMB Board is determined and fixed by the Minister.¹¹⁰ To encourage performance, the Grain Marketing Act provides for the removal of a director if he has been absent without the board's permission from three consecutive board meetings, of which he has been given proper notice and if there was no just cause for the member's absence.¹¹¹ The other grounds for dismissal of a board member are improper conduct and failure to comply with the terms and conditions of his appointment.¹¹²

2.3.5 Data Collection Methods

The quality of the collected data determines the quality of the findings of the research.¹¹³ Basically, three methods were used to collect data for the research namely; literature analysis, questionnaires and interviews. Since the research involved human participants, it was a

¹⁰⁵ Section 6 of the Grain Marketing Act.

¹⁰⁶ Section 5 of the Grain Marketing Act.

¹⁰⁷ Section 12 of the Grain Marketing Act.

¹⁰⁸ Ibid.

¹⁰⁹ Section 13 of the Grain Marketing Act.

¹¹⁰ Section 14 of the Grain Marketing Act.

¹¹¹ Section 9 of the Grain Marketing Act.

¹¹² Ibid.

¹¹³ The process of data collection focuses on the skills of the investigator. It basically "includes the ability to ask questions, to listen actively, to adapt to unforeseen circumstances that may arise, to grasp the issues being addressed, and to identify personal bias" (Brown PA "A Review of the Literature on Case Study Research" (2008) 1(1) *Canadian Journal for New Scholars in Education* 1-13).

requirement that ethical clearance be obtained from the College of Law Research Ethics Committee in terms of the University of South Africa Policy on Research Ethics. Ethical issues involved informed consent,¹¹⁴ confidentiality and anonymity of the participants which was achieved through educating the participants on what is expected from them and ensuring that the data collected did not identify the participants by name.

Furthermore, a cover letter was given to the participants informing them about the purpose of the study and its importance as well as assuring them of the confidentiality of their answers and that the information provided will be used for research purposes only. To further maintain the confidentiality and anonymity of the participants, data analysis and research results were reported in such a way that the information they contain could not be directly linked to anyone.

2.3.5.1 Questionnaire Survey

It is generally accepted that for a questionnaire to be effective, it should be clear, reliable and valid for the purpose for which it is to be used, as short and concise as possible, avoid leading and double-barreled questions and avoid questions with implied assumptions, among others.¹¹⁵ Taking note of the above observations, two questionnaires were developed, one targeted towards directors (Appendix C) and the other one designed for chief executive officers, company secretaries, senior management and shareholder representatives (Appendix D).

The questionnaires were designed to cover nine aspects namely; personal information, general corporate governance knowledge, role of board, appointment of board, composition of the board, remuneration of the board, evaluation of the board's performance, compliance enforcement and general recommendations. The questionnaires consisted of both open and closed ended questions. Open-ended questions were designed to allow participants to give

¹¹⁴ Informed refers to “the knowing consent of an individual voluntarily, without undue inducement or any element of force, fraud, duress or any other form of constraint or coercion”. It involves adequate explanations to the participants with regard to the type of information the researcher requires from them, the purpose for which the information is being sought, its intended use, how the participants are expected to contribute to the study and how it will affect them (Cherry K *What is Informed Consent?* available at http://psychology.about.com/od/iindex/g/def_informedcon.htm (accessed on 7 August 2014)).

¹¹⁵ Bradburn NM, Sudman S and Wansink B *Asking Questions: The Definitive Guide to Questionnaire Design—For Market Research, Political Polls, and Social and Health Questionnaires* Revised Edition (Jossey-Bass 2004) 3-8. See also Brancato G *et al Handbook for Recommended Practices for Questionnaire Development and Testing in the European Statistical System* available at epp.eurostat.ec.europa.eu/portal/.../portal/.../RPSQDET27062006.pdf (accessed on 10 August 2014).

adequate answers in their own words and to freely express their opinion, recommendations or criticism without being limited by the options available as in the case of closed questions.¹¹⁶ On the other hand, closed ended questions included an array of all possible answers and participants were asked to choose the most appropriate answer.¹¹⁷

In Section A of the questionnaires, the questions focus on information about the participants such as gender, position in the public entity and length of service. Section B focuses on general corporate governance knowledge and seeks to establish the level of understanding of the participant of what corporate governance entails and his assessment of the general level of corporate governance compliance of the entity. Section C focuses on the role of the board with a view to determine the systems and mechanisms put in place by the entity to guide the operations of the board, the effectiveness of the systems and mechanisms and suggestions on how the board can be assisted to undertake its role effectively.

Section D of the questionnaires concentrates on the process of board selection and appointment seeking to understand the basis on which boards are appointed, by whom and the duration of appointment. Section E focuses on board composition and tries to find out whether there are any specific mandatory requirements for the compositions of the public entities' boards in terms of minimum qualifications, gender, board size, maximum years of tenure, maximum age of directors, minimum or maximum years of experience in specific areas and maximum number of board membership each director may hold. This part also concentrates on establishing the processes involved in the establishment of board committees and to confirm whether or not committees have clear terms of reference setting out their scope of work and responsibilities to enable them to perform their functions properly.

¹¹⁶ The open-ended questions have the disadvantages that they can necessitate too much time for respondents to answer, they may yield a lot of unnecessary information and responses are difficult to code and interpret. As opened ended questions seek to establish opinions rather than numbers, fewer questionnaires needed to be distributed (Cohen L, Manion L and Morrison K *Research Methods in Education* 6th ed. (Routledge, Taylor & Francis Group, USA 2007) 321-330). See also Bradburn M, Sudman S and Wansik B *Asking Questions* Revised Edition (John Wiley & Sons, Inc 2004) 154-155 and Sincero S M *Types of Survey Questions* (Research Paper 2012) available at <https://explorable.com/types-of-survey-questions> (accessed on 28 August 2014).

¹¹⁷ Closed-ended questions have the advantage that it is easier and quicker for respondents to answer, there are fewer irrelevant or confused answers to questions and the answers of different respondents are easier to compare. However, the closed-ended questions have the disadvantage that participants are required to choose a response that does not exactly reflect their answer; they can yield misleading assumptions and discourage disclosure of true opinions and the researcher may experience difficulties in exploring further the meaning of the responses (Cohen L, Manion L and Morrison K *Research Methods in Education* (2007) 321-329). See also Cassell C and Symon G *Essential Guide to Qualitative Methods in Organizational Research* (SAGE Publications 2004) 12-15.

Section F deals with the aspect of board remuneration with the aim of determining the adequacy of the remuneration, how the remuneration is determined and what the views of the participants are as regards the existing board remuneration system. Section G focuses on establishing whether the entity's boards and individual directors' performance are evaluated and, if so, how frequently, by whom and through which evaluation methods. Furthermore, this part explores the perspectives of the selected participants on board evaluation; its association with board effectiveness and performance and the participants' views on potential improvements to board evaluation. Thus, this part aims to find out whether or not the board evaluation processes have assisted public entities in enhancing the effectiveness of boards and in promoting good corporate governance.

Section H focuses on the issues to do with enforcement of compliance with good corporate governance standards by public entities. This part tries to establish the participants' opinions on the sufficiency of the existing legal and regulatory framework in enhancing the effectiveness of public entities boards as well as the effectiveness of the regulatory bodies and the judicial system in enforcing compliance and promoting good corporate governance in these entities. The last part (Section I) gives the participant the opportunity to make general comments and express any other views considered important to the study.

Five independent people¹¹⁸ were requested to analyse the questionnaire and comment on the length, structure and wording (clarity) of the questionnaire highlighting any ambiguities or areas that needed to be reviewed. Some questions were then altered accordingly taking into account the people's comments. The questionnaires were then submitted to the thesis supervisors for validation before distribution to participants.

Copies of the questionnaires were emailed and hand delivered to selected board members, chief executive officers, company secretaries, senior management and ministry representatives.¹¹⁹ Emailing questionnaires was considered appropriate because of the

¹¹⁸ These included two lecturers from the University of Zimbabwe, one lecturer from the Midlands State University, a colleague who recently graduated from University of South Africa and one corporate governance expert with the Institute of Directors of Zimbabwe.

¹¹⁹ To increase the response rate, representatives of the selected people were allowed to respond on the former's behalf and more than the required number of managers were given the questionnaires in case some did not respond.

expediency of emails whilst hard copies were delivered to those who preferred hand writing to typing their responses. Further, in compliance with the Ethics Committee requirements, a copy of the 'Participant's Information Sheet' (Appendix B) was attached to the emails or hard copies to convey the confidentiality of the individual data of the study to the participants. Completed hard copies were collected from the participants and the response rate to emailed documents was improved through follow-up email reminders.

2.3.5.2 Interview Survey

Interviews are one of the most common methods of data collection used in qualitative research. The purpose of the research interview is to explore the views, experiences, beliefs and/or motivations of individuals on specific matters as well as to provide a deeper understanding of social phenomena than would be obtained from other methods, such as questionnaires.¹²⁰ There are different interview methods namely; structured,¹²¹ semi-structured¹²² and unstructured.¹²³ To conduct this research, the semi-structured format was chosen to enable the researcher to probe and understand the meaning, attitudes, opinions and personal experiences of the participants and to enable the interviewees to freely bring up issues that they felt were relevant to the study.

The participants were initially contacted by telephone, in person or through email. Letters of Introduction (Appendix A), the 'Participant's Information Sheet' and the questionnaire were

¹²⁰ Cassell C and Symon G *Essential Guide to Qualitative Methods in Organizational Research* (2004) 11-16. See also Gill P *et al* "Methods of Data Collection in Qualitative Research: Interviews and Focus Groups" (2008) 204 *British Dental Journal* 291-295 available at <http://www.nature.com/bdj/journal/v204/n6/full/bdj.2008.192.html> (accessed on 2 September 2014).

¹²¹ Cohen L, Manion L and Morrison K *Research Methods in Education* (2007) 351-355. Structured interviews are formally organised, based on prearranged and standardised questions and are relatively quick and easy to administer. The scope for variation of the questions and for follow-up questions to unclear responses is limited (Gill P *et al* "Methods of Data Collection in Qualitative Research: Interviews and Focus Groups" (2008) 291-295).

¹²² Semi-structured interviews may entail using different questions to suit each interviewee's circumstances without necessarily observing any particular order. This format gives the interviewer the freedom to ask follow up questions where the interviewee's responses warrant further clarification thus making it possible for the interviewer to explore pertinent information that may have been omitted in the initial response (Cohen L, Manion L and Morrison K *Research Methods in Education* (2007) 355-356).

¹²³ Unstructured interviews are informal (usually with no predetermined questions), time consuming and encourage comprehensive explorations of a topic such that they can be difficult to manage for the interviewer and may not be easy for the interviewee to participate due to lack of predetermined questions. These types of questions are commonly used where greater detail is required or where little information is known about the subject matter or a different viewpoint of a known subject matter is needed (Gill P *et al* "Methods of Data Collection in Qualitative Research: Interviews and Focus Groups" (2008) 291-295). See also Cohen L, Manion L and Morrison K *Research Methods in Education* (2007) 355-356.

then sent to those people who had expressed their willingness to participate in the research. The participants signed the consent form prior to the interview as evidence of their willingness to participate in the study. The Information Sheet described what the participants in the study were required to do, their rights to refuse to answer questions and to withdraw from the study at any time as well as their freedom to seek for clarification on questions they did not understand. The Information Sheet also assured participants that the information obtained from them would be strictly used for academic purposes and kept confidential.¹²⁴ The confidentiality and anonymity of the information obtained during the study were further emphasised in the introductory remarks of the interview.

The interviews involved face-to-face contacts, guided by the questionnaire, with two company directors, the chief executive officer, the company secretary and two senior managers of each of the selected public entities. Interviewees were presented with the questionnaire beforehand to make the interview more efficient and effective as the participants would be more prepared to answer the questions.¹²⁵ The participants were encouraged to objectively describe how they conducted various activities related to corporate governance. Interviews had an additional advantage over questionnaires in that participants were able to elaborate their answers by providing examples and the researcher was also able to obtain clarity on some issues which clarity might not have been obtained through questionnaires.

The majority of the interviews were held during and after hours at the offices of the participants except for two board members who opted to visit the researcher's office. The time taken to conduct interviews ranged from forty-five minutes to an hour and a half. All interviews were conducted in English. A tape recorder was used to record the majority of the interviews to enable the researcher to fully concentrate on the interview at hand and to adapt the questions according to the responses given and to maximise on the advantages of recording interviews. First, recording interviews made it easier for the researcher and even

¹²⁴ Moreover, the questions were of a general business nature, and did not delve into personal issues where the interviewee would feel uncomfortable. There was no reference made to disclosing confidential information which would in any way identify the participant or the public entity.

¹²⁵ However, the researcher also accepted the possibility of the participants not being truthful in some of their responses given the sufficient time given to frame answers and consult other people. Also some people had not had time to look at the questionnaire hence the researcher had to start the interview by explaining the content of the questionnaire. However, the sharing of the questions with the participants some days before the interviews assisted in creating a relaxed environment.

other independent persons to comprehensively analyse the results after the interview.¹²⁶ The second advantage was that the recorded interviews provided a level of detail and accuracy not obtainable from jotting notes or recalling from memory.¹²⁷

During the interview, situations arose where the interviewees' answers covered more than one aspect or where, in trying to answer one question, they ended up answering a subsequent question in the questionnaire. These situations called for flexibility in deciding which aspects to explore further without losing focus. Furthermore, the probing technique was used to seek further clarification, show appreciation and understanding especially where the interviewee's response sounded incomplete.¹²⁸ To help the interviewees relax and answer questions freely the interviews were conducted in a casual and friendly manner on one hand, but directive and more formal on the other.¹²⁹ In conducting the interviews, cognisance was also taken of the possibility of offending interviewees with regard to certain sensitive questions. As an example, some board members showed dismay when asked on the capabilities of boards or themselves as individuals to promote good corporate governance in public entities. As a result of this observation, sensitive questions were asked in indirect and subtle ways so as not annoy the interviewees.

But, it is important to note that the majority of the participants were very cooperative and were willing to supply data and detailed information that would have been difficult to access without their assistance.

¹²⁶ This advantage has been confirmed by a number of researchers (DuFon MA "Video Recording in Ethnographic SLA Research: Some Issues of Validity in Data Collection" (2002) 6(1) *Language Learning & Technology* 40-59 available at <http://llt.msu.edu/vol6num1/dufon/> (accessed on 12 January 2015)). See also Bill G *Research Interviewing: the Range of Techniques: A Practical Guide* (McGraw-Hill International 2005) 89-91.

¹²⁷ Ibid. See also Given LM "Mini-disc Recorders: A New Approach for Qualitative Interviewing" (2004) 3(2) *International Journal of Qualitative Methods* 1-5 available at http://www.ualberta.ca/~iiqm/backissues/3_2/pdf/given.pdf (accessed on 12 January 2015).

¹²⁸ For more details on the importance of probing techniques, see Cassell C and Symon G *Essential Guide to Qualitative Methods in Organizational Research* (2004) 17-18.

¹²⁹ Mathers *et al* emphasise the need to create a conducive environment so as to be able to obtain as much information as necessary for the research (Mathers N, Fox N and Hunn A *Using Interviews In A Research Project?* (Trent Focus Group 1998) 9-12 available at <http://web.simmons.edu/~tang2/courses/CUAcourses/lsc745/sp06/Interviews.pdf> (accessed on 28 December 2014)).

2.3.5.3 Documents Analysis

As indicated above,¹³⁰ the research information was obtained through literature study of books, electronic/internet sources, journal articles, theses and dissertations, case law and legislation. With regard to the selected public entities, publicly available information and company reports such as government reports, annual reports, enabling statutes and website reports were analysed to corroborate assertions made by interviewees and those who responded to questionnaires as well as to obtain additional information that may have been omitted by the participants.

2.4 LIMITATIONS OF THE RESEARCH METHODS

This section acknowledges the fact that in every research there might be some limitations with regard to the methodology used in the research.¹³¹ First, due to practical reasons and data collection limitations, the survey was limited to four out of eight-six (86) public entities. Although the sample is small it represents the majority of the public entities in that the sample comprises of entities whose corporate governance framework is similar to more than three quarters of the public entities in Zimbabwe.¹³² The sample was also selected on the assumption that these four entities would have the resources to place themselves at the forefront of developments in corporate governance given their significant contribution to the growth of the economy.¹³³ The aim was to engage directors, chief executive officers, company secretaries, senior managers and shareholder representatives who were assumed to have had the most exposure to corporate governance issues. The data collection was meant to provide insight into the role of boards, selection and appointment of boards, composition of

¹³⁰ Para 2.3.1 above.

¹³¹ Azarian R “Potentials and Limitations of Comparative Method in Social Science” (2011) 1(4) *International Journal of Humanities and Social Science* 113-125.

¹³² Researchers have found that it may be difficult to confirm with certainty that a sample can 100% represent the whole population (Cohen L, Manion L and Morrison K *Research Methods in Education* 6th ed. (Routledge 2007) 101-103).

¹³³ MMCZ and ZMDC play significant catalytic roles in the mining sector which is one of the key economic sectors in Zimbabwe. GMB is also crucial given the key role it plays in the agricultural sector considering the fact that Zimbabwe is an agro-based economy. Likewise, transport networks and infrastructure are essential for economic development hence the importance of NRZ as an influential arm in economic growth. For more details on the importance of the mining, agriculture and infrastructure sectors to Zimbabwe’s economic development, see *Zimbabwe Agenda for Sustainable Socio-Economic Transformation (Zim Asset) Policy Document* (Government of Zimbabwe 2008) 8-11 that is available at www.zimtreasury.gov.zw/zim-asset (accessed on 1 December 2014).

boards, remuneration of boards, evaluation of board performance, compliance enforcement and their linkages with board effectiveness in the selected entities.

Secondly, using interviews as a data collection technique has inherent limitations namely, interviewer bias resulting from the interviewer's own opinion and expectations.¹³⁴ The interviewer's bias exists when the interviewer only records the interviewee's answers that conform to his expectations or inaccurately records answers to suit his requirements especially where the interviewee's answers are vague.¹³⁵ Another contributory factor to interviewer bias is the use of open ended questions that draw free answers resulting in the need for the interviewer to summarise the responses using his personal selectivity.¹³⁶ To minimise on such bias the researcher avoided leading questions and providing personal opinions on questions asked and where the answers proffered were not clear, a summary of what the interviewer had said was given to confirm whether both parties had similar understanding.¹³⁷ Given the above, interviewer bias cannot be considered as of significant concern for this study although it cannot be completely ruled out.

Thirdly, it is possible to have other data limitations owing to inherent deficiencies of questionnaire surveys. The questionnaire survey limitations may present themselves in the form of incomplete knowledge of participants and self-reporting bias.¹³⁸ For example, if the participants do not have adequate knowledge about the issues asked they may not answer the question or may give inaccurate answers. However, in this study the majority, if not all, participants selected were considered competent enough to provide complete and clear answers. Of the selected participants twelve were board members, four corporate secretaries,

¹³⁴ Philliber S, Bast M and Sloss G S *Research Method: Guides to a Decision-Making Process* (Peacock Publishers, Inc 1999). See also Grindstedt A "Interactive Resources Used in Research Interviewing" (2004) 32 *Hermes Journal of Linguistics* 117-144 available at http://download2.hermes.asb.dk/archive/download/H32_06.pdf (accessed on 13 January 2015).

¹³⁵ Ibid.

¹³⁶ Reis H T and Judd C M *Handbook of Research Methods in Social and Personality Psychology* (Cambridge University Press, 2000) 302. See also Rajendran N S *Dealing with Biases in Qualitative Research* (Paper presented at the "Qualitative Research Convention: Navigating Challenges, organised by the University of Malaya, Kuala Lumpur in October 2001) 5-6 available at <http://nsrajendran.tripod.com/Papers/Qualconfe2001.pdf> (accessed on 27 January 2015).

¹³⁷ The ideas were obtained from Manion L and Morrison K *Research Methods in Education* (2007) 334-335.

¹³⁸ Harris LR and Brown GTL "Mixing Interview and Questionnaire Methods: Practical Problems in Aligning Data" (2010) 15(1) *Practical Assessment, Research & Evaluation* (A Peer-Reviewed Electronic Journal) 1-19 available at <http://pareonline.net/pdf/v15n1.pdf> (accessed on 27 January 2015).

four chief executive officers, eighteen senior managers and twelve senior shareholder representatives hence incomplete knowledge of the issues was not considered a major risk. Nevertheless, it would be difficult to say with certainty whether the participants reported with bias or not and whether they answered the questions frankly and openly.

The other limitation is that the majority of empirical studies examining the effectiveness of boards of public entities have relied on data obtained from developed nations. It is, therefore, debatable whether these results can be directly extended and applied to a developing market such as Zimbabwe where there is inadequate capital flow, markets are less sophisticated and educational and professional resources are limited.¹³⁹

2.5 PRELIMINARY CONCLUSIONS

This chapter dealt with the research design and the methods that were used to find answers to pertinent questions sought to be addressed by this study. It described in detail the research methods, sample selection, methods of data collection and possible limitations of the research methods. The research methods included literature analysis, circulation of questionnaires and carrying out interviews with chosen board members, senior managers, company secretaries, chief executive officers and shareholder representatives from four selected public entities.

The next chapter discusses corporate governance practices in public entities from a theoretical perspective.

¹³⁹ ZEPARU and BAZ *Harnessing Resources from the Informal Sector for Economic Development* (Study conducted by Zimbabwe Economic Policy Analysis and Research Unit (ZEPARU) & Bankers Association of Zimbabwe (BAZ) 2014) 5-7 available at <http://www.sundaymail.co.zw/wp-content/uploads/2015/02/Harnessing-Resources-From-The-Informal-Sector-for-Economic-Development.pdf> (accessed on 13 January 2015).

CHAPTER 3

CORPORATE GOVERNANCE IN PUBLIC ENTITIES: A THEORETICAL OVERVIEW

3.1 INTRODUCTION

Universally, it is considered a government's responsibility to deliver, *inter alia*, basic services such as education, health, policing, water, electricity and sanitation to their citizens.¹ These services are offered either directly by departments and ministries or through public entities or state-owned enterprises. Public entities were incorporated in most countries to facilitate and accelerate economic and social development.² However, increasing evidence indicates that most public entities in developing countries do not contribute strongly to this development because they perform their functions ineffectively resulting in huge losses, budgetary burdens and poor products or services.³ As a result of the poor performance by public entities, policy makers and other interested stakeholders have engaged in continuing debates. The debates were aimed at establishing the extent to which public entities contribute to economic and social development, why so many of the entities have been unsuccessful to

¹ Bulbuena SS *State-owned Enterprises in Southern Africa: A Stocktaking of Reforms and Challenges* (OECD Corporate Governance Working Papers, No. 13 (OECD Publishing 2014)) 7-8 available at <http://dx.doi.org/10.1787/5jzb5zntk5r8-en> (accessed on 10 November 2014). See also Indreswari M *Corporate Governance in the Indonesian State Owned Enterprises* (2006) 103-104 and Okojie C *Decentralization and Public Service Delivery in Nigeria* (University of Benin, Nigeria Strategy Support Program (NSSP) Background Paper No. NSSP 004 of 2009) 11-12 available at <http://www.ifpri.org/sites/default/files/publications/nsspb04.pdf> (accessed on 15 November 2014). Public entities are also incorporated for other purposes other than basic services, for instance airlines (e.g. South African Airways and Air Zimbabwe Ltd)

² OECD *Comparative Report on Corporate Governance of State-Owned Enterprises* (OECD Publishing 2005) 6-7 available at <http://www.oecd.org/daf/ca/corporategovernanceofstate-ownedenterprises/34803211.pdf> (accessed on 14 August 2014). Due to the fact that public entities are publicly owned, they are expected to operate in compliance with government policy and to be accountable to both the government, acting as the shareholder, and the general public as the stakeholders (Indreswari M *Corporate Governance in the Indonesian State Owned Enterprises* (2006) 122).

³ Cottarelli C *Revenue Mobilization in Developing Countries* (Paper prepared by International Monetary Fund - Fiscal Affairs Department in March 2011) 8-11 available at www.imf.org/external/np/pp/eng/2011/030811.pdf (accessed on 18 May 2014). See also Nellis J *Back to the Future for African Infrastructure? Why State-Ownership Is No More Promising the Second Time Around* (Center for Global Development Working Paper No. 84 of 2006) 10 available at http://www.cgdev.org/files/6352_file_WP_84.pdf (accessed on 15 December 2014) and Nellis JR *Public Enterprises in Sub-Saharan Africa* (World Bank Discussion Paper Number 1, Washington, DC. 1986) 2-3.

competently deliver the services for which they were created and how their administration and governance can be improved.⁴

In the findings, it has been established that having an effective board is one of the key elements to a successful public entity.⁵ According to Frederick, in order to operate effectively, public entities should be adequately supervised by an independent board which should put in place structures and procedures that ensure that the public entities operate effectively, efficiently, accountably, and responsively in the public interest and that they are contributing to national development.⁶ Despite the acknowledgement of the role played by boards, empirical studies have established that the boards have not been as effective as they should be in discharging their duties.⁷ Greater focus has thus been on establishing the causes of the boards' ineffectiveness and finding ways of improving their efficiency.⁸

In pursuance of this objective, it has been established that some of the major contributing factors to the poor performance by boards are: the scope and extent of government influence which has, in practice, been extreme;⁹ fewer qualified individuals available to serve as directors, appointment of people for “their political allegiance rather than business acumen”

⁴ Rondinelli DA *Can Public Enterprises Contribute to Development? A Critical Assessment and Alternatives for Management Improvement* (United Nations Department of Economic and Social Affairs, New York 2008) 21-22 available at unpan1.un.org/intradoc/groups/public/documents/un/unpan021619.pdf. (accessed on 28 March 2014).

⁵ Hermalin BE and Weisbach MS *Boards of Directors as an Endogenously Determined Institution: A Survey of the Economic Literature* (FRBNY Economic Policy Review April 2003) 9-10 available at <http://www.faculty.haas.berkeley.edu/hermalin/601herma.pdf>. (accessed on 19 December 2013).

⁶ Frederick W *Enhancing the Role of the Boards of Directors of State-Owned Enterprises* (OECD Corporate Governance Working Papers, No. 2 (OECD Publishing 2011)) 8 available at <http://dx.doi.org/10.1787/5kg9xfg6n4wj-en> (accessed on 15 January 2014). See also OECD *Guidelines on Corporate Governance of State-owned Enterprises* (2005) 13, 17.

⁷ Nellis J *Back to the Future for African Infrastructure? Why State-Ownership Is No More Promising the Second Time Around* (2006) 9. Researchers have generally found that the rampant corporate failures point to the fact that boards have “failed to fulfill their role as the top-level corporate control mechanism” and have thus “ruined reputations of companies”. (Fuller J and Jensen MC *What's A Director to Do?* in *Best Practices: Ideas and Insights from the World's Foremost Business Thinkers* (Cambridge, MA: Perseus Publishing and London, Bloomsbury Publishing 2003) available at <http://ssrn.com/abstract=357722> (accessed on 23 December 2014)).

⁸ Frederick W *Enhancing the Role of the Boards of Directors of State-Owned Enterprises* (2011) 8-9. See also Hermalin BE and Weisbach MS *Boards of Directors as an Endogenously Determined Institution: A Survey of the Economic Literature* (2003) 9-10.

⁹ The roles of government include “setting objectives and performance targets, appointing directors, monitoring the performance of the enterprise and its Board”. The remaining authority rests with a professional board and management if they are to be effectively empowered. However, research has established that this has been hardly the case as the government has gone further down to perform the duties of the board and management. Moreover, legislators or government officials who are supposed to oversee the public entity managers have tended to push their own personal or political interests at the expense of the entity's interests (Vagliasindi M *The Effectiveness of Boards of Directors of State Owned Enterprises in Developing Countries* (2008) 3-4).

and imposition of senior government or military officials who are not competent or sufficiently experienced. The other factors include individual directors sitting on too many boards thus diluting their capacity to monitor corporate events, poor board remuneration, lack of transparency¹⁰ in the face of insufficient external scrutiny and no questioning of shortfalls in board performance, among others.¹¹ Thus the development of properly composed, focused, adequately empowered, motivated and efficient public entity boards capable of greater responsibility remains a significant challenge to corporate governance in many countries for the predictable future.¹²

This study attempts to establish how relevant the above findings are to Zimbabwe, and to identify any additional challenges experienced by boards of public entities in this jurisdiction. Measures taken to enhance the effectiveness of public entity boards as well as to promote good corporate governance in these entities are also examined. The ultimate goal is to recommend measures which can strengthen public entity boards' effectiveness and promote good corporate governance in these entities so that they can significantly contribute to economic and social development. The present chapter defines corporate governance and highlights some of the benefits derived from good corporate governance practices. The chapter then gives an overview of public entities and analyses the five aspects considered critical in enabling a board to effectively discharge its duties. Lastly, the chapter examines corporate governance enforcement mechanisms and challenges from a global perspective.

3.2 OVERVIEW OF PUBLIC ENTITIES

The term “public entity” or “state-owned enterprise” refers to “enterprises where the state has significant control, through full, majority, or significant minority ownership”.¹³ Similarly,

¹⁰ It has been found that the majority of public entities do not provide sufficient information on their business results or the information provided may be undependable. The lack of transparency may sometimes be intentional since it enables politicians and bureaucrats to cover up their self-interests in the business of the public entity to the detriment of the taxpayers who need to have a clear picture of how their interests are being taken care of (Wicaksono A *Corporate Governance of State-Owned Enterprises: Investment Holding Structure of Government-Linked Companies in Singapore and Malaysia and Applicability for Indonesian State-Owned Enterprises* (2009) 152-154). See also Wong SCY “Improving Corporate Governance in SOEs: An Integrated Approach” (2004) 7(2) *Corporate Governance International* 5-15.

¹¹ Vagliasindi M *The Effectiveness of Boards of Directors of State Owned Enterprises in Developing Countries* (2008) 3-4. See also Robinett D *The Challenge of SOE Corporate Governance for Emerging Markets* (2006) 24-27.

¹² Ibid.

¹³ OECD *Guidelines on Corporate Governance of State-Owned Enterprises* (2005) 11. See also section 2 of the Zimbabwe PFMA and section 1 of the South African Public Finance Management Act (No. 1 of 1999) for similar definitions.

Shirley defines public entities to include entities that are expected to earn most of their revenue from the sale of goods and services, have a separate legal identity, and are majority-owned by government.¹⁴ Public entities provide goods and services that are not usually provided by the private sector and profit maximisation is not the sole basis for measuring their efficiency.¹⁵

Public entities have always played a critical role in the socio-economic development of many countries. According to Nellis, after independence, “most African governments inherited the notion that extensive public sector involvement in the economy was the natural, proper order of affairs”.¹⁶ He argues that efficient and effective service delivery to the public is a fundamental role of government. Thus, through public entities, governments have played a leading role in the provision of essential goods and services such as water, electricity, transportation, education and health in the urban as well as in rural areas.¹⁷ The entities have therefore, been considered as important agencies for socio-economic transformation, creation of employment and as instruments for economic empowerment.

However, the performance of many public entities has been below expectation. This has been ascribed to various reasons, mainly weak corporate governance and unethical practices.¹⁸ The governance systems in some of the public entities have been found to be “characterised with role ambiguity, ineffective boards, ineffective management systems and non-adherence to statutes”.¹⁹ The other challenge cited is that of multiple and conflicting objectives set for

¹⁴ Shirley M *Managing State-Owned Enterprises* (World Bank Staff Working Papers No. 577, Management and Development Series No. 4, Washington, D.C, World Bank 1983) 2. See also Kowalski P *et al State-Owned Enterprises: Trade Effects and Policy Implications* (OECD Trade Policy Paper No. 147 (OECD Publishing 2013) available at <http://dx.doi.org/10.1787/5k4869ckqk71-en> (accessed on 13 March 2014).

¹⁵ Mwaura K “The Failure of Corporate Governance in State Owned Enterprises and the Need for Restructured Governance in Fully and Partially Privatized Enterprises: The Case of Kenya” (2007) 34-75.

¹⁶ Nellis J *The Evolution of Enterprise Reform in Africa: From State-owned Enterprises to Private Participation in Infrastructure — and Back?* (Paper commissioned by the World Bank as a Background Paper for a Conference on African Infrastructure, held in Cape Town, South Africa, in June, 2005) 3 available at <http://ssrn.com/abstract=828764> (accessed on 17 May 2014).

¹⁷ Ibid.

¹⁸ “Foreword” to the Zimbabwean *Corporate Governance Framework for State Enterprises and Public Entities* (2010) ix.

¹⁹ This scenario has contributed to poor performance by some of these public entities, “rendering them a drain to the fiscus.” (Zimbabwe *Corporate Governance Framework for State Enterprises and Parastatals* (2010) ix). See also Chikuhwa JW A *Crisis of Governance: Zimbabwe* (Algora Publishing 2004) 283.

these entities.²⁰ Whilst governments expect public entities to operate in a commercially efficient and profitable manner, they require them to “provide goods and services at prices below cost, serve as generators of employment, receive inputs from state-sanctioned suppliers and choose plant locations based on political rather than commercial criteria”.²¹ The mixing of non-commercial or social with commercial objectives unavoidably leads to political interference in the public entities’ operations to the “detriment of managerial autonomy, commercial performance and economic efficiency”.²² These factors, among others, have contributed to poor performance by some of the public entities. As a result, a number of organisations and countries have come up with corporate governance principles and guidelines aimed at inculcating a culture of accountability and transparency as well as efficiency and effectiveness in the management of public entities.²³

3.3 DEFINITION OF CORPORATE GOVERNANCE

Before one can critically evaluate whether or not good corporate governance makes a difference in company performance, it is essential to have a clear understanding of what corporate governance is. Corporate governance is defined in different ways.²⁴ The Zimbabwean *CGF* defines corporate governance as “a set of processes, customs, value codes, policies, laws and structures governing the way a corporation is directed, controlled and held accountable”.²⁵ Similarly, the *Cadbury Report* defines the term to mean “the system by which companies are directed and controlled”.²⁶ *Cadbury’s* view is that corporate governance focuses almost exclusively on the internal structure and operation of the organisation’s

²⁰ Vagliasindi M *The Effectiveness of Boards of Directors of State Owned Enterprises in Developing Countries* (2008) 13 and Robinett D *The Challenge of SOE Corporate Governance for Emerging Markets* (2006) 4.

²¹ Nellis J *The Evolution of Enterprise Reform in Africa: From State-owned Enterprises to Private Participation in Infrastructure — and Back?* (2005) 7-9. Many governments have tried to achieve a balance between provision of services on a cost recovery and commercial basis, and services that are non-commercial and social in nature. To this end, they classify public entities as commercial and non-commercial or social enterprises.

²² Ibid.

²³ For example, *OECD Guidelines on Corporate Governance of State-Owned Enterprises* (2005), Zimbabwean *CGF* (2010) and South African *Protocol on Corporate Governance in the Public Sector* (RSA Department of Public Enterprises 2002).

²⁴ However, this research refers to only a few of the definitions.

²⁵ Para 1.3 of the *CGF*. The *CGF* further states that “corporate governance ensures that the organization is run properly, that goals are being achieved and funds are being managed with high standards of propriety and probity”.

²⁶ *Cadbury A Report of the Committee on the Financial Aspects of Corporate Governance* (1992) 14.

decision-making process.²⁷ Another view is that corporate governance relates to the inter-relationships between a company's management, its board, its shareholders, customers and other stakeholders; provides the structure through which objectives of the company are set; and places a strong emphasis on the welfare of shareholders.²⁸ It, therefore, encompasses matters such as directors' duties, financial accounting and the protection of the interests of various stakeholders.²⁹

Scholars and practitioners of corporate governance have given the term a wider variety of definitions. Some economists and social scientists have defined corporate governance largely as "the institutions that influence how business corporations allocate resources and returns".³⁰ John and Senbet give a more widespread definition which states that "corporate governance deals with mechanisms by which stakeholders of a corporation exercise control over corporate insiders and management such that their interests are protected".³¹ According to Salacuse, these definitions focus on the informal practices that develop in the absence of effective formal rules and not only on the formal rules and institutions of corporate governance.³² Also, "they encompass not only the internal structure of the corporation but also its external environment".³³

²⁷ Ibid.

²⁸ Du Plessis JJ "Corporate Governance and the Cadbury Report" (1994) 6 *South African Mercantile Law Journal* 81-82. See also OECD *Principles of Corporate Governance* (2004) 11.

²⁹ Ibid.

³⁰ O'Sullivan M "Corporate Governance and Globalization" (2000) 570 *Annals of the American Academy of Political and Social Science* 153-172 available at flora.insead.edu/fichiersti_wp/inseadwp1999/99-71.pdf (accessed on 12 December 2013).

³¹ John K and Senbet LW "Corporate Governance and Board Effectiveness" (1998) 22 *Journal of Banking and Finance* 371-403. See also World Bank *Building Institutions for Markets* (World Bank Development Report 2002) 68.

³² Salacuse JW *Corporate Governance in the UNECE Region* (Paper commissioned for the Economic Survey of Europe, 2003 No. 1 by the Secretariat of the United Nations Economic Commission for Europe (UNECE, Geneva, December 2002) 6-9 available at www.unece.org/ead/misc/Salacuse.doc. (accessed on 20 January 2014). According to this view, corporate governance is concerned with practices and procedures for trying to ensure that a company is run in such a way that it achieves its objectives.

³³ Ibid. The internal structure refers to the mechanisms within the corporation that determine how it is run whilst the external environment includes government regulatory agencies, stock markets on which corporations list their shares and the courts that enforce remedies for violations of corporate governance rules (Salacuse JW *Corporate Governance in the UNECE Region* (2002) 6-9).

In support of the economists and social scientists' view, the OECD³⁴ Task Force defines corporate governance as follows:

Corporate governance ... involves a set of relationships between a company's management, its Board, its shareholders and other stakeholders. Corporate governance also provides the structure through which the objectives of the company are set, and the means of attaining those objectives and monitoring performance are determined. Good corporate governance should provide proper incentives for the Board and management to pursue objectives that are in the interests of the company and shareholders and should facilitate effective monitoring.³⁵

According to the OECD, corporate governance encompasses not only internal aspects of corporate governance but takes into account other stakeholders and the impact of the company on them.³⁶ It also entails that a company, and especially its directors, abide by the provisions of relevant statutes, societal norms, standards and codes of best practices as well as manage the company reliably.³⁷ Similarly, in support of this view, Crowther defines corporate governance as:

an environment of trust, ethics, moral values and confidence - as a synergic effort of all the constituent parts - that is the stakeholders, including government, the general public etc., professionals, service providers and the corporate sector.³⁸

From a slightly different perspective, the Securities and Exchange Board of India (SEBI) Committee on Corporate Governance³⁹ views corporate governance as ethical conduct in business in that it is concerned with the code of values and principles that enables a person to conduct a company's business in line with the expectations of all stakeholders.⁴⁰ According

³⁴ See para 3.5 for more information about the OECD.

³⁵ OECD *Principles of Corporate Governance* (2004) 11.

³⁶ Ibid. The same principle was adopted by Gabrielle O'Donovan who defines corporate governance as a "system of structuring, operating and controlling a company with a view to achieve long term strategic goals to satisfy shareholders, creditors, employees, customers and suppliers, and complying with the legal and regulatory requirements, apart from meeting environmental and local community needs" (O'Donovan G "A Board Culture of Corporate Governance" (2003) 6(3) *Corporate Governance International Journal* 22-30). See also Gopalsamy N A *Guide to Corporate Governance* (New Age International 2008) 20-21 for more similar definitions.

³⁷ Van der Merwe JG *et al South African Corporate Business Administration* (Juta & Co Ltd 2009) 15.1-15.32.

³⁸ Crowther D and Seifi S *Corporate Governance and International Business* (Ventus Publishing ApS 2011) 10.

³⁹ *Report of the SEBI Committee on Corporate Governance 2003* available at http://www.acga-asia.org/public/files/India_MurthyCtee_Feb03.pdf (accessed on 15 March 2014).

⁴⁰ The SEBI Committee defines corporate governance as "the acceptance by management of the inalienable rights of shareholders as the true owners of the corporation and of their own role as trustees on behalf of the shareholders. It is about

to the committee, “corporate governance is beyond the realm of law. It stems from the culture and mindset of management, and cannot be regulated by legislation alone”.⁴¹ From a public policy perspective, corporate governance concentrates more on balancing economic and social goals and individual and communal goals at the same time promoting the “efficient use of resources, accountability in the use of power and stewardship as well as aligning interest of individuals, corporations and society”.⁴²

Judging from the above definitions, it is clear that the overall objective of corporate governance is the harmonisation of relationships and interests of key stakeholders to achieve organisational goals.⁴³ It can also be concluded that many, if not all, of the principles of corporate governance apply to all organisations regardless of nature and size.⁴⁴ Irrespective of the type of ownership and structure, the wider governance agenda advocates that all organisations should act ethically, transparently and in a socially responsible manner.⁴⁵ A government organisation for instance, should be managed for the benefit of the general public and to achieve the aims of the government itself.⁴⁶

A charitable organisation should be managed in the interests of the charitable activity and with regard to the interests of and concerns of providers of the funding.⁴⁷ Likewise, individuals controlling an organisation should not permit self-interest to dominate their

commitment to values, about ethical business conduct and about making a distinction between personal & corporate funds in the management of a company” (*Report of the SEBI Committee on Corporate Governance* (2003) 1).

⁴¹ *Report of the SEBI Committee on Corporate Governance* (2003) 1. See also Dalei P, Tulsyan P and Maravi S *Corporate Governance in India: A legal Analysis* (Paper presented at International Conference on Humanities, Economics and Geography (ICHEG), Bangkok, March, 2012) 17-18 available at psrcentre.org/images/extramimages/312018.pdf (accessed on 18 January 2014).

⁴² Okeahalam CC and Akinboade OA *A Review of Corporate Governance in Africa: Literature, Issues and Challenges* (Paper presented for the Global Corporate Governance Forum on 15 June 2003) 3 available at [http://www.ifc.org/ifcext/cgf.nsf/AttachmentsByTitle/Pan_Africa_2003_Review_of_CG_Okeahalam/\\$FILE/Charles+Okeahalam++Corporate-Governance+ver+4+Jul+2003.pdf](http://www.ifc.org/ifcext/cgf.nsf/AttachmentsByTitle/Pan_Africa_2003_Review_of_CG_Okeahalam/$FILE/Charles+Okeahalam++Corporate-Governance+ver+4+Jul+2003.pdf). (accessed on 25 January 2014).

⁴³ OECD *Principles of Corporate Governance* (2004) 11.

⁴⁴ What is important, however, is to appreciate the fact that although the general principles are widely accepted, they are not set in concrete but must be adjusted to reflect the specific circumstances and needs of individual organisations or countries (OECD *Principles of Corporate Governance* (2004) 11-13).

⁴⁵ Coyle B *Corporate Governance* (2003) 5-6.

⁴⁶ Ibid.

⁴⁷ Clarke T *International Corporate Governance: A Comparative Approach* (Routledge 2007) 6-8.

decisions but should work for the objectives of the organisation.⁴⁸ Thus to deter individuals, especially directors and managers, from pursuing their own interests at the company's expense, shareholders and other stakeholders need corporate governance mechanisms that can discipline directors' and managers' conduct.⁴⁹

3.4 VALUE OF CORPORATE GOVERNANCE

The challenge of corporate governance is to find a way in which the interests of shareholders, directors and other interested parties can all be sufficiently satisfied.⁵⁰ Thus, the majority of the guidelines in the codes of conduct for corporate governance and the codes of best practice are directed towards reducing the potential for conflict and reconciling the interests of the various stakeholder groups.⁵¹ In essence, effective corporate governance establishes a system that guides the relationship between owners, boards, managers and various stakeholders, clarifying the rules and procedures for making decisions on corporate affairs, by whom the decisions should be made and how they should be implemented.⁵² Corporate governance processes, accordingly, inject transparency into the decision-making process, which is valuable to shareholders, potential investors, regulators, customers, suppliers, employees and any other stakeholders who may be affected by a company's actions.⁵³

⁴⁸ Ibid.

⁴⁹ See "Preamble" to the OECD *Principles of Corporate Governance* (2004) 11-12 and the "Introduction and Background" to the Zimbabwe *National Code* and Chapter 4, para 4.2.2 below.

⁵⁰ Adegbie FF and Fofah ET "Ethics, Corporate Governance and Financial Reporting in the Nigerian Banking Industry: Global Role of International Financial Reporting Standards" (2016) 5(1) *Accounting and Finance Research* 50-63.

⁵¹ Weil G and Manges LP *Comparative Study of Corporate Governance Codes Relevant to the European Union and Its Member States* (Report prepared on behalf of the European Commission 2002) 28-30 available at http://www.ecgi.org/codes/documents/comparative_study_eu_i_to_v_en.pdf (accessed on 13 March 2014). Examples of such codes are the South African *King Reports*, OECD *Principles of Corporate Governance*, CAGG *Guidelines* and the UK *Corporate Governance Code*.

⁵² By doing so, corporate governance also provides the structure through which the company objectives are set, and the means of attaining those objectives and monitoring performance (OECD *Principles of Corporate Governance* (2004) 11-13). See also Crowther D and Seifi S *Corporate Governance and International Business* (2011) 13-14.

⁵³ Effective corporate governance means that transparency values exist, investors receive timely and relevant information, decision-making is not done secretly, decision-makers are held accountable for their actions, there is tightened internal controls and financial reporting and managers/directors act in the interest of a company and not their personal interests (Hontz E and Shkolnikov A *Corporate Governance: The Intersection of Public and Private Reform* (Center for International Private Enterprise 2009) 29 available at www.cipe.org/sites/default/files/publication-docs/CG_USAID.pdf (accessed on 20 January 2014)).

The extent to which countries attract foreign capital is dependent on their systems of corporate governance and the degree to which companies are duty-bound to honour the legal rights of shareholders and other stakeholders.⁵⁴ Arthur Levitt, the former United States' Securities and Exchange Commissioner confirmed that: "If a country does not have a reputation for strong corporate governance practices, capital will flow elsewhere".⁵⁵ Levitt's view is supported by Lipman who states that, good corporate governance "enhances the reputation of the organisation and makes it more attractive to customers, investors, suppliers, and in the case of non-profit organisations, contributors".⁵⁶ This means that "individual and institutional investors will refrain from providing capital or will demand a higher risk premium for their capital from enterprises in countries without effective systems of corporate governance than from similar enterprises in countries having strong corporate governance standards".⁵⁷ International investment thus not only provides corporations with expanding sources of capital, but also encourages the continued integration of sound corporate governance practices, which may help the corporations to gain the trust of investors, reduce their capital costs and induce more stable financial sources.⁵⁸

Corporate governance in public entities focuses primarily on making the state an effective owner, by creating "clear and simple lines of political and social accountability, improving board selection and quality, and contributing to the development of clear corporate strategies that reward efficiency and professionalism".⁵⁹ Good corporate governance is important for public entities in that it increases their productivity and competitiveness as well as helps to

⁵⁴ Horn RC *The Legal Regulation of Corporate Governance with Reference to International Trends* Unpublished Thesis (University of Stellenbosch 2005) 15-16. See also Cornelius P "Corporate Practices and National Governance Systems: What do Country Rankings Tell Us?" (2005) 6(3) *German Law Journal* 583-604 available at https://www.germanlawjournal.com/pdfs/Vol06No03/PDF_583-604_Articles_Cornelius.pdf (accessed on 22 April 2015).

⁵⁵ "Introduction and Background" to the *King II Report*. From Levitt's comments, the degree to which corporations observe basic principles of good corporate governance is an important factor for investment decisions and in ensuring long term sustainability. See also Demaki GO "Proliferation of Codes of Corporate Governance in Nigeria and Economic Development" (2013) 3(3) *Business and Management Review* 37-42.

⁵⁶ Lipman FD and Lipman LK *Corporate Governance Best Practices: Strategies for Public, Private, and Not-for-Profit Organizations* (John Wiley & Sons, New Jersey 2006) 3.

⁵⁷ Salacuse JW "Corporate Governance in the New Century" (2004) 25(3) *The Company Lawyer* 69-83. See also Tura HA "Overview of Corporate Governance in Ethiopia: The Role, Composition and Remuneration of Boards of Directors in Share Companies" (2012) 6(1) *Mizan Law Review - African Journals Online (AJOL)* 45-76 available at <http://www.ajol.info/index.php/mlr> (accessed on 12 December 2014).

⁵⁸ Vaughn M and Versteegen Ryan L "Corporate Governance in South Africa: a Bellwether for the Continent?" (2006) 14(5) *Corporate Governance: An International Review* 504-512.

⁵⁹ Hontz E and Shkolnikov A *Corporate Governance: The Intersection of Public and Private Reform* (2009) 27-29.

ensure that public funds invested in these entities are not mismanaged and are spent effectively.⁶⁰ Improving the governance of public entities thus brings substantial benefits in the form of increased productivity and profitability, improved financial position for the government, better protection and utilisation of public assets, reduced corruption,⁶¹ greater attractiveness to investors resulting in increased state income and efficient service delivery to the public.⁶² In addition, good corporate governance helps to increase efficiency and transparency as well as to prevent public entity failures, thus minimising adverse social effects.⁶³

From the above, it can be concluded that countries and business entities that genuinely observe and embrace the principles of good corporate governance will derive vast benefits. Good corporate governance enables an organisation to attract investment, maximise the opportunities available to it, increase transparency and accountability, manage its risks better, boost its chances of succeeding in the market and to achieve sustainable long term growth. Every country or business entity should therefore strive to practice good corporate governance for sustainable long term growth and success.

Despite the acknowledged vast benefits of corporate governance, it has been found that, in some instances, corporate governance has not really added as much value due to the fact that in many instances directors just “box-tick”⁶⁴ without substantially complying with the corporate governance principles.⁶⁵ This means that, whilst good corporate governance

⁶⁰ Ibid.

⁶¹ Corruption negatively affects efficiency in service delivery and creates problems beyond legal repercussions and ethical issues by increasing the cost of doing business. As a corruption-fighting tool, corporate governance minimises the chances for directors and corporate employees to engage in self-dealing and/or corrupt practices (Sullivan JD *Corruption, Economic Development, and Governance: Private Sector Perspectives from Developing Countries* (Global Corporate Governance Forum Issue 2 of 2006) 3-5 available at www.unglobalcompact.org (accessed on 12 February 2014)).

⁶² Hontz E and Shkolnikov A *Corporate Governance: The Intersection of Public and Private Reform* (2009) 27-29. Better corporate governance can increase productivity and contribute to overall economic performance both directly and by reallocating resources within the state sector and across the economy as a whole. In addition, improved governance in the public sector can create a model for and increase pressure on the private sector to improve its own governance.

⁶³ Blume D *Policy Framework for Investment: A Review of Good Practices* (OECD Publishing 2006) 137-140 available at www.oecd.org/investment/investment-policy/40287385.pdf (accessed on 23 May 2014). See also “Foreword” and “Preamble” to the OECD *Guidelines on Corporate Governance of State-Owned Enterprises* (2005) 3, 9.

⁶⁴ Box-ticking refers to the situation where corporate governance boxes are ticked, indicating that there was compliance with a specific aspect.

⁶⁵ According to King, even with the “comply or explain” regime directors just “box-tick” to avoid having to go through the cumbersome process of explaining non-compliance (King M *Governance for All Entities*, ((The Corporate Citizen, Johannesburg 2006) 12).

frameworks may be valuable, they are not adequate on their own as directors may just comply with the form of corporate governance at the expense of substantive compliance. As an example, it has been found that the failure of Enron had little to do with insufficient corporate governance standards and procedures, but everything to do with the culture, environment and conduct of the people at Enron.⁶⁶ Unquestionably, Enron was considered as having one of the best boards in America before its collapse and was rated highly for its commitment to corporate governance practices.⁶⁷ However, its collapse may be an indication that directors just chose to box-tick without necessarily complying with good corporate governance standards.

In another study conducted in South Africa, it was shown that whilst most listed companies in South Africa view corporate governance as an important matter, full compliance with the *King Corporate Governance Code* is still rare and a substantial number of companies comply only with the letter and not the spirit of the *Code*.⁶⁸ For example, many companies were found not to provide adequate information about their companies' internal operations, such as how directors are evaluated or how much each director is remunerated.⁶⁹ It therefore, follows that investors and other stakeholders must recognise that although corporate governance standards might be essential they are not sufficient on their own to compel directors to act in a manner that achieves good corporate governance.⁷⁰ For corporate governance to actually add value, directors have to substantively comply with the principles and not just box-tick.

⁶⁶ Cunningham GM and Harris JE "Enron and Arthur Andersen: The Case of the Crooked E and the Fallen A" (2006) 3(1) *Global Perspectives on Accounting Education* 27-48.

⁶⁷ Ibid.

⁶⁸ Deutsche Bank Securities Incorporated *Global Corporate Governance, Valuing Corporate Governance in South Africa* (Deutsche Bank Securities Incorporated, New York 2002) 27-28 available at www.ifc.org/ifcext/corporategovernance.../DB+on+South+Africa.pdf (accessed on 12 June 2014). See also KPMG *Survey of Integrated Sustainability Reporting in South Africa* (Johannesburg 2006) 19-23.

⁶⁹ Ibid. See also Moloi STM *Assessment of Corporate Governance Reporting in the Annual Reports of South African Listed Companies* (2008) 211-213.

⁷⁰ Trebeck K "Exploring the Responsiveness of Companies: Corporate Social Responsibility to Stakeholders" (2008) 4(3) *Social Responsibility Journal* 349-365.

3.5 INTERNATIONAL INITIATIVES ON CORPORATE GOVERNANCE

Globally, it has become well established that, to strengthen companies, be they private or public entities, there must be continuous investment of capital and human resources as well as customer satisfaction and public confidence in the entities.⁷¹ To be able to attain these objectives, companies need to do more than just create a track record of producing goods and services and having a reasonable market share, but must have good and effective management and be perceived to be properly governed.⁷² Proper corporate governance is globally considered as a very important tool to achieve these aims.

The realisation of the importance of corporate governance for the socio-economic development of countries has motivated a number of initiatives, at national and at international levels, aimed at responding to the corporate governance challenges worldwide. At national level, a number of countries have come up with reforms to prevent the occurrence of further corporate collapses and improve corporate governance practices.⁷³ Internationally, these initiatives are being spearheaded by multilateral organisations including the World Bank,⁷⁴ OECD,⁷⁵ CACG,⁷⁶ UN⁷⁷ and ICGN,⁷⁸ among others.⁷⁹ The World Bank regards

⁷¹ Cronin P *et al Corporate Governance for Main Market and AIM Companies* (Paper prepared by White Page Ltd in association with London Stock Exchange Plc 2012) 3 available at <http://www.londonstockexchange.com/companies-and-advisors/aim/publications/documents/corpgov.pdf> (accessed on 5 November 2014).

⁷² Ibid.

⁷³ Examples of national codes are the UK's *Cadbury* (1992), *Greenbury* (1994), *Hampel* (1998), *Turnbull* (1999), *Combined Code* (2003) and UK *Corporate Governance Code* (2014), South Africa's *King Reports* (I-III), Australia's *Bosch Report*, *Hilmer Report* and *Australian Stock Exchange Corporate Governance Council Corporate Governance Principles and Recommendations*, Malawi's *Code of Best Practice for Corporate Governance*, Canada's *Dey Report* and Zimbabwe's *National Code*. See chapters 4-6 for detailed discussions on the Zimbabwean, South Africa and Australia's codes of corporate governance.

⁷⁴ The World Bank was launched at the Bretton Woods Conference, New Hampshire held in July 1944 at the end of World War II. The Bank was launched alongside the International Monetary Fund by the governments of the United States of America and Britain. The Bank was designed for investment as well as providing loans to support the development of major utilities and services focusing mostly on the parts of the economy that are not profitable for private companies to build hence are left to the public sector. The Bank's initial focus was on Western Europe but it later shifted its lending towards the underdeveloped and developing nations to fund development of infrastructural systems, alleviate poverty and address social services (Mason ES and Asher RE *The World Bank Since Bretton Woods* (Brookings Institution Press 1973) 1-3). The Bank later also got involved in the promotion of good corporate governance. The Bank, through Reports on the Observance of Standards and Codes (ROSC), identifies weaknesses that may contribute to a country's economic and financial vulnerability and makes appropriate recommendations. Visit http://www.worldbank.org/ifa/rosc_cg_egy.pdf for more information.

⁷⁵ The OECD was officially launched on 30 September 1961. It is an exclusive international forum consisting of 34 member countries and more than 70 non-member economies. Its main objective is to promote economic growth, prosperity, and sustainable development (See www.oecd.org/about/ for more information about the OECD). The OECD has published the *Principles of Corporate Governance* (1999 and 2004) and the *Guidelines on Corporate Governance of State-Owned Enterprises* (2005). It has also published a significant number of working papers which "provide timely analysis and information on national and international corporate governance issues and developments". The papers are available at <http://www.oecd.org/corporate/ca/oecdcorporategovernanceworkingpapers.htm>.

corporate governance as an essential tool in supporting international financial structures, creating a conducive investment environment for developing countries to have access to capital and eliminating corruption in both the private and public sectors.⁸⁰ In furthering efforts to promote good corporate governance practices, the World Bank partnered with the OECD to put together a far-reaching international co-operation framework.⁸¹ The co-operation between the World Bank and the OECD is structured along two major initiatives: a Global Corporate Governance Forum (GCGF)⁸² and a series of Regional Policy Dialogue Round Tables.⁸³

⁷⁶ The CACG published the first set of corporate governance guidelines in 1999 to promote good standards in corporate governance and business practice throughout the Commonwealth (CAGG *Guidelines* (1999) 1).

⁷⁷ Over and above the UN *Global Compact's* 10 principles referred to in Chapter 1, para 1.5 above, the United Nations published "*Guidance on Good Practices in Corporate Governance Disclosure*" in 2006. The guidelines are mostly targeted towards, among others, regulators and companies in developing countries and transitional economies. The guidelines drew upon recommendations for disclosure relevant to corporate governance contained in such widely acknowledged documents as the OECD *Principles of Corporate Governance*, ICGN *Principles*, CACG *Guidelines*, *King II Report* and *Combined Code*, among others. The guidelines are accessible at http://unctad.org/en/docs/iteteb20063_en.pdf.

⁷⁸ The ICGN Global Corporate Governance Principles Committee, in consultation with ICGN Members, published the *Global Corporate Governance Principles* in November 2009. The Principles are intended to be of general application around the world, with flexibility and understanding of the specific circumstances of individual companies and their markets.

⁷⁹ It is important to note that it is not within the scope of this study to discuss these in detail but to make reference to them where necessary, because Zimbabwe's corporate governance has mostly been based on principles recommended by these international recognised institutions.

⁸⁰ The World Bank has established a program to assist its member countries in strengthening their corporate governance frameworks through its Reports on the Observance of Standards and Codes (ROSC) initiative. The Bank conducts corporate governance country assessments under the ROSC initiative at the invitation of country authorities and makes recommendations that can lead to a country action plan. The assessment of corporate governance practices in a country measures the legal and regulatory framework, as well as practices and compliance of listed firms against the OECD *Principles of Corporate Governance*. The World Bank Group established the International Finance Corporation (IFC) in 1956 to promote "private sector-led growth in developing countries" (IFC *Practical Guide to Corporate Governance: Experiences from the Latin American Companies Circle* (IFC 2009) iv available at <http://www.oecd.org/daf/ca/corporategovernanceprinciples/43653645.pdf> (accessed on 15 December 2014). Also visit the World Bank's website at http://www.worldbank.org/ifa/rosc_cg.html for more information.

⁸¹ Nestor S *International Efforts to Improve Corporate Governance: Why and How* (OECD Publishing 2001) 7-8 available at www.oecd.org/corporate/ca/corporategovernanceprinciples/1932028.pdf (accessed on 18 November 2014).

⁸² In 1999, the OECD and the World Bank signed a memorandum of understanding to sponsor the Global Corporate Governance Forum (GCGF). The forum was created to enable the coordination and channelling of technical assistance to specific countries worldwide and to promote global, regional and local initiatives that aim to improve the institutional framework and practices of corporate governance. The GCGF also builds knowledge and capacity related to corporate governance reform in emerging markets and developing countries by providing technical assistance and capacity-building training in collaboration with regional and local affiliates (Iskander MR and Chamlou N *Corporate Governance: A Framework for Implementation* (World Bank Publication 2000) 70-71 available at <http://www.persianholdings.com/UsersFiles/admin/files/BookFile/CorporateGovernance> (accessed on 18 November 2014)). See also Shelton JR *World Bank/OECD Global Corporate Governance Forum* (Paper presented at the launch of the World Bank/OECD Global Corporate Governance Forum Washington, D.C. on 27 September 1999) available at 9iacc.org/papers/day2/ws3/d2ws3_jrshelton.html (accessed on 29 November 2014).

⁸³ The OECD/World Bank Regional Roundtables on Corporate Governance are an "inclusive platform for policy-dialogue, where senior policymakers, regulators, corporations, investors, labour organisations and others can raise concerns, exchange experiences and find solutions" on corporate governance (Nestor S *International Efforts to Improve Corporate Governance: Why and How* (2001) 7-8).

The principles formulated by the OECD, CACG, UN and ICGN have provided a broad framework for a large number of countries to develop their own specific principles of corporate governance.⁸⁴ The broad membership of the OECD, CACG, UN and ICGN suggest that these principles reflect the views of a large number of countries with respect to the correct approach for addressing the challenge of corporate governance. The principles recommended by the OECD, CACG, UN and ICGN are minimum benchmarks against which member countries can compare their systems and carry out country-specific initiatives.⁸⁵

To complement the efforts of international organisations like the OECD, CACG, UN and ICGN, African leaders and policy makers have also come up with initiatives to, among other things; promote good corporate governance practices in the continent. Examples of the initiatives are the New Partnership for Africa's Development (NEPAD),⁸⁶ African Peer Review Mechanism (APRM),⁸⁷ Africa Governance Forum (AGF),⁸⁸ Africa Governance

⁸⁴ OECD *Principles of Corporate Governance* (2004) 11-12 and CACG *Guidelines* (1999) 1-2.

⁸⁵ OECD *Principles of Corporate Governance* (2004) 13-14, ICGN *Principles* (2009) 3 and CACG *Guidelines* (1999) 3-4. As a result, a number of countries have developed their own principles of corporate governance. *Framework (CGF) for State Enterprises and Parastatals* 2010, the South African *Protocol on Corporate Governance in the Public Sector* 2002 (available at http://www.gov.za/sites/www.gov.za/files/corpgov_0.pdf), the *Malawi Code II: Sector Guidelines for Parastatal Organisations and State Owned Enterprises* 2011 (available at http://www.ecgi.org/codes/documents/sector_guidelines_parastatal_so_e_malawi_3feb2011_en.pdf) and the Australian *Commonwealth Government Business Enterprise (GBE) Governance and Oversight Guidelines* 2011 (Australian Government Business Advice Branch of the Department of Finance and Deregulation 2011) available at www.finance.gov.au/publications/governance.../GBE_Guidelines.pdf, (accessed on 6 December 2014).

⁸⁶ The African leaders adopted the New Partnership for Africa's Development (NEPAD) during the July 2001 Lusaka Summit meeting in Zambia. The NEPAD was ratified by the African Union (AU) in November 2002 to address the continent's development problems including governance. The AU also adopted the NEPAD Declaration on Democracy, Political, Economic and Corporate Governance (DDPECG), which underpins the work of the African Peer-Review Mechanism (APRM). The NEPAD "determines that peace, security, democracy, and good economic and corporate governance are preconditions for sustainable development and proposes a system of voluntary peer review and adherence to codes and standards of conduct". The founding member countries of NEPAD are South Africa, Nigeria, Algeria, Egypt and Senegal (Mekelo A and Resta V *Governance Progress in Africa: Challenges and Trends* (Discussion paper prepared by United Nations Department of Economic and Social Affairs 2005) 9 available at unpan1.un.org/intradoc/groups/public/documents/un/unpan021509.pdf (accessed on 12 November 2014)).

⁸⁷ The APRM was established at the inaugural Summit of the African Union (AU) in Durban, South Africa in July 2002. Its main objective is "to encourage and build responsible leadership through a self-assessment process and constructive peer-dialogue, to foster the adoption of policies, standards and practices that lead to political stability, high economic growth, sustainable development and accelerated sub-regional and continental economic integration through sharing of experiences and reinforcement of successful and best practices, including identifying deficiencies and assessing the needs of capacity-building needs of participating countries". The APRM involves periodic reviews of the policies and practices of participating countries to determine progress made towards achieving mutually agreed goals and compliance with agreed political, economic, and corporate governance values, codes, and standards. The APRM country self assessment is centered on four areas namely; democracy and good political governance, economic governance and management, corporate governance and socio-economic development (Mangu AM "The African Union and the Promotion of Democracy and Good Political Governance under the African Peer-Review Mechanism: 10 Years on" (2014) 6(1) *Africa Review* 59-72).

⁸⁸ The AGF was initiated by the United Nations Development Programme (UNDP) and the United Nations Economic Commission for Africa (UNECA) in Addis Ababa, Ethiopia, in 1997. The objective of the AGF was to assist African

Inventory (AGI).⁸⁹ In the same spirit, a number of organisations have spearheaded the promotion and facilitation of high standards of corporate governance, business ethics and social responsibility for the economic development and social transformation of Africa. Examples are the African Development Bank (AfDB)⁹⁰ and Centre for Corporate Governance (CCG).⁹¹ In addition, the Institutes of Directors from twelve African countries launched the African Corporate Governance Network (ACGN) whose main objective is to strengthen “national corporate governance standards through shared learning, experience exchanges and dissemination of best practices aimed at addressing on-going corporate governance challenges in Africa”.⁹²

3.6 FUNDAMENTALS OF AN EFFECTIVE BOARD

In an effort to find possible solutions to improve the efficiency and effectiveness of boards of public entities, this study examines five elements considered vital to an effective board. The selected elements are role, selection and appointment, composition, remuneration and evaluation of the board. The selection of the critical aspects was based on previous research

governments through “raising awareness, promoting debate on a wide range of governance priorities, encouraging the exchange of African governments and other national stakeholders’ experiences in governance” (Mekelo A and Resta V *Governance Progress in Africa: Challenges and Trends* (2005) 11-12).

⁸⁹ The AGI was created in 1999 by African governments as a management tool used to “enhance and monitor governance policies and activities, improve programming, coordination, monitoring, evaluation and mobilization of resources in governance and promoting regional partnerships”. It facilitates exchange of information by African governments prepared to share information on governance initiatives and possible solutions to solve governance problems (Mekelo A and Resta V *Governance Progress in Africa: Challenges and Trends* (2005) 11-12).

⁹⁰ The AfDB was established on 4 August 1963 in Khartoum, Sudan, to help development efforts on the African continent. The AfDB had 54 independent African countries and 26 non-African countries as at the end of June 2015. The Bank seeks to improve corporate governance in government organisations, regional economic institutions, financial intermediaries and corporations. The Bank works in close cooperation with NEPAD-African Peer Review Mechanism (APRM), other specialised institutions and governments to develop and enforce their codes of corporate governance through financial support and technical assistance. In July 2007 the Bank came up with a Corporate Governance Strategy aimed at enhancing economic and political governance in African countries by promoting sound practices at corporate level. Visit <http://www.afdb.org/en/about-us/history/> for more information.

⁹¹ The Centre for Corporate Governance (CCG) was “established by a private sector initiative for corporate governance in 1999 to foster the highest standards of corporate governance in all types of corporations”. The Centre was first registered as the Private Sector Corporate Governance Trust (PSCGT) but was later renamed the Centre for Corporate Governance in 2002. The Centre’s main objectives are to promote the implementation of good corporate governance principles and practices in Africa by creating awareness to the public, corporate leaders and policy makers on the need to observe good corporate governance. The objectives are achieved through conducting research studies, facilitating the development and implementation of appropriate educational, training and development programmes, providing an institutional framework for the evaluation, monitoring and recognition of corporate governance practices in corporations and institutions and co-operating and coordinating with similar organisations within and outside the continent to advance the cause of good corporate governance. Visit <http://www.ccg.or.ke/index.php>, for more information.

⁹² The ACGN was launched on 16 October 2013 in Mauritius. The NEPAD Business Foundation serves as the Secretary of the ACGN. Visit <http://www.afcgn.org/> for more information about the ACGN.

which identified them as the major components of board effectiveness.⁹³ It is important to note that it is beyond the scope of this thesis to discuss these elements in detail. Only certain aspects of the elements, as they relate to the effectiveness of boards of Zimbabwean public entities, are focused on. In addition, the general enforcement mechanisms put in place to encourage compliance with good corporate governance are examined and their effectiveness reviewed.⁹⁴

3.6.1 Role of the Board

Corporate governance must be evaluated not only in terms of rights, but also in terms of duties and responsibilities.⁹⁵ As an example, shareholders and the board are expected to perform certain duties in the accomplishment of company objectives. The shareholders contribute to corporate governance by virtue of their obligation to “appoint the directors and the auditors and to satisfy themselves that an appropriate governance structure is in place”.⁹⁶ The shareholders also have a duty to behave responsibly by attending general meetings, voting, and exercising their authority within the organisation.⁹⁷ After appointing the directors,

⁹³ See John K and Senbet LW “Corporate Governance and Board Effectiveness” (1998) 371-403, Vagliasindi M *The Effectiveness of Boards of Directors of State Owned Enterprises in Developing Countries* (2008) 3-12, Fernando AC *Business Ethics: An Indian Perspective* (Pearson Education India 2009) 148-141 and Robinett D *The Challenge of SOE Corporate Governance for Emerging Markets* (2006) 23-27. Some of the corporate governance codes also highlight these aspects as important aspects of the board, for example, Principle 2 of the South African *King III Report* (2009), Principle 2 of the Australian Stock Exchange Corporate Governance Council’s *Corporate Governance Principles and Recommendations* (2014) and Chapter 3 of the Zimbabwean *National Code* (2015).

⁹⁴ Ibid. The issue of enforcement of compliance has been identified as an essential element of corporate governance hence the reason the research focuses on it. See La Porta R *et al* “Investor Protection and Corporate Valuation” (2002) 57 *The Journal of Finance* 1147-1170, Berglöf E and Claessens S *Corporate Governance and Enforcement* (World Bank Policy Research Working Paper 3409, September 2004) 1 available at <http://elibrary.worldbank.org/doi/pdf/10.1596/1813-9450-3409> (accessed on 10 September 2014) and “Introduction and Background” to the *King III Report*.

⁹⁵ Fernando AC *Corporate Governance: Principles, Policies and Practices* (Pearson Education India 2009) 16-18. As indicated in Chapter 1, para 1.5.1 above, the role or responsibilities of the board has come under significant scrutiny partly due to the recurring corporate collapses and also due to the changing nature of the business environment. It is thus universally accepted that most of the corporate scandals were due to a “breakdown of the governance relation between shareholders, the board, and the senior executives” (Heath J and Norman W “Stakeholder Theory, Corporate Governance and Public Management: What Can the History of State-Run Enterprises Teach us in the Post-Enron Era?” (2004) 53 *Journal of Business Ethics* 247-265). See also Cadbury A *Corporate Governance and Chairmanship: A Personal View* (2002) 36.

⁹⁶ The UK *Corporate Governance Code* (September 2014) 1. See also Part Two (II) of the OECD *Principles of Corporate Governance* and Principle 8 of the *King III Report*.

⁹⁷ Principle 8 of the *King III Report*, Section E of the UK *Corporate Governance Code* and Part One (II) of the OECD *Principles of Corporate Governance*. Further to the general shareholders’ responsibilities, institutional investors (e.g. banks, development financial institutions, insurance companies, mutual funds, foreign institutional investor and provident funds) are expected to monitor the decisions of the board and help in building effective corporate governance practices as well as conduct research on critical issues and make appropriate recommendations to other shareholders. Institutional investors, due to the size of their investments, are able to effect change through exercising their voting rights as well as to effectively monitor the board and management (Gillan SL and Starks LT “Corporate Governance Proposals and Shareholder Activism:

the shareholders expect the former, particularly executive directors, to carry out the day to day management of the company and to ensure that the company observes good corporate governance.⁹⁸

The extent of the power exercised by and the legal responsibilities of directors vary with the nature of the organisation and the jurisdiction within which it operates.⁹⁹ In the past, directors' duties in many common law jurisdictions were owed almost entirely to the company¹⁰⁰ and its members, and the board was required to carry out its duties for the financial benefit of the company.¹⁰¹ However, recently efforts have been made to provide for

The Role of Institutional Investors" (2000) 57(2) *Journal of Financial Economics* 275-305 and OECD *The Role of Institutional Investors in Promoting Good Corporate Governance* (OECD Publishing 2011) 8-10 available at <http://www.oecd.org/daf/ca/49081553.pdf> (accessed on 12 March 2015).

⁹⁸ Colley Jr. JL *et al Corporate Governance* (New York: McGraw-Hill 2003) 3-5. For public entities, the board is crucial to maintain the independence of the entity and to detach it from political intrusion. The board is thus expected to act as a shield between the parent ministry and the management of the public entity (Wong SCY "Improving Corporate Governance in SOEs: An Integrated Approach" (2004) 5-15).

⁹⁹ Davies PL *The Board of Directors: Composition, Structure, Duties and Powers* (OECD Publishing 2001) 3-4 available at <http://www.oecd.org/daf/ca/corporategovernanceprinciples/1857291.pdf> (accessed on 15 November 2014). Different jurisdictions have different frameworks. For example, board structures differ in that they can either follow the Anglo-American style (e.g. United States of America, Canada, South Africa and United Kingdom) or the German style (e.g. Finland, Germany and Netherlands) also known as the one tier or two tier system, respectively. The one tier board system refers to where the governing body is comprised of a single board consisting of both executive and non-executive directors whilst the two tier board system refers to where the governing body is comprised of two separate boards, a supervisory board (consisting of non-executive directors) and a management board (consisting of executive directors) (Shivnath T *Comparative Board Structures under Corporate Governance Framework* (2013) 1-2 available at <http://ssrn.com/abstract=2282924> and Bezemer P *et al* "How Two-Tier Boards Can Be More Effective" (2014) 14(1) *Corporate Governance* 15-31 available at <http://www.governanceuniversity.nl/images/bestanden/6688-2014.pdf> (accessed on 27 April 2015).

¹⁰⁰ A company is a legal entity separate from its management and shareholders. It has legal rights and obligations in the same way that a natural person does. Under the traditional rules of company law, directors' duties are owed to the company and to the company alone; and for this purpose the company's interests are equated with the interests of the members collectively (Mann R and Roberts B *Essentials of Business Law and the Legal Environment* 12th ed. (Cengage Learning 2015) 668-670 and Harvey D, McLaney E and Atrill P *Accounting for Business* (Routledge 2013) 198).

¹⁰¹ This has been referred to as the shareholder theory which was originally proposed by Milton Friedman (1970) (Friedman M *The Social Responsibility of Business is to Increase its Profits* (*The New York Times Magazine* of 13th September 1970) available at <http://www.colorado.edu/studentgroups/libertarians/issues/friedman-soc-resp-business.html>) (accessed on 13 October 2015). The theory is based on the premise that the board and management should run the company for the shareholders' benefit and the sole responsibility of business is to increase profits. The courts have traditionally tended to hold directors have a duty to promote the success of the company only for the financial well-being of present and future shareholders (*Gaiman v National Association for Mental Health* (1971) Ch 317 at 330 and *Provident International Corp v International Leasing Corp Ltd* (1969) 1 NSW 424, 440). However, the theory is now viewed as the outdated way of doing business with business entities now acknowledging that "acting in the best interests of the company" does not mean concentrating solely on the interests of shareholders. The current view is expressed in *The Bell Group Ltd (in liq) v Westpac Banking Corporation*, where Owen J found that "it does not follow that in determining the content of the duty to act in the interests of the company, the concerns of shareholders are the only ones to which attention need be directed or that the legitimate interests of other groups can safely be ignored" (*The Bell Group Ltd (in liq) v Westpac Banking Corporation* (No 9) (2008) 39 WAR 1, 534). See also Gerner-Beuerle C, Paech P and Schuster E P *Directors' Duties and Liability* (Study prepared for the European Commission DG Markt by Department of Law, London School 2013) 63-66 available at http://ec.europa.eu/internal_market/company/docs/board/2013-study-analysis_en.pdf (accessed on 12 June 2014), Havenga MK "Directors' Fiduciary Duties under our Future Company Law Regime" (1997) 9 *South African Mercantile Law Journal* 310-324, Brink A *Corporate Governance and Business Ethics* (Springer Science & Business Media 2011) 333-335 and Smith M and Rezek B *Director Fiduciary Duties: Owed to the Corporation or the Shareholders?* (King and Spalding

more scope for directors to act as good corporate citizens by considering a wide range of other stakeholders' interests¹⁰² and the impact of their actions and decisions on the societies and environments in which they operate.¹⁰³ The directors should thus, whilst seeking to maximise profit for the company, exercise their duties in the best interests of the company, all other stakeholders and the environment.¹⁰⁴

Directors Governance Center 2014) available at <http://www.directorscenter.com/director-fiduciary-duties-owed-corporation-shareholders/> (accessed on 27 April 2015).

¹⁰² "Stakeholder" refers to any person or group of persons which can affect or be affected by the actions of a business and includes employees, creditors, customers, suppliers, competitors and local communities (CAGG *Guidelines* (1999) 3-4, OECD *Principles of Corporate Governance* (2004) 58, Chapter 8 of the *King III* and Chapter 3 of *Zimbabwe National Code*). See also Mason C and Simmons J "Embedding Corporate Social Responsibility in Corporate Governance: A Stakeholder Systems Approach" (2013) *Journal of Business Ethics* 1-10 and Awotundun DA, Kehinde JS and Somoye ROC "Corporate Governance and Stakeholders Interest: A Case of Nigerian Banks" (2011) 6(10) *International Journal of Business and Management* 102-112.

¹⁰³ This is known as the stakeholder theory and was originally proposed by Edward Freeman (1963) (Freeman RE and Evan WM "Corporate Governance: A stakeholder Interpretation" (1990) 19 *Journal of Behaviour Economics* 337-359 and Freeman RE *Strategic Management: A Stakeholder Approach* (Cambridge University Press 2010) 32-33). The theory states that a company owes a responsibility to a wider group of stakeholders, other than just shareholders. For example, in Germany, South Africa, UK and Zimbabwe the focus for directors shifted from looking solely at shareholders' interests and "in the interests of the company" has been interpreted to mean that directors are expected to, where appropriate, recognise the importance of other stakeholders over and above the company itself (Keay A "Tackling the Issue of the Corporate Objective: An Analysis of the United Kingdom's 'Enlightened Shareholder Value Approach'" (2007) 29 *Sydney Law Review* 577-612 available at http://sydney.edu.au/law/slr/slr29_4/Keay.pdf (accessed on 12 November 2014) and Mason C and Simmons J "Embedding Corporate Social Responsibility in Corporate Governance: A Stakeholder Systems Approach" (2013) 1-10). In a recent Canadian Supreme Court judgement, the court found that "in the interests of a corporation" did not equate simply with "the best interests of shareholders" hence consideration of other stakeholders' interests was legally acceptable in appropriate circumstances. The Court held that in determining whether directors are acting in the best interests of a company, "it may be legitimate, given all the circumstances surrounding the case, for the board of directors to consider, inter alia, the interests of shareholders, employees, suppliers, creditors, consumers, governments and the environment" (*Trustee of Peoples Department Stores Inc (Trustee of) v Wise* (2004) SCC 68). A number of English decisions confirm that directors have an indirect obligation to consider the interests of other stakeholders e.g. creditors. In *Lonrho v Shell Petroleum* it was held that the best interests of the company "are not exclusively those of its shareholders, but may include those of its creditors" (*Lonrho v Shell Petroleum* (1980) 1 WLR 627 at 634). This perspective was confirmed in the decision in *The Liquidator of the Property of West Mercia Safetywear Ltd (in liq) v Dodd and Another* where it was held that the interests of the company include the interests of creditors, because the company was insolvent (*The Liquidator of the Property of West Mercia Safetywear Ltd (in liq) v Dodd and Another* (1988) BCLC 250 (CA)). Some countries have enacted specific legislation that makes it mandatory for companies to consider the interests of certain stakeholders, for example, section 172 of the UK Companies Act 2006 (Chapter 46). The section obliges directors to have regard to the interests of the company's employees and creditors, the need to foster the company's business relationships with suppliers, customers and others and to consider the impact of the company's operations on the community and the environment. See also Esser I *Recognition of Various Stakeholder Interests in Company Management* Published Thesis (UNISA 2008) 211-213 and Garcia CR *et al* "Shareholder vs. Stakeholder: Two Approaches to Corporate Governance" (2008) 17(3) *Business Ethics, A European Review* 1-7 available at <http://www.ieseinsight.com/tipo.aspx?tipo=1> (accessed on 17 May 2015).

¹⁰⁴ Directors should "pursue shareholder wealth with a long-run orientation that seeks sustainable growth and profits based on responsible attention to the full range of relevant stakeholder interests" (the enlightened shareholder value approach) (Keay A "Tackling the Issue of the Corporate Objective: An Analysis of the United Kingdom's Enlightened Shareholder Value Approach" (2007) 577-612, Awotundun DA, Kehinde JS and Somoye ROC "Corporate Governance and Stakeholders Interest: A Case of Nigerian Banks" (2011) 102-112 and Keay A *The Duty to Promote the Success of the Company: Is It Fit For Purpose?* (University of Leeds 2011) 6-8 available at <http://www.law.leeds.ac.uk/assets/files/research/events/directors-duties/keay-the-duty-to-promote-the-success.pdf> (accessed on 27 April 2015). See also comments from Mervyn King, when he states that "Directors in the twenty-first century have to be seen to be directing companies to be good corporate citizens. The inclusive approach recognizes that a company is a link that brings together the various stakeholders relevant to the business of the company" (King M *Governance for all Entities* (2006) 14).

In most common law countries, directors are subjected to various duties which include statutory and common law duties.¹⁰⁵ In undertaking these responsibilities, directors are bound by a fiduciary duty and a duty of skill, care and diligence to the company.¹⁰⁶ In a number of jurisdictions, the common law directors' duties of care and skill have become more stringent over time and have been codified in company legislation.¹⁰⁷ The fiduciary duties include the duty to prevent a conflict of interests,¹⁰⁸ not exceed the limitation of their powers,¹⁰⁹ maintain an unfettered discretion¹¹⁰ and exercise their powers for the purpose for which they were conferred.¹¹¹ A director's fiduciary obligation entails that he should undertake his duties in

¹⁰⁵ Davis G and Whitley D "Directors' Fiduciary Duties: Increasing Focus on Good Faith and Independence" (2009) 83(7) *The Florida Bar Journal* 31-58 available at <http://www.floridabar.org/DIVCOM/JN/JNJournal01.nsf/> (accessed on 13 February 2015). See also Ramsay I *Corporate Governance and the Duties of Company Directors* (Centre for Corporate Law and Securities Regulation, University of Melbourne 1997) 10-12 available at http://law.unimelb.edu.au/files/dmfile/139-Law_Mono1.pdf (accessed on 13 February 2015).

¹⁰⁶ Davies P *Gower and Davies' Principles of Company Law* 8th ed. (Sweet and Maxwell, London 2008) 506-508. According to Hahlo, the "paramount duty of directors, individually and collectively, is to exercise their powers *bona fide* in the best interests of the company" (Pretorius JT *et al Hahlo's South African Company Law Through the Cases* 6th ed. (Juta & Co, Kenwyn 1999) 279. See also para 5.1.1 of the *South African Protocol on Corporate Governance in the Public Sector*, section 4 of the *Malawi Code II: Sector Guidelines for Parastatal Organisations and State Owned Enterprises* and para 3.3 of the Zimbabwe *CGF*.

¹⁰⁷ The main reasons advanced for the codification include the need to foster best practices and improved corporate governance, provide greater clarity on what is expected of directors and make the law more accessible and predictable. See for example, sections 171-177 of the UK Companies Act (2006), sections 115, 131-132 & 361 of the New Danish Companies Act (No. 470 of 2009), sections 180-184 of the Australian Corporations Act (Act No. 50 of 2001) and section 76 of the South African Companies Act (2008). See also Harner MM "A More Realistic Approach to Directors' Duties" (2013) 15 *The Tennessee Journal of Business Law* 15-31 available at http://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=2380&context=fac_pubs (accessed on 13 May 2015).

¹⁰⁸ For South African case law examples, see *Robinson v Randfontein Estates Gold Mining Company Limited* 1921 (AD) 168 where it was held that "where one man stands to another in a position of confidence involving the duty to protect the interests of that other, he is not allowed to make a secret profit at the other's expense or place himself in a position where his interests conflict with his duty". In *Sibex Construction (SA) (Pty) Ltd v Injectaseal CC* (1988) 2 SA 54 (T) it was held that "It would be a most unusual situation which allowed directors... of one company to act in the same or similar capacity for a rival without actual or potential conflict situations arising with frequent regularity". See also Langford TL and Ramsay IM "Conflicted Directors: What Is Required to Avoid a Breach Of Duty?" (2014) 8 *Journal of Equity* 108-127 available at <http://www.law.unimelb.edu.au/files/dmfile/Conflicteddirectors-.....JnlEquity20142.pdf> (accessed on 27 February 2015).

¹⁰⁹ Generally directors must manage the company within the limits of legislation and other company constitutive documents (Watson SM "The Significance of the Source of the Powers of Boards of Directors in UK Company Law" (2011) *Journal of Business Law* 597-613, Naidoo R *Corporate Governance: An Essential Guide for South African Companies* (2009) 162-171 and Van Bekkum J *et al* "Corporate Governance in the Netherlands" (2010) 14(3) *Electronic Journal of Comparative Law* 1-35 available at <http://www.ejcl.org> (accessed on 13 May 2015)).

¹¹⁰ Ferran E "The Decision of the House of Lords in *Russel v Northern Bank Development Corporation Ltd*" (1994) 53(2) *Cambridge Law Journal* 343-366. A director must also not allow his judgment to be interfered with and must objectively apply his mind to the business of the company (Campbell D and Woodley S *Trends and Developments in Corporate Governance* (Kluwer Law International 2003) 17-18).

¹¹¹ *Ibid.* See *Ngurli Ltd v McCann* (1953) 90 CLR 425 at 440 where it was held that directors should exercise their powers "bona fide – that is for the purpose for which it was conferred, not arbitrarily or at the absolute will of the directors, but honestly in the interest of the shareholders as a whole". If directors exceed their authority and their powers, they may be held liable and their decisions may be set aside even if they have acted honestly. An example is the case of *Howard Smith Ltd v Ampol Petroleum Ltd* where the Privy Council found that the board had acted for an improper purpose, even though the directors had acted honestly and not for personal advantage. In this case two shareholders who held fifty-five per cent of the shares in a company announced that they would vote against any offer from a bidder in an intended takeover. The board of directors then allotted new shares to the bidder. The Privy Council found that the board had used the shares purely for the

good faith and in the interests of the company.¹¹² When a director acts in the company's interests,¹¹³ he should exercise whatever skill he has with the reasonable care expected from a person of his standing.¹¹⁴

Furthermore, a director is prohibited from using his corporate position for personal gain or profit and from acting *ultra vires* his powers.¹¹⁵ Therefore, directors are obliged to act both within the powers of the company as well as within their fiduciary duties to the company.¹¹⁶ But, it is important to note that ordinarily, directors do not work individually. They act collectively as a board although they are empowered to delegate their powers to individual directors, a committee of the board, an officer of the company or competent specialists.¹¹⁷

purpose of destroying an existing majority (*Howard Smith Ltd v Ampol Petroleum Ltd* (1974) AC 821 (PC)). See also Davies P Gower and Davies' *Principles of Company Law* (2008) 506-510.

¹¹² *Treasure Trove Diamonds Ltd v Hyman* 1928 AD 464 at 479. It has been acknowledged that the law concerning the duty of care and skill could be precisely stated as requiring a director to show the degree of skill as may be reasonably expected from a person with his knowledge and experience and requiring a director to take such care as an ordinary man might be expected to take on his own behalf (*Dorchester Finance Co v Stebbing* (1989) BCLC 498). See also Austin RP, Ford HAJ and Ramsay IM *Company Directors: Principles of Law and Corporate Governance* (LexisNexis Butterworths, Sydney 2004) 271-276. Also para 3.3 of the Zimbabwean CGF requires directors to act in good faith, with diligence, skill and care and in the best interests of the state owned enterprise. In the modern world, observing good corporate governance can be interpreted to be acting in the interests of the company as the credibility of the company is enhanced if the directors observe good corporate governance.

¹¹³ See *Re Smith and Fawcett Ltd* (1942) 1 Ch 306 where it was held that directors "must exercise their discretion bona fide in what they consider - not what a court may consider - is in the interests of the company, and not for any collateral purpose".

¹¹⁴ See *Re Brazilian Rubber Plantations and Estates Ltd* (1911) 1 Ch 425 at 437 where it was held that, when performing their duties, directors must attend carefully to the affairs of the company and must exhibit the "reasonable care" which any ordinary person might be expected to take under the same circumstances. In *Australian Securities and Investments Commission v Healey* (2011) FCA 717 at 17-18 it was held that "... a director is not relieved of the duty to pay attention to the company's affairs which might reasonably be expected to attract inquiry, even outside the area of the director's expertise". See also *Re City Equitable Fire Insurance Co* (1925) Ch 407 at 427-429 and Zwinge T *Have Directors' Duties of Care and Skill Become More Stringent? What has Driven this Development? Is this Development Beneficial? An Analysis of the Duty of Care in the UK in Comparison to the German Duty of Care* (Research Paper of October 2009) 3-4 available at <http://dx.doi.org/10.2139/ssrn.1591590> (accessed on 10 November 2014).

¹¹⁵ See *Hogg v Cramphorn Ltd* (1967) Ch. 254 where directors, fearing a takeover bid and their subsequent removal from the board of directors, allotted shares to their supporters. The court held that although the directors acted under the belief that it would be in the company's interests to preserve their board positions they had acted for an improper cause and thus declared the allotment of the shares to be voidable. See also Davies P Gower and Davies' *Principles of Company Law* (2008) 506-510, Palmiter AR "Duty of Obedience: The Forgotten Duty" (2010) 55(11) *New York Law School Law Review* 457-478 available at <http://www.nylslawreview.com/wp-content/././16/2013/11/55-2.Palmiter.pdf> (accessed on 27 April 2015) and Havenga M "Directors' Fiduciary Duties under Our Future Company-law Regime" (1997) 310-324.

¹¹⁶ *Ibid*. This rule is so strictly enforced that, even where the conflict of interest/duty is purely hypothetical, the directors can be forced to surrender all personal gains arising from it (*Regal (Hastings) Ltd v Gulliver* (1942) 1 All ER 378). The law's position is that "good faith must not only be done, but must be seen to be actually done, and seriously monitors the conduct of directors in this regard; and will not allow directors to escape liability by contending that his decision was in fact well founded." (Adler A *Type of Director Duties Based on Enron Case from the Perspective Company Law in Malaysia* available at <http://www.scribd.com/Type-Of-Director-Duties-Based-On-Enron-Case/d/14179407> (accessed on 17 May 2014)).

¹¹⁷ Browne J *Company Law in Practice* (Oxford University Press 2012) 71 and Vasudev PM and Watson S *Corporate Governance After the Financial Crisis* (Edward Elgar Publishing 2012) 212-215. The duty to act as a board does not exonerate individual directors from exercising their individual judgement in respect of issues presented before the board (*Re*

Boards, as indicated above, play a crucial role in the successful governance of an enterprise and a number of views have been advanced as to what constitutes the board's role.

Nicholson and Newton ascribe three key roles to the board namely; to monitor management (control role), to provide advice and links to external resources (service role); and to set overall corporate strategy (strategic role).¹¹⁸ According to the OECD, the board is responsible for "reviewing and guiding corporate strategy, major plans of action, risk policy, annual budgets and business plans; setting performance objectives; monitoring implementation and corporate performance and overseeing major capital expenditures, acquisitions and divestitures".¹¹⁹ The new South African Companies Act introduced a shift in power in the company from the shareholders to the board.¹²⁰ Section 66 of the Companies Act provides that:

the business and affairs of a company must be managed by or under the direction of its board, which has the authority to exercise all of the powers and perform any of the functions of the company, except to the extent that this Act or the company's Memorandum of Incorporation provides otherwise.

Therefore, in South Africa, the board has been granted the ultimate power in the management of the company, subject to the Act and the company's Memorandum of Incorporation.¹²¹

The United Kingdom *Corporate Governance Code* states the board's role as to:

provide entrepreneurial leadership of the company within a framework of prudent and effective controls which enables risk to be assessed and managed.....set the company's strategic aims, ensure that the necessary financial and human resources are in place for the company to meet its objectives and review management performance..... set the company's

Barings Plc (No 5) (2000) 1 BCLC 489 and Gerner-Beuerle C, Paech P and Schuster EP *Directors' Duties and Liability* (2013) 170-172). See also Naidoo R *Corporate Governance: An Essential Guide for South African Companies* (2009) 164-165. The CGF states that "directors are jointly and severally responsible for all the decisions taken by the Board" (para 3.6 of the CGF).

¹¹⁸ Nicholson GJ and Newton CJ "The Role of the Board of Directors: Perceptions of Managerial Elites" (2010) 16(2) *Journal of Management and Organization* 201-218. See also Nicholson G and Kiel G "A Framework for Diagnosing Board Effectiveness" (2004) 12(4) *Corporate Governance an International Review* 442-460.

¹¹⁹ Part One (VI) of the OECD *Principles of Corporate Governance*. See also Chapter 2 of the *King III Report*.

¹²⁰ Delport PA "The Division of Powers in a Company" in Visser C and Pretorius JT *Essays in Honour of Frans Malan* (LexisNexis, South Africa 2014) 84-92.

¹²¹ *Ibid.*

values and standards and ensure that its obligations to its shareholders and others are understood and met.¹²²

Specific to the public entities, the OECD notes that the board's role is to monitor management and provide strategic guidance in accordance with the objectives set by the shareholders.¹²³

However, the role of public entity boards is not as clear as that of private companies' boards due to a number of factors.¹²⁴ First, it has been found that these boards have not been fully empowered or are not sufficiently independent to discharge their duties mostly due to the legal status of the public entity, lack of clear policy objectives¹²⁵ and inadequate regulatory and legislative frameworks.¹²⁶ In many cases, the responsibilities of a public entity board may be performed or greatly manipulated by government which is the 100% shareholder.¹²⁷ In some instances, it has been found that a government may usurp the power of the boards and run the public entity directly, circumventing the board altogether both through the influence of its board nominees and the objectives and directives given to the management of the public entity.¹²⁸ The board is thus not empowered to address certain fundamental problems as a

¹²² Section A of the UK *Corporate Governance Code* (2014).

¹²³ Chapter VI of the OECD *Guidelines on Corporate Governance of State-Owned Enterprises*.

¹²⁴ Vagliasindi M *The Effectiveness of Boards of Directors of State Owned Enterprises in Developing Countries* (2008) 3-4. See also Ho D and Young A "China's Experience in Reforming Its State-Owned Enterprises: Something New, Something Old and Something Chinese?" (2013) 2(4) *International Journal of Economy, Management and Social Sciences* 84-90, available at www.waprogramming.com/download.php?download...14604602.pdf (accessed on 18 November 2014) and Akoum I *The Political Economy of SOE Privatization and Governance Reform in the MENA Region* (International Scholarly Research Network (ISRN) Economics, Article ID 723536 of 2012) available at <http://dx.doi.org/10.5402/2012/723536> (accessed on 22 November 2014).

¹²⁵ According to Wilkinson and Peddler, officer bearers, frustrated with lack of policy and strategic direction may fill the vacuum themselves which leads to conflict of power as interdependent roles become difficult to disentangle (Wilkinson N and Peddler S *Introduction to Social Research* (McGraw Hill, New York. 1995) 24).

¹²⁶ Robinett D *The Challenge of SOE Corporate Governance for Emerging Markets* (2006) 23. See also Garrat B *Thin on Top – Why Corporate Governance Matters and How to Measure and Improve Board Performance* (Nicholas Brealey, London 2007) 1, where the author argues that "the roles, tasks, and accountabilities of the board of directors are not clearly understood by politicians, business executives themselves or the general public" and this has resulted in poor compliance with good corporate governance standards and principles. In addition, sometimes there is lack of communication by the government regarding its objectives and its plan to monitor and influence the pursuit of those objectives.

¹²⁷ Mwaure K "The Failure of Corporate Governance in State Owned Enterprises and the Need for Restructured Governance in Fully and Partially Privatized Enterprises: The Case of Kenya" (2007) 34-75. Shliefer and Vishny observed that the management and oversight of state owned enterprises by politicians and bureaucrats was undesirable because, in the majority of cases, politicians set goals for state owned enterprises which were not in the best interest of the public but rather as a means of getting re-elected (Shliefer A and Vishny RW "A Survey of Corporate Governance" (1997) 737-783).

¹²⁸ Such intervention can take the form of a directive in response to a government need, and may override the needs of the public entity. Often, such a state of affairs places boards in unsustainable situations, "torn between their obligation of loyalty to the public entity and the need to act on behalf of" the shareholders (Frederick W *Enhancing the Role of the Boards of*

significant number of the issues that determine the success of the public entity's operations are under government control.¹²⁹

For example, government may set and drive the strategy of public entities; appoint and dismiss board members and the chief executive officer; approve executives' and board members' remuneration and approve financial and major capital expenditures of public entities.¹³⁰ This creates a complex situation in which various factors contribute to confuse the board as to its powers and their execution.¹³¹ This also has the tendency of undermining the general "objective of reducing political interference" and increasing public entity independence.¹³² It further reduces transparency, as such directives may evade prescribed systems of control and make board accountability fundamentally worthless because the board may have very little to account for.¹³³

A second observation has been that public entity boards have customarily focused more on conformity with rules and compliance with the directives of government authorities than on performance and other strategic issues.¹³⁴ The conformance mentality has been attributed to governance customs which encourage the setting of comprehensive quantitative performance targets and monitoring accomplishment against such targets as the best way to promote and

Directors of State-Owned Enterprises (2011) 10). See also Ashe PA *Governance in Antigua and Barbuda: A Qualitative Case Study of Five State Owned Enterprises* (2012) 47.

¹²⁹ Some commentators argue that weak governance practices of the government, the influence of changing political currents and gaps in the legal framework prevent better performance by boards of public entities (Mwaura K "The Failure of Corporate Governance in State Owned Enterprises and the Need for Restructured Governance in Fully and Partially Privatized Enterprises: The Case of Kenya" (2007) 34-75).

¹³⁰ Frederick W *Enhancing the Role of the Boards of Directors of State-Owned Enterprises* (2011) 11-12. See also Ashe PA *Governance in Antigua and Barbuda: A Qualitative Case Study of Five State Owned Enterprises* (2012) 47.

¹³¹ The numerous approval requirements have the overall effect of constraining the ability of the board to make timeous commercial decisions (IFAC *Governance in the Public Sector: A Governing Body Perspective* (Study by the International Federation of Accountants (IFAC) Public Sector Committee in August 2001) 6-8 available at <http://www.ifac.org/> (accessed on 15 July 2014).

¹³² Robinett D *The Challenge of SOE Corporate Governance for Emerging Markets* (2006) 24-25.

¹³³ Ibid.

¹³⁴ Some commentators have argued that boards of public entities sometimes lack the motivation to adequately and effectively supervise management because they are not shareholders and also they are not entitled to profit sharing (Indreswari M *Corporate Governance in the Indonesian State Owned Enterprises* (2006) 121 and Wicaksono A *Corporate Governance of State-Owned Enterprises: Investment Holding Structure of Government-Linked Companies in Singapore and Malaysia and Applicability for Indonesian State-Owned Enterprises* (2009) 158).

administer the public entity for positive results.¹³⁵ The challenge with focusing excessively on conformance is that boards and state owners may mistakenly believe that they are fulfilling their fiduciary functions yet they are neglecting more important issues such as the effectiveness of the overall business strategy.¹³⁶ An example is a situation where the board may preoccupy itself with the budget setting processes and variations from budgets and plans at the expense of performance and risk management issues.

In the third instance, the absence of sufficient training programs to particularly train and develop public entity board members in many developing countries has significantly contributed to the ineffective discharge of the board's role.¹³⁷ In some cases, boards of the entities are not properly inducted or tend to attribute little significance to training especially with regard to their roles and corporate governance issues.¹³⁸ Furthermore, at times board members have neither sufficient time nor the willingness to understand the intricacies of the business, its competitors and the industry environment.¹³⁹ All these factors may compromise the quality of the board's performance and its effectiveness in achieving the objectives of the respective public entities.

¹³⁵ Nedelchev M "Good Practices in Corporate Governance: One-Size-Fits-All vs. Comply-or-Explain" (2013) 4(6) *International Journal of Business Administration* 75-81. See also Mwaura K "The Failure of Corporate Governance in State Owned Enterprises and the Need for Restructured Governance in Fully and Partially Privatized Enterprises: The Case of Kenya" (2007) 34-75.

¹³⁶ Bosch H "The Changing Face of Corporate Governance" (2002) 25(2) *University of New South Wales Law Journal* 270-293. See also Frederick W *Enhancing the Role of the Boards of Directors of State-Owned Enterprises* (2011) 13 and Stuart S *The Governance Challenge: Compliance Versus Excellence in Singapore* (Paper presented at Annual Spencer Stuart Singapore Board & CEO Summit of March 2013) available at <https://www.spencerstuart.com/research-and-insight> (accessed on 12 September 2014).

¹³⁷ OECD *Board of Directors of State-Owned Enterprises: An Overview of National Practices* (Report prepared by the OECD Corporate Governance Committee December 2012) 36-39 available at <http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/> (accessed on 21 May 2014).

¹³⁸ Most directors shun formal training but prefer to do their learning on the job and through meetings with management and auditors, interactions with outside experts and memberships on other boards. However, on the job training has been considered insufficient especially in developing countries where skilled individuals are in short supply (Frederick W *Enhancing the Role of the Boards of Directors of State-Owned Enterprises* (2011) 25-26).

¹³⁹ In order to fulfil this strategic role, the board needs to be adequately empowered and have an understanding of the company's essential business, competitors and industry atmosphere. But, there has been general consensus that directors, especially non-executive directors, have inadequate knowledge of the company's business and industry environment as well as lack strategic focus (Bosch H *The Director at Risk: Accountability in the Boardroom* (Melbourne, Pearson Professional 1995) 106).

3.6.2 Selection and Appointment of Board Members

The performance of an entity depends largely on the capabilities and performance of its board.¹⁴⁰ It is therefore, imperative that the appointed directors should have relevant qualifications, background, experience, integrity, diverse skills and/or specialised knowledge to effectively contribute to the organisation's business growth.¹⁴¹ The directors should be able to relate well with all stakeholders and have the ability to translate their knowledge and experience to the benefit of the organisation in which they would have been appointed.¹⁴² Recent corporate governance codes specify numerous conditions related to appropriate number of directors, diversity in terms of gender and race, their type (e.g. executive, non-executive and independent directors), requisite skills and recommended restrictions on factors such as age and the number of boards on which directors should sit.¹⁴³ Also, the different codes have strongly advocated for increased transparency in the selection and appointment of board members of public entities.¹⁴⁴

However, it has been found that, in a number of developing countries, transparent selection of competent board members and creation of effective boards may not be easily achievable.¹⁴⁵ This has been found to be mostly as a result of the absence of specific guidelines for the identification and selection of directors and political interference in the board appointment process.¹⁴⁶ In the majority of cases, public entity boards are occupied by people chosen for

¹⁴⁰ Ngoe AO *The Effect of Board Structure on the Performance of Quoted Companies at the Nairobi Stock Exchange* (2011) 3.

¹⁴¹ OECD *Board of Directors of State-Owned Enterprises: An Overview of National Practices* (2012) 27-28. See also Principle 2.19 of the *King III Report*, para 5.1.6 of the *South African Protocol on Corporate Governance in the Public Sector* and section B of the *UK Corporate Governance Code*.

¹⁴² Argüden Y *Measuring the Effectiveness of Corporate Governance* (Research Paper published by INSEAD Business School of the World in April 2010) available at <http://knowledge.insead.edu/csr/corporate-governance/measuring-the-effectiveness-of-corporate-governance-1149> (accessed on 15 January 2015).

¹⁴³ Vagliasindi M *The Effectiveness of Boards of Directors of State Owned Enterprises in Developing Countries* (2008) 2-3. See also Principle 2.18 of the *King III Report*, para 5.1.6 of the *South African Protocol on Corporate Governance in the Public Sector*, section B of the *UK Corporate Governance Code* and section 2.0 of the *ICGN Principles*.

¹⁴⁴ Para 5.1.6 of the *South African Protocol on Corporate Governance in the Public Sector*, para 2.7 of Australia's Commonwealth Government Business Enterprise: *Governance and Oversight Guidelines* (Australian Government, Department of Finance and Deregulation 2011) and section B of the *UK Corporate Governance Code*.

¹⁴⁵ Vagliasindi M *The Effectiveness of Boards of Directors of State Owned Enterprises in Developing Countries* 3. See also Robinett D *The Challenge of SOE Corporate Governance for Emerging Markets* (2006) 26.

¹⁴⁶ OECD *Corporate Governance Boards of Directors of State-Owned Enterprises An Overview of National Practices: An Overview of National Practices* (OECD Publishing 2013) 30-31. The political influence goes either through the selection and appointment process itself, which involves complicated political negotiation among different organs of the government, or

their political loyalty rather than business expertise,¹⁴⁷ for example, senior government or military officials who do not possess relevant qualifications, appropriate technical or commercial skills and experience.¹⁴⁸ The same civil servants normally sit on too many boards thus weakening their capacity to learn the intricacies of the business as well as attend to and monitor corporate events.¹⁴⁹ To worsen the situation, sometimes the appointed board members end up seeking to protect the interests of their ministry or government thus weakening the public entity's corporate governance as well as negatively impacting on the effective implementation of the public entity's strategy and fulfilment of its mandate.¹⁵⁰

The other established challenge has been that, in some cases, skilled persons are not willing to be appointed to public entity boards because of the excessive interference by governments in the operations of the public entities which renders the board ineffective and also for fear of the reputational damages associated with being a board member in a poorly performing public entity.¹⁵¹ The refusal by some professionals to be appointed as public entity board members exacerbates the already existing challenge in most countries of limited numbers of people who qualify to be board members.¹⁵² Too short tenures and frequent changes in boards

through express appointment of political appointees chosen for their political allegiance rather than business knowledge (Frederick W *Enhancing the Role of the Boards of Directors of State-Owned Enterprises* (2011) 18-19).

¹⁴⁷ Bulbuena SS *State-owned Enterprises in Southern Africa: A Stocktaking of Reforms and Challenges* (2014) 18. Although it has been argued that the appointment of politically affiliated board members reduces the operational autonomy of the public entity, others have argued that appointing board members with political affiliations and contacts enables the board to have easy access to government policies and decision making processes. The other reason for appointing political representatives on the board is to ensure that the board's decisions and actions are aligned with the interests of the state as principal shareholder (Indreswari M *Corporate Governance in the Indonesian State Owned Enterprises* (2006) 120-122).

¹⁴⁸ Mwaura K "The Failure of Corporate Governance in State Owned Enterprises and the Need for Restructured Governance in Fully and Partially Privatized Enterprises: The Case of Kenya" (2007) 34-75. The appointment of qualified persons would enhance the performance of the boards by raising the standard of care expected from directors. But, because the vast majority of directors lack the relevant qualifications, skills and experience they are likely to escape liability for breach of their duties of skill and care. See also Ashe PA *Governance in Antigua and Barbuda: A Qualitative Case Study of Five State Owned Enterprises* (2012) 47.

¹⁴⁹ Nellis J *Back to the Future for African Infrastructure? Why State-Ownership Is No More Promising the Second Time Around* (2006) 9.

¹⁵⁰ Ibid. It has also been argued that public entities boards may be concerned more about their chances of being re-elected to current board positions, which makes them inclined to focus on the kinds of governance decisions that please the government-owner, sometimes at the expense of good corporate governance (Ludvigsen S *State Ownership and Corporate Governance: Empirical Evidence from Norway and Sweden* Unpublished Thesis (BI Norwegian School of Management 2010) 22-23).

¹⁵¹ Generally, directors would not want to be associated with poorly performing business entities or entities whose image has been tarnished because of business scandals or poor performance (Vagliasindi M *The Effectiveness of Boards of Directors of State Owned Enterprises in Developing Countries* (2008) 7).

¹⁵² Okeahalam CC and Akinboade OA *A Review of Corporate Governance in Africa: Literature, Issues and Challenges* (2003) 24. See also Part 3 of the CAGG *Guidelines* which indicates that "shortage of skills and lack of familiarity with board functions and fiduciary responsibilities" has presented challenges in most countries.

have also been found to be detrimental to the successful operations of public entities.¹⁵³ For example, it has been found that, in most countries, a change in government is normally accompanied by enormous changes in public entity boards.¹⁵⁴ As a result of the cited challenges, transparent and merit-based selection and appointment of board members as well as board continuity have been difficult to achieve in many countries.

3.6.3 Composition of the Board

Board composition is essential to its proper functioning and effective performance.¹⁵⁵ Most corporate governance promoters acknowledge that board effectiveness is dependent on a properly composed board in terms of diversity, experience, skills and judgments of individual directors and the ways in which they relate as a board in seeking to accomplish organisational objectives.¹⁵⁶ According to Roberts *et al*, board effectiveness is related to the “degree to which non-executives acting individually and collectively are able to create accountability within the Board in relation to both strategy and performance”.¹⁵⁷ This means that it is crucial for board members to have interpersonal skills such as being able to work in a group and respecting each other’s views if the board is to be effective.¹⁵⁸

The board members should also have skills and experience that enable them to significantly contribute to debates and respond to the requirements of the company. Thus, the composition of the board in terms of a suitable combination of skills, knowledge and experience (e.g. professional backgrounds and industry experience), board independence (ratio of executive

¹⁵³ Indreswari M *Corporate Governance in the Indonesian State Owned Enterprises* (2006) 120-121.

¹⁵⁴ Ibid. See also Bulbuena SS *State-owned Enterprises in Southern Africa: A Stocktaking of Reforms and Challenges* (2014) 18.

¹⁵⁵ Frederick W *Enhancing the Role of the Boards of Directors of State-Owned Enterprises* (2011) 15. See also Principle 2 of the *King III Report*, para 10 of the Malawi’s *Code of Best Practice for Corporate Governance*, section B of the UK *Corporate Governance Code* and Principle 2 of the Australian Stock Exchange (ASX) *Corporate Governance Council (CGC) Corporate Governance Principles and Recommendations* (ASX CGC *Corporate Governance Principles and Recommendations* 3rd ed. (ASX Corporate Governance Council 2014).

¹⁵⁶ Roberts J, McNulty T and Stiles P “Beyond Agency Conceptions of the Work of the Non-Executive Director: Creating Accountability in the Boardroom” (2005) 16 *British Journal of Management* S5-S26.

¹⁵⁷ Ibid.

¹⁵⁸ According to Hendrikse, board performance is a factor of teamwork on the notion that the sum of individual directors’ knowledge and abilities and their shared perception of role of board is what distinguishes a mediocre board from an effective one (Hendrikse K *Positive Accounting Theory* (Englewood Cliffs, NJ: Prentice-Hall 1995) 29).

and non-executive directors), size and diversity has been considered important in enhancing the effectiveness of the board.¹⁵⁹ Although some empirical studies have found evidence of positive links between the composition of the board of directors and the performance of an organisation,¹⁶⁰ other researchers have argued that there is a negative relationship¹⁶¹ or no prominent relationship between the composition of the board and the company's performance.¹⁶² There has therefore, been no agreed position as to the impact of the composition of the board on the performance of the company either "directly or through corporate activities thought to affect shareholder wealth".¹⁶³

Promoters of good corporate governance recommend that "there should be a sufficient number of independent non-executive directors on the board of directors to create a suitable balance of power and prevent the dominance of the board by one individual or by a small number of individuals".¹⁶⁴ The other reason put forward in support of the recommendation is that a board composed of a majority of non-executive directors is more effective in that it is able to act in shareholders' best interests, critically review management proposals and control management decisions as the directors are not directly affiliated with the management.¹⁶⁵ In

¹⁵⁹ Leblanc RW "What is Wrong with Corporate Governance? A Note" (2004) 12 *Corporate Governance: An International Review* 436-441.

¹⁶⁰ Uadiale OM "The Impact of Board Structure on Corporate Financial Performance in Nigeria" (2010) 5(10) *International Journal of Business and Management* 155-166.

¹⁶¹ Erickson J *et al* "Board Composition and Firm Value under Concentrated Ownership: The Canadian Evidence" (2005) 13 *Pacific-Basin Finance Journal* 387- 410.

¹⁶² Bhagat S and Black B "The Non-Correlation between Board Independence and Long Term Firm Performance" (2002) 27 *Journal of Corporation Law* 231-274. See also Choi TH and Jung J "Ethical Commitment, Financial Performance and Evaluation: An Empirical Investigation of Korean Companies" (2008) 81 *Journal of Business Ethics* 447-463 and Staikouras PK, Staikouras CK and Agoraki MK "The Effect of Board Size and Composition on European Bank Performance" (2010) 23(1) *European Journal of Law and Economics* 1-27.

¹⁶³ Nicholson GJ and Kiel GC "Can Directors Impact Performance? A Case Based Test of Three Theories of Corporate Governance" (2007) 15(4) *Corporate Governance: An International Review* 585-608.

¹⁶⁴ Coyle B *Risk Awareness and Corporate Governance* 2nd ed. (Global Professional Publishing 2004) 236. See also Principle 2.18 of the *King III Report*, Section 1 (A.3) of the *Combined Code*, Part VI of the *OECD Principles of Corporate Governance* and paras 3.1 & 3.8 of the *CGF* which make similar recommendations. What is clear is that policy makers and governance proponents believe that inside directors lack the necessary objectivity and independence to properly monitor the organisation's operations hence the need to have a sufficient number of non-executive directors in the board to bring independence to the board's judgment. It is thus believed that a board is more independent as the number of outside directors increases proportionately (Robinett D *The Challenge of SOE Corporate Governance for Emerging Markets* (2006) 26-27).

¹⁶⁵ *Ibid.* In support of this assertion, Fairfax demonstrated that with a combination of inside and independent directors, the directors are better able to monitor the performance of the corporation and the management team, prevent dominance by the CEO and senior managers and improve the corporate governance within the corporation (Fairfax D "The Uneasy Ride for the Inside Directors" (2010) 96 *IOWA Law Review* 127- 193). See also Scherrer PS "Director's Responsibilities and Participation in the Strategic Decision Making Process" (2003) 3(1) *Corporate Governance* 86-90.

addition, non-executive directors provide the company with opportunities to link with the outside world, thereby assisting it in securing essential resources and expanding networking.¹⁶⁶

Another view is that, although non-executive directors are expected to operate independently from management, in practice, they are unable to effectively do so because they rely heavily on the same management to provide them with relevant information to make critical decisions.¹⁶⁷ Some researchers have argued that having non-executive directors on the board of directors could negatively affect firm performance due to the fact that non-executive directors may not have access to and adequate knowledge of the company, may have limited understanding of the complexities of the company and also may not be able to commit adequate time to the organisation due to the nature of their appointments which are part-time.¹⁶⁸ According to this view, the presence of independent directors on a board is no guarantee for company success.¹⁶⁹ In support of their view they argue that, although the boards of directors of Enron Corporation, Parmalat and WorldCom were varied with both inside and independent directors, the level of corporate oversight was still poor and the board members could not prevent the corporate failures.¹⁷⁰

Therefore, the results of studies investigating the relationship between the existence of non-executive directors on the boards of companies and company performance have not resulted

¹⁶⁶ Weisbach MS “Outside Directors and CEO Turnover” (1988) 20 *Journal of Financial Economics* 431-460. See Moloi STM *Assessment of Corporate Governance Reporting in the Annual Reports of South African Listed Companies* (2008) 95-97.

¹⁶⁷ Turnbull S “Corporate Governance: Its Scope, Concerns and Theories” (1997) 5 *Corporate Governance: An International Review* 180-205.

¹⁶⁸ Schwartz M, Dunfee T and Kline M “Tone at the Top: An Ethics for the Directors” (2005) 58 *Journal of Business Ethics* 70-100.

¹⁶⁹ Ibid. See also Bhagat and Black who express the view that it is unlikely that board composition has a direct impact on company performance (Bhagat S and Black B “The Uncertain Relationship between Board Composition and Firm Performance” (1999) 54 *Business Lawyer* 921-963).

¹⁷⁰ Dembinski PH *et al Enron and World Finance: A Case Study in Ethics* (2006) 29-30. See also Gwilliam D and Marnet O *Audit Within the Corporate Governance Paradigm: A Cornerstone Built on Shifting Sand?* (Economics, Finance and Accounting Applied Research Working Paper Series of Coventry University of Business School 2009) 5-8, 29-3 available at www.coventry.ac.uk/Global/.../Research%20Paper%202009%2013.pdf (accessed on 28 July 2014). Similarly, Johl *et al* found that board independence does not affect firm performance (Johl SK, Kaur S and Cooper BJ “Board Characteristics and Firm Performance: Evidence from Malaysian Public Listed Firms” (2015) 3(2) *Journal of Economics, Business and Management* 239-243).

in a conclusive position.¹⁷¹ But, it is apparent that proponents for good corporate governance have revealed a clear preference for boards composed of a majority of non-executive directors for the main reason that this promotes a wider perspective, minimises potential conflict of interests and allows for greater objective decision making.¹⁷² The other area that has been of interest with regard to board composition is the effect of the size of the board on its effectiveness. Attempts to establish whether a direct or indirect correlation exists between the performance of a company and the size of the board have also been inconclusive.¹⁷³

Some commentators have argued that boards with diverse members in terms of skill, gender and experience are better able to respond more rapidly to the challenges of an uncertain and dynamic business environment.¹⁷⁴ They argue that diversity enhances the board's flexibility in its decision-making process due to a wider set of perceptions and views as well as unique and different experiences.¹⁷⁵ Accordingly, a large and diverse board is better able to initiate and implement more extensive policies, strategies, activities and projects.¹⁷⁶ In support of this view, other researchers suggest that the size of the board increases with the complexity and diversity of the company, hence large boards may be appropriate in complex and large corporations where more resources and expertise are required to maintain sufficient contacts

¹⁷¹ This is because some researchers have found a positive relationship between board independence and the company's financial performance, others have found a negative relationship and others have established no relationship at all (Fauzi F and Locke S "Board Structure, Ownership Structure and Firm Performance: A Study of New Zealand Listed-Firms" (2012) 8(2) *Asian Academy of Management Journal of Accounting and Finance* 43-67).

¹⁷² This is demonstrated in the majority of corporate governance codes (e.g. Chapter 2 of the *King III Report*, Section 3 of the *Malawi Code II: Sector Guidelines for Parastatal Organisations and State Owned Enterprises*, section B of the UK *Corporate Governance Code*, Part VI of the OECD *Principles of Corporate Governance* and paras 3.1 & 3.8 of the *CGF*). See also Ongore VO and K'Obonyo PO "Effects of Selected Corporate Governance Characteristics on Firm Performance: Empirical Evidence from Kenya" (2011) 1(3) *International Journal of Economics and Financial Issues* 99-122.

¹⁷³ Coles J, Daniel N and Lalitha L "Boards: Does One Size Fit All?" (2008) 87(2) *Journal of Financial Economics* 329-356. Boone *et al* have recommended that more research should be conducted to determine whether there is an optimum size for a board due to the lack of certainty of the optimum size board (Boone A *et al* "The Determinants of Corporate Board Size and Composition: An Empirical Analysis" (2007) 85(1) *Journal of Financial Economics* 66-101).

¹⁷⁴ Daily CM, Certo ST and Dalton DR "A Decade of Corporate Women: Some Progress in the Boardroom, None in the Executive Suite" (1999) 20 *Strategic Management Journal* 93-99. A number of studies suggest that a diversified and well-balanced board of directors can significantly enhance a firm's performance. See also Swartz NP *Board Structure and Company Performance in South Africa* Unpublished Thesis (University of Witwatersrand, Johannesburg 2006) 4, 85-86.

¹⁷⁵ Wang J and Dewhirst HD "Boards of Directors and Stakeholder Orientation" (1992) 11(2) *Journal of Business Ethics* 115-121. Too small boards may not have the critical mass to sustain healthy debates.

¹⁷⁶ Cox TH and Blake S "Managing Cultural Diversity: Implications for Organisational Competitiveness" (1991) 5 *Academy of Management Executive* 45-56. Other researchers argue that a large board size is better than a small size one for the reason that it allows for specialisation and diversity in the effective monitoring and advising functions of the board (Andres PD and Vallelado E "Corporate Governance in Banking: The Role of the Board of Directors" (2008) 32 *Journal of Banking and Finance* 2570-2580).

with the external environment.¹⁷⁷ Moreover, a small board has the disadvantage that it may be easily manipulated by the chief executive officer.¹⁷⁸

On the other hand, some authors have suggested that large boards can be less effective than small boards because small boards provide a greater opportunity for each director to contribute substantively to the discussions and the decision-making processes.¹⁷⁹ Their main argument is that while the board's capacity to monitor performance may be enhanced if the number of directors is increased, the benefit may be outweighed by the incremental cost of poorer communication and bureaucratic processes associated with larger groups.¹⁸⁰ In addition, it is argued that a large board encourages laxity and free-riding among directors as far as the monitoring of the public entity's strategy implementation and effectiveness of management is concerned.¹⁸¹ Thus, it has been found that limiting its size may improve board effectiveness. The above contradictory arguments are a clear indication that there is no prescribed right or optimum size of a board, but that the board size should be determined by the specific needs of the organisation.¹⁸² It seems that the number that is popularly considered

¹⁷⁷ Boone A *et al* "The Determinants of Corporate Board Size and Composition: An Empirical Analysis" (2007) 66-101. See also Eisenberg T, Sundgren S and Wells MT "Larger Board Size and Decreasing Firm Value in Small Firms" (1998) 48 *Journal of Financial Economics* 35-54.

¹⁷⁸ Jensen MC "The Modern Industrial Revolution, Exit and the Failure of Internal Control Systems" (1993) 48(3) *Journal of Finance* 831-880.

¹⁷⁹ Lipton M and Lorsch JW "A Modest Proposal for Improved Corporate Governance" (1992) 48 *Business Lawyer* 59-77. In disapproving large boards, Jensen argues that large boards are less effective and easier for the CEO to control because of the difficulties that are encountered in coordinating and processing problems (Jensen M "The Modern Industrial Revolution, Exit and the Failure of Internal Control Systems" (1993) 831-880).

¹⁸⁰ Uyar A, Kilic M and Bayyurt N "Association Between Firm Characteristics and Corporate Voluntary Disclosure: Evidence From Turkish Listed Companies" (2013) 9(4) *Intangible Capital* 1068-1075 available at <http://dx.doi.org/10.3926/ic.439> (accessed on 17 January 2014). See also John K and Senbet LW "Corporate Governance and Board Effectiveness" (1998) 22(4) *Journal of Banking and Finance* 371-403.

¹⁸¹ Ibid. See also Yermack D "Higher Valuation of Companies with a Small Board of Directors" (1996) 40 *Journal of Financial Economics* 185-211.

¹⁸² Coles J, Daniel N and Lalitha L "Boards: Does One Size Fit All?" (2008) 329-356. See also Melyoki LL *Determinants of Effective Corporate Governance in Tanzania* Unpublished Thesis (University of Twente, The Netherlands 2005) 144-145. The OECD *Principles of Corporate Governance*, CAGG *Guidelines*, Malawi's *Code of Best Practice for Corporate Governance*, UK *Corporate Governance Code* and South African *King Report* do not specify the number of directors to be considered adequate but recommend that the size should just be of a size and composition to make the board effective in carrying out its fiduciary duties (Part VI (D) of the *OECD Principles of Corporate Governance*, Principle 2 of the CAGG *Guidelines*, section 1 (A.3) of the *Combined Code*, Chapter 2 of *King III Report*, section 3 of the Malawi's *Code of Best Practice for Corporate Governance* and section B of the UK *Corporate Governance Code*).

sufficient for a public entity board to be effective is between six and ten as shown in the statutes creating some public entities.¹⁸³

In addition, corporate governance experts support the view that, given the current dynamic global business environment and the emergence of greater power being assigned to a wider set of stakeholder groups, greater demographic diversity¹⁸⁴ amongst members of corporate boards may lead to improvements in a company's performance.¹⁸⁵ In particular, one demographic characteristic that has been recognised as beneficial to the company is the representation of women on boards.¹⁸⁶ Unfortunately, similar to the above aspects, research findings on the relationship between the percentage of women on boards and company performance have also been rather conflicting.¹⁸⁷

On the one hand, it has been argued that there is a positive relationship between the percentage of women on a board and the company's performance.¹⁸⁸ As such, it has been

¹⁸³ Examples are section 5 of the Minerals Marketing Corporation of Zimbabwe Act, section 8 of the South African Civil Aviation Authority Act (No. 40 of 1998) and section 22 of the Australian Postal Corporation Act (Act No. 64 of 1989). See also Uhrig J *Review of the Corporate Governance of Statutory Authorities and Office Holders* (2003) 96.

¹⁸⁴ Board diversity can broadly be defined as variations amongst the members of board of directors "in terms of characteristics such as expertise and managerial backgrounds, personalities, learning styles, gender, age, education and values" (Garba T and Abubakar BA "Corporate Board Diversity and Financial Performance of Insurance Companies in Nigeria: An Application of Panel Data Approach" (2014) 4(2) *Asian Economic and Financial Review* 257-277). See also Omondi NA *The Effect of Board Structure on the Performance of Quoted Companies at the Nairobi Stock Exchange* Unpublished Thesis (University of Nairobi 2011) 4.

¹⁸⁵ Daily CM, Certo ST and Dalton DR "A Decade of Corporate Women: Some Progress in the Boardroom, None in the Executive Suite" (1999) 93-99. Other researchers have also found that board diversity benefits a company if there is in place a process by which the positive aspects of diversity are properly utilised (Milliken FJ and Luis LM "Searching for Common Threads: Understanding the Multiple Effects of Gender Diversity in Organisational Groups" (1996) 21(2) *The Academy of Management Review* 402-433).

¹⁸⁶ *Ibid.* The issue of women in corporate boards has mainly been studied from the perspective that diversity is important to generate productive boardroom discourse, facilitate effective boardroom decision-making, and in general contributes to good governance (Milliken FJ and Luis LM "Searching for Common Threads: Understanding the Multiple Effects of Gender Diversity in Organisational Groups" (1996) 402-433). It is important to note that the present study, despite acknowledging the importance of other aspects of board diversity, focuses only on the aspect of gender consideration when composing boards.

¹⁸⁷ Some researchers have found that board gender diversity has no significant effect on the performance of a company. (Ekadah JWJM "Effect of Board Gender Diversity on the Performance of Commercial Banks in Kenya" (2009) 7(8) *European Scientific Journal* 129-148). Others have found a positive relationship whilst others have actually established a negative relationship between board gender diversity and firm performance (Erhardt NL, Werbel JD and Shrader CB "Board of Director Diversity and Firm Financial Performance" (2003) 11 *Corporate Governance: An International Review* 102-111).

¹⁸⁸ Burke RJ and Mattis MC *Women on Corporate Boards of Directors: International Challenges and Opportunities* (Kluwer Academic Publishers 2000) 27-28. As an example, a research by Erhardt *et al* established that a board comprising of women tends to have a positive impact on company performance (Erhardt NL, Werbel JD and Shrader CB "Board of Director Diversity and Firm Financial Performance" (2003) 102-111).

found that boards with women performed much better in terms of governance and share price performance than those with only men.¹⁸⁹ The main reason for this argument is that differences in the gender backgrounds of directors can add different sociological perceptions and understandings to strategy formulation and decision-making processes.¹⁹⁰ As an example, some researchers found that female directors on a company's board may assist in facilitating strategic change, increase financial performance and provide greater idea generation and innovation.¹⁹¹ Robinson and Dechant argue that gender diversity leads to creativity and innovation as well as enables effective market penetration through matching the diversity of directors to that of customers and employees.¹⁹²

Others found that female directors are more concerned and give “greater emphasis to social welfare, legal protection and transparency in government and business” than male directors.¹⁹³ Similarly, others argue that, by virtue of their position at the top of the corporate hierarchy, female directors can serve other corporate women in various ways, “as role models, as mentors and champions for high-performing women”, and as promoters of the “recruitment, retention and advancement of women” in organisations.¹⁹⁴ In support of these

¹⁸⁹ Curtis M, Schmid C and Struber M *Gender Diversity and Corporate Performance* (Credit Suisse Research Institute Paper of August 2012) 18-19 available at https://www.credit-suisse.com/newsletter/doc/gender_diversity.pdf (accessed on 17 July 2014).

¹⁹⁰ Brammer S, Millington A and Pavelin S “Corporate Reputation and Women on the Board” (2009) 20 *British Journal of Management* 17–29. Similarly, Smith *et al* argue that board gender diversity improves problem solving as a variety of viewpoints arise thus more options are assessed in the process (Smith N, Smith V and Verner M “Do Women in Top Management Affect Firm Performance? A Panel Study of 2,500 Danish Firms” (2006) 55(7) *International Journal of Productivity and Performance Management* 569–593).

¹⁹¹ OECD *Gender and Sustainable Development: Maximising the Economic, Social and Environmental Role of Women* (OECD Publishing 2008) 30-31 available at www.oecd.org/social/40881538.pdf (accessed on 12 August 2014). See also Du Plessis JJ, Saenger I and Foster R “Board Diversity or Gender Diversity? Perspectives from Europe, Australia and South Africa” (2012) 17(2) *Deakin Law Review* 207-249 available at <http://www.austlii.edu.au/au/journals/DeakinLRev/2012/10.pdf> (accessed on 13 November 2014).

¹⁹² Robinson G and Dechant K “Building a Business Case for Diversity” (1997) 11 *Academy of Management Executive* 21–30. Similarly, Williams found that the escalation in numbers of women and racial minority directors on boards have resulted in increased attention to social responsibility, charitable giving and community relationships (Williams RJ “Women on Corporate Boards of Directors and Their Influence on Corporate Philanthropy” (2003) 42(1) *Journal of Business Ethics* 1-10).

¹⁹³ Du Plessis JJ, Saenger I and Foster R “Board Diversity or Gender Diversity? Perspectives from Europe, Australia and South Africa” (2012) 207-249. The researchers argue that when female directors participate in governance of companies, there is a greater chance that the overall quality of governance tends to rise and policies that are formulated will reflect more closely the needs of all citizens.

¹⁹⁴ Bilimoria D and Piderit SK “Board Committee Membership: Effects of Sex-based Bias” (1994) 37(6) *The Academy of Management Journal* 1453-1477.

views, a significant number of corporate governance codes¹⁹⁵ and statutes have given prominence on the need to promote and observe gender equality in organisations and society at large.¹⁹⁶ Furthermore, a number of international and regional instruments have been put in place to promote gender equality and women empowerment.¹⁹⁷

Contrary to the above, it has been shown that women's impact on company performance is negative.¹⁹⁸ The main argument has been that gender diversity on the board may negatively impact to the organisation's performance because it may increase the likelihood of intra-group conflicts resulting in slower decision-making processes.¹⁹⁹ In addition, it was found that women are more risk averse than men in financial decision making which may adversely affect the organisation's resource allocation.²⁰⁰ Another view is that increased gender diversity may negatively affect the performance of a company as women tend to increase costs due to higher turnover and absenteeism.²⁰¹

Some researchers fail to establish a meaningful relationship between the presence of women on the board and company performance.²⁰² These researchers concluded that companies

¹⁹⁵ See section 10 of the Malawi's *Code of Best Practice for Corporate Governance*, Part VI of the OECD *Principles of Corporate Governance*, Principle 2.18 of the *King III Report* and para 2.13 of the Australian Commonwealth Government Business Enterprise (GBE) *Governance and Oversight Guidelines*.

¹⁹⁶ Examples of legislative instruments that encourage gender equality are the Denmark Act on Gender Equality (Act No. 388 of 2000), United Kingdom Equality Act (2010), Australian Workplace Gender Equality Act (2012), Malawi Gender Equality Act (2013) and South African Women Empowerment and Gender Equality Bill (2013).

¹⁹⁷ Examples are African Union *Solemn Declaration on Gender Equality 2004* available at www.afrimap.org/english/images/treaty/AU_GenderSolemnDec04.pdf, SADC *Gender Policy* available at http://www.sadc.int/files/8414/0558/5105/SADC_GENDER_POLICY_-_ENGLISH.pdf, United Nations *Convention on the Elimination of All Forms of Discrimination against Women, CEDAW 1979* available at http://www.un.org/womenwatch/directory/instruments_treaties_1003.htm.

¹⁹⁸ Adams RB and Ferreira D "Women in the Boardroom and their Impact on Governance and Performance" (2009) 94(2) *Journal of Financial Economics* 291-309.

¹⁹⁹ Goodstein J, Gautam K and Boeker W "The Effects of Board Size and Diversity on Strategic Change" (1994) 15(3) *Strategic Management Journal* 241-250. Some researchers argue that groups of the same gender are more likely to cooperate and have fewer conflicts than diversified groups as they are more likely to share similar opinions (Earley PC and Mosakowski E "Creating Hybrid Team Cultures: An Empirical Test of Transnational Team Functioning" (2000) 43 *Academy of Management Journal* 26-49.

²⁰⁰ Richard OC *et al* "Cultural Diversity in Management, Firm Performance, and the Moderating Role of Entrepreneurial Orientation Dimensions" (2004) 47(2) *Academy of Management Journal* 255-266.

²⁰¹ Cox TH and Blake S "Managing Cultural Diversity: Implications for Organizational Competitiveness" (1991) 5(3) *Academy of Management Executive* 45-56.

²⁰² Campbell K and Minguez-Vera A "Gender Diversity in the Boardroom and Firm Financial Performance" (2008) 83(3) *Journal of Business Ethics* 435-451.

employing female board members perform neither significantly better nor worse than firms with no female board representation.²⁰³ The main reasons for failing to establish a relationship was said to be the low number of women that were actually on the boards and the fact that women were disadvantaged by the type of assignments they were traditionally given whilst on the board.²⁰⁴ The other observation was that, women managers tend to be scrutinised and criticised more than men, and they tend to be evaluated less favourably, even when performing as effectively in exactly the same leadership roles as men.²⁰⁵

From the above, it is clear that there is no conclusive position on the relationship between the board composition and company performance. In spite of the conflicting views, it seems like the majority opinion is in favour of some relationship existing between board composition and company performance. This view is supported by the prominence this aspect has been given in international codes of corporate governance like the OECD *Principles of Corporate Governance*, ICGN *Principles*, CAGG *Guidelines* and other country specific codes like the *King Report*, UK *Corporate Governance Code*, Malawi's *Code of Best Practice for Corporate Governance*.²⁰⁶ However, achieving the most appropriate board composition for a public entity remains a difficult matter.

First, it has been established that there is a limited number of professional and experienced people from whom to select appropriately qualified directors resulting in inexperienced board members being selected.²⁰⁷ Secondly, board members are sometimes appointed for political

²⁰³ Ibid. See also Mkhize M and Msweli P “The Impact of Female Business Leaders on the Performance of Listed Companies in South Africa” (2011) 14(1) *South African Journal of Economic and Management Sciences* 1-7.

²⁰⁴ According to Bilimoria and Piderit, despite the suggested benefits of having women on boards, women in top leadership positions in the corporate world are rare (Bilimoria D and Piderit SK “Board Committee Membership: Effects of Sex-based Bias” (1994) 1453-1477). See also Du Plessis JJ, Saenger I and Foster R “Board Diversity or Gender Diversity? Perspectives from Europe, Australia and South Africa” (2012) 207-249.

²⁰⁵ Ryan MK and Haslam SA “The Glass Cliff: Exploring the Dynamics Surrounding the Appointment of Women to Precarious Leadership Positions” (2007) 32(2) *Academy of Management Review* 549–572. See also Haslam SA *et al* “Investing with Prejudice: The Relationship between Women’s Presence on Company Boards and Objective and Subjective Measures of Performance” (2010) 21 *British Journal of Management* 484-497.

²⁰⁶ Part VI of the OECD *Principles of Corporate Governance*, Principle 9 of the CAGG *Guidelines*, Principle 2.18 of the *King III Report*, Section 1 (A.3) of the *Combined Code*, Section B of the UK *Corporate Governance Code*, Principle 2 of the ASX CGC *Corporate Governance Principles and Recommendations* (2014) and paras 3.1 and 3.8 of the *CGF*.

²⁰⁷ This is a common problem in various countries. For Zimbabwe’s status on availability of professional and experienced directors, see Wushe T, Shenje J and Ndlovu D “Too Many Seats Too Little Talent: An Analysis of Optimum Number of Seats for Board of Directors in State Owned Enterprises (SOEs) in Zimbabwe” (2015) 6(2) *Environmental Economics* 109-116 and Makwiranzou TH *Operational Governance in Quasi Government Organisations in Zimbabwe: A Case Study of Telecommunications Sector 2005-2013* Unpublished Thesis (Bindura University of Science Education 2014) 96. For South Africa’s position see, Arries C *Comparative Study on Specific Governance Elements in the State-Owned Entities Overseen*

reasons rather than business experience, for example, senior government officials who do not possess relevant qualifications, appropriate technical or commercial skills and experience have been seconded to public entities to represent government interest.²⁰⁸ Such actions have resulted in a poor skills mix in boards thus causing ineffectiveness.

A third challenge has been that board gender diversity has not been achieved mostly due to negative perceptions on the capabilities of female board members, stereotyping and mere lack of willingness to implement governments' policies on gender promotion.²⁰⁹ Also, it has been argued that women tend not to be as ambitious in terms of professional development as men and to have fewer acquaintances on professional networking platforms which reduces their opportunities of board appointments.²¹⁰ With regard to board independence and size, research has found that most countries do not experience challenges because the statutes enabling the creation of the entities normally stipulate the number of directors of which the majority are non-executive directors, with the chief executive officer being the only executive director.²¹¹

3.6.4 Remuneration of Directors

The structure and level of remuneration is another contentious area with contradicting views on whether directors are, in general, appropriately or excessively remunerated.²¹² On the one hand, some commentators believe that board remuneration, especially in public entities, is not sufficient to attract as well as to motivate directors to offer their maximum efforts towards

by the Department of Public Enterprises (DPE) and the Department of Transport (DOT) in South Africa (2014) 14. For Australia's position, see Uhrig J *Review of the Corporate Governance of Statutory Authorities and Office Holders* (Commonwealth of Australia 2003) 43-44.

²⁰⁸ Mwaura K "The Failure of Corporate Governance in State Owned Enterprises and the Need for Restructured Governance in Fully and Partially Privatized Enterprises: The Case of Kenya" (2007) 34-75. See also Ashe PA *Governance in Antigua and Barbuda: A Qualitative Case Study of Five State Owned Enterprises* (2012) 47.

²⁰⁹ Curtis M, Schmid C and Struber M *Gender Diversity and Corporate Performance* (2012) 26-27.

²¹⁰ Ibid.

²¹¹ Section 8 of the South African Civil Aviation Authority Act, section 12 of the South African National Roads Agency Limited Act (No.7 of 1998), section 22 of the Australian Postal Corporation Act and section 5 of the Zimbabwean Grain Marketing Act.

²¹² OECD *Corporate Governance of Non-Listed Companies in Emerging Market* (OECD Publishing 2006) 172-173. Ferrarini G, Moloney N and Ungureanu MC "Executive Remuneration in Crisis: A Critical Assessment of Reforms in Europe" (2010) 73-118.

achieving organisational objectives.²¹³ This is so especially considering the increasingly high level of obligations required from them and the potential legal liability and reputational risks.²¹⁴ They also argue that, apart from demoralising directors, poor remuneration discourages them from complying with strict business principles and practices.²¹⁵ On the other hand, some commentators are of the opinion that directors are excessively paid especially considering the fact that, in most cases, their remuneration is not linked to their performance.²¹⁶

The main argument is that directors are paid the same packages whether or not the company performs well, which does not make much business sense.²¹⁷ Non-performance related remuneration could result from directors or managers “who may rationally sacrifice shareholder value in pursuance of their own” personal interests.²¹⁸ This is because managers are better informed on investments and company prospects than the shareholders.²¹⁹ Nevertheless, it has been considered imperative that the level of remuneration for members of the board should be sufficient to attract and retain the quality and calibre of individuals needed to run the organisation successfully.²²⁰ At the same time, it has been suggested that the structure of an individual’s remuneration package should motivate the individual towards the achievement of performance that is in the best interests of the company, its stakeholders

²¹³ Mwaura K “The Failure of Corporate Governance in State Owned Enterprises and the Need for Restructured Governance in Fully and Partially Privatized Enterprises: The Case of Kenya” (2007) 34-75.

²¹⁴ Robinett D *The Challenge of SOE Corporate Governance for Emerging Markets* (2006) 27. See also Zhao Y *Corporate Governance and Directors’ Independence* (Kluwer Law International 2011) 166-167.

²¹⁵ Ibid.

²¹⁶ Theunissen P *Remuneration and Benefits Review of State Owned Enterprises* (Paper Presented by Solidarity on Invitation of South Africa’s Department of Public Enterprises July 2010) 2-3 available at <http://navorsing.co.za/wp-content/uploads/2010/08/Solidarity-presentation-to-DPE.pdf>. (accessed on 25 August 2014). See also Bebchuk LA, Fried JM and Walker DI “Managerial Power and Rent Extraction in the Design of Executive Compensation” (2002) 69 *The University of Chicago Law Review* 751-846.

²¹⁷ McCahery J and Renneboog L “Managerial Remuneration: The Indirect Pay-For-Performance Relation” (2001) 317-332.

²¹⁸ Ibid. See also Bebchuk LA, Fried JM and Walker DI “Managerial Power and Rent Extraction in the Design of Executive Compensation” (2002) 751-846.

²¹⁹ Bebchuk LA, Fried JM and Walker DI “Managerial Power and Rent Extraction in the Design of Executive Compensation” (2002) 751-846.

²²⁰ According to Bhattacharya *et al*, remuneration should be designed to provide incentives to perform at the highest operational standards and performance-related elements of the remuneration should constitute a substantial portion of the total remuneration package in order to align their interests with the shareholders’ (Bhattacharya S, Boot AWA and Thakor AV “The Economics of Bank Regulation” (1998) 745-770). This view is supported in the majority of the corporate governance codes. For example, section 1 (B.1) of the *Combined Code*, Principle 2.25 of the *King III Report*, Principle 2 of the *ASX CGC Corporate Governance Principles and Recommendations* and paras 2.2.2 and 3.2.4 of the *CGF*.

and those of the individual.²²¹ Thus, it is strongly recommended that directors' remuneration should be fair and linked to individual and company performance in order to align their interests with those of the shareholders.²²² To assist in the achievement of fair remuneration for directors, most corporate governance codes recommend the establishment of remuneration committees whose main role is to assist the board in determining and administering remuneration policies in the company's long-term interests.²²³

Despite the general acknowledgement that directors need to be adequately remunerated as a performance motivational tool, it has been found that the challenge is that, in most countries, public entity boards, in comparison to their private sector counterparts, are not adequately remunerated.²²⁴ First, the remuneration paid to the public entity directors is far below market levels when considering the responsibilities involved and the competencies and experience required.²²⁵ One of the reasons established is that the responsible government authorities regulate and prescribe remuneration packages without taking into account the prevailing market conditions.²²⁶

In some cases, for example in Australia and Turkey, independent statutory bodies have been set up to determine board remuneration payable to board members of certain public entities.²²⁷ However, it has been established that, whilst government control may be essential

²²¹ Talha M, Salim ASA and Masoud S *A Study on Directors' Remuneration and Board Committee in Malaysia* (2009) 34-35. See also Chapter 2 of the *King III Report*, section 1 (B.1) of the *Combined Code*, section 11 of the Malawi's *Code of Best Practice for Corporate Governance* and para 3.13 of the *CGF*. The bottom line is that directors need to be remunerated for the duties performed and the risks taken on behalf of the company, but the remuneration should be adequately linked to the duties so performed. According to Ferrarini *et al*, one of the board's "central responsibilities is to align the pay of key managers and directors with the long-term interests of the company and its shareholders" (Ferrarini G, Moloney N and Ungureanu MC "Executive Remuneration in Crisis: A Critical Assessment of Reforms in Europe" (2010) 73-118).

²²² Para 5.1.10 of the South African *Protocol on Corporate Governance in the Public Sector*, section D of the UK *Corporate Governance Code*, section 11 of the Malawian *Sector Guidelines for Parastatal Organisations and State Owned Enterprises* and Principle 8 of the ASX *CGC Corporate Governance Principles and Recommendations*. In a United States Supreme Court judgement, the court ruled that overall compensation needs to be reasonable in proportion to the value of services rendered (*Rogers v Hill* 289 U.S. 582 (1933)).

²²³ *Ibid*.

²²⁴ Wicaksono A *Corporate Governance of State-Owned Enterprises: Investment Holding Structure of Government-Linked Companies in Singapore and Malaysia and Applicability for Indonesian State-Owned Enterprises* (2009) 120. See also The World Bank *Corporate Governance of State-Owned Enterprises: A Toolkit* (World Bank Publications 2014) 201-202.

²²⁵ OECD *Board of Directors of State-Owned Enterprises: An Overview of National Practices* (2012) 40.

²²⁶ Governments usually wish to avoid public controversy over excessive pay in the public entities and being accused of unfairly remunerating public entity boards more generously at the expense of other members of the general public (OECD *Board of Directors of State-Owned Enterprises: An Overview of National Practices* (2012) 40-41).

²²⁷ OECD *Corporate Governance of State-Owned Enterprises: A Survey of OECD Countries* (OECD Publishing 2005) 154.

to prevent the public entities boards from abusing the entities' funds and excessively paying themselves, poor remuneration makes it difficult for the entities to attract experienced directors who are able to add the highest value.²²⁸ To further complicate matters, boards may be compelled to cushion themselves by holding unnecessary board meetings so as to earn sitting fees thus enhancing their remuneration.²²⁹

Secondly, it has been argued that the remuneration paid to directors is, in most cases, not linked to achievement of performance targets.²³⁰ Directors are, therefore, assured of obtaining their full remuneration regardless of ineffectively discharging their duties and not achieving organisational goals.²³¹ It has been established that the main reason for non-recognition of performance is that most public entity boards do not have clear policies on performance measurement and the responsible authorities sometimes do not have the capacity to effectively evaluate the boards' performance so as to determine the appropriate remuneration.²³² A third observation is that, in the majority of situations, the remuneration committees of public entity boards have minimal say on directors' remuneration as their function is, contrary to good practices, just to make recommendations to the relevant government authority which has the final say.²³³ The non-executive directors' remuneration is, thus, more or less dictated by government authority. Therefore, if board effectiveness is to be improved, governments need to do much more to ensure that board remuneration is commensurate with the level of expertise required, the enormous board responsibilities and the liability risk associated with being a public entity board member.

²²⁸ The World Bank *Corporate Governance of State-Owned Enterprises: A Toolkit* (2014) 201-202.

²²⁹ Ibid.

²³⁰ OECD *Corporate Governance of State-Owned Enterprises: A Survey of OECD Countries* (2005) 153. See also Bebchuk LA, Fried JM and Walker DI "Managerial Power and Rent Extraction in the Design of Executive Compensation" (2002) 751-846 and The World Bank *Corporate Governance of State-Owned Enterprises: A Toolkit* (2014) 201-202.

²³¹ Ibid. See also McCahery J and Renneboog L "Managerial Remuneration: The Indirect Pay-For-Performance Relation" (2001) 317-332.

²³² Budiman A, Lin D and Singham S *Improving Performance at State-owned Enterprises* (McKinsey and Company Publication 2009) available at http://www.mckinsey.com/insights/public_sector/improving_performance_at_state-owned_enterprises (accessed on 2 October 2014). See also Abdullah SN "Directors' Remuneration, Firm's Performance and Corporate Governance in Malaysia among Distressed Companies" (2006) 6(2) *Corporate Governance: The International Journal of Business in Society* 162 – 174.

²³³ OECD *Board of Directors of State-Owned Enterprises: An Overview of National Practices* (2012) 42. See also Frederick W *Enhancing the Role of the Boards of Directors of State-Owned Enterprises* (2011) 21.

3.6.5 Evaluation of Board Performance

It seems to be internationally acknowledged that board performance needs to be regularly monitored and evaluated.²³⁴ Although board evaluations are mostly common in large private sector companies, they have gradually become more prevalent in public entities.²³⁵ The need to monitor and measure board performance has become more widespread because the board is increasingly held accountable for corporate performance and there is an increase in shareholder activism resulting in investors demanding more from boards than before.²³⁶ In addition, the increase in media and community scrutiny and lawsuits against boards or individual directors has also reinforced the general public expectations that boards should be held accountable for the performance of the companies they preside over.²³⁷ Board scrutiny has also increased due to the escalation in corporate collapses and the increase in board autonomy, which has limited the government's ability to directly assess the performance of boards.²³⁸

Performance evaluation is essential for two reasons. First, it serves as means by which boards can identify strengths, areas of improvement, corporate governance problems as well as particular skills that will best increase board effectiveness and add real value to shareholders and their organisations.²³⁹ In a similar way, board evaluations are a useful incentive for individual board members to devote sufficient time and effort in carrying out their critical functions, and for the board as a whole to really be the strategic leader and monitor of the

²³⁴ Principle 2.22 of the *King III*, Principle 1 of the *ASX CGC Corporate Governance Principles and Recommendations*, Principle 11 of the *CAGG Guidelines*, para 5.1.7 of the *South African Protocol on Corporate Governance in the Public Sector*, section D of the *UK Corporate Governance Code* and section 5 of the *Malawian Sector Guidelines for Parastatal Organisations and State Owned Enterprises*.

²³⁵ Frederick W *Enhancing the Role of the Boards of Directors of State-Owned Enterprises* (2011) 20.

²³⁶ Kiel GC, Nicholson GJ and Barclay MA *Board, Director and CEO Evaluation* (McGraw-Hill, Australia 2005) 4.

²³⁷ *Ibid.*

²³⁸ Kiel GC, Nicholson GJ and Barclay MA *Board, Director and CEO Evaluation* (2005) 4. See also Frederick W *Enhancing the Role of the Boards of Directors of State-Owned Enterprises* (2011) 20).

²³⁹ Board evaluations provide an opportunity for boards to identify sources of governance failure and to rectify the challenges before they get out of hand. It has been widely accepted that boards who conduct proper and regular evaluations experience significant benefits at individual, board and organisational levels "in terms of improved leadership, greater clarity of roles and responsibilities, improved teamwork, greater accountability, better decision making, improved communication and more efficient Board operations" (Kiel GC and Nicholson GJ "Evaluating Boards and Directors" (2005) 613-631). See also Part VI of the *OECD State Owned Enterprises Guidelines*.

public entity.²⁴⁰ The second benefit derived from evaluation of board performance is that it enables the responsible authorities and other interested stakeholders to assess whether the board is effectively performing its duties in the best interests of the organisation and thus enables the former to act accordingly.²⁴¹ At the same time, the evaluation process enables those responsible for appointing board members to recognise necessary competencies and board member profiles as well as the director development activities essential to address any skills gaps in boards.²⁴²

The enormous benefits of board performance evaluations have caused some commentators to call for and some countries to implement compulsory board performance appraisals to promote board effectiveness, corporate transparency and accountability.²⁴³ However, internationally, the majority of the corporate governance codes or reports have left it to organisations to voluntarily implement board evaluations although they make specific recommendations on such evaluation.²⁴⁴ Most board evaluation systems concentrate on the agents performing the evaluation (e.g. self-evaluation, consultants), the issues to be assessed (e.g. accountability, knowledge and contribution), the stakeholders involved (e.g. shareholders, major customers), the way the evaluation is performed (e.g. interviews, observations, surveys) and for what purpose the results are used (e.g. review corporate governance processes, review of board composition and performance).²⁴⁵

²⁴⁰ Kiel GC and Nicholson GJ “Evaluating Boards and Directors” (2005) 613-631.

²⁴¹ In this regard, the board evaluation is linked to the achievement of “overall corporate objectives” and therefore seeks to establish the board’s ability to meet “agreed objectives and corporate strategies” (OECD *Board of Directors of State-Owned Enterprises: An Overview of National Practices* (2012) 51).

²⁴² Atkinson T and Carter C *Evaluating Board Performance: A Guide for Directors* (Australian Institute of Company Directors 2006) 8-9 available at <https://books.google.co.zw/books?isbn=1876604697> (accessed on 13 January 2015).

²⁴³ Kiel GC and Nicholson GJ “Evaluating Boards and Directors” (2005) 613-631. In Slovenia, it is obligatory for public entities boards to conduct self evaluations in accordance with a manual for self evaluation of boards, issued by Slovenian Directors’ Association. Similarly in Estonia, self-evaluation is mandatory in terms of commercial law and forms part of the annual report presented to the shareholders (OECD *Board of Directors of State-Owned Enterprises: An Overview of National Practices* (2012) 52).

²⁴⁴ Examples are section B of the UK *Corporate Governance Code*, section 5 of the *Malawi Code II: Sector Guidelines for Parastatal Organisations and State Owned Enterprises*, Principle 2.22 of the *King III* and Principle 1 of the *ASX CGC Corporate Governance Principles and Recommendations*.

²⁴⁵ Clarke T and Klettner A *The State of Play on Board Evaluation in Corporate Australia and Abroad* (Study Commissioned by The Australian Council of Superannuation Investors and Prepared by The Centre for Corporate Governance, University of Technology, Sydney in October 2010) 10-12 available at www.acsi.org.au (accessed on 24 May 2014).

Despite the general agreement on the necessity of evaluation of board performance, it has been found that the majority of public entities seem to be lagging behind in so far as implementation of systematic and consistent board evaluations is concerned.²⁴⁶ Moreover, in some cases where board evaluations have been improperly conducted they have caused disharmony in the boards and between the board and management.²⁴⁷ The first challenge has been identified as lack of formal board evaluation systems in the majority of the public entities.²⁴⁸ Most governments, especially in developing countries, were found to have no objective and standardised evaluation of board performance tools in place which makes it difficult to conduct effective board performance assessments.²⁴⁹ The second challenge has been the setting of incomprehensive, uncoordinated and vague performance indicators and lack of capacity to conduct performance assessment by the responsible authorities.²⁵⁰

Too much interference by governments on operational issues of public entities has been established as the third challenge.²⁵¹ Governments tend to interfere with operational decisions which, under normal circumstances, should be the prerogative of the boards, for example, the appointment of senior managers like the chief executive officer.²⁵² The resultant challenge is that managers may be appointed on criteria other than managerial skills and executive

²⁴⁶ Simpson SNY “Performance Contract and Performance Evaluation of State-Owned Enterprises: Insights from the Goal Setting Theory” (2013) 3(2) *Journal of Public Administration and Governance* 22-39.

²⁴⁷ Kiel GC and Nicholson GJ “Evaluating Boards and Directors” (2005) 613-631.

²⁴⁸ Most companies are yet to develop their own internal indicators to evaluate the performance of board members. There are currently no formal mechanisms to assess the performance of state representatives; neither are there any practices to make them liable for underperformance of duties (Filatov A, Tutkevich V and Cherkaev D *Board of Directors at State-Owned Enterprises (SOE) in Russia* (OECD Publishing 2005) 22 available at <http://www.oecd.org/daf/ca/35175304.pdf> (accessed on 28 August 2014).

²⁴⁹ The World Bank *Corporate Governance of State-Owned Enterprises: A Toolkit* (2014) 202.

²⁵⁰ In some instances, there are completely no written performance contracts for some of the public entities boards and where they are in place they are not effectively implemented and monitored by the respective government authorities because of lack of capacity (PwC and IoDSA *State-owned enterprises: Governance responsibility and accountability* (Public Sector Working Group: Position Paper 3 of 2011 (PricewaterhouseCoopers (PwC) & Institute of Directors in Southern Africa (IoDSA)) available at www.iodsa.co.za (accessed on 28 April 2014)).

²⁵¹ See para 3.6.1 above and Wong SCY “Improving Corporate Governance in SOEs: An Integrated Approach” (2004) 5-15. See also Salleh MFM and Ahmad A “Political Influence on Economic Decision-Making in Government-Owned Companies: From the Perspectives of Key Players” (2012) 6(7) *African Journal of Business Management* 2716-2726.

²⁵² In practice, the major key mandate of the board may be undertaken or at least heavily influenced by the responsible government authority which effectively means that the government would have a greater say in the strategy and purpose of the public entity than its board (Robinett D *The Challenge of SOE Corporate Governance for Emerging Markets* (2006) 24).

leadership which compromises the efficiency of the public entities.²⁵³ Similarly, the appointment of directors without considering the relevancy of their skills and competences creates challenges for boards to effectively discharge their duties.²⁵⁴ In addition, the numerous ministerial approval requirements (for example budget and strategic plan approvals) and delays in obtaining such approvals have the overall effect of constraining the ability of directors to make commercial and strategic decisions on a timely basis.²⁵⁵ The many issues beyond the board's control make it difficult to effectively measure its performance and to attribute poor performance of the entity wholly to the board.

A fourth challenge experienced by boards in effectively discharging their duties and achieving the entities' objectives has been found to be the high turnaround of directors which makes it difficult to achieve continuity, measure performance and does not allow boards to exercise any influence in corporate events.²⁵⁶ In some cases, the dismissal of board members was undertaken without using any concrete performance data but simply based on perception which makes it difficult to assess whether or not evaluation of board performance is at all important.²⁵⁷ Fifthly, due to the absence of transparency (timely and accurate disclosure) in public entities, the shareholder and other stakeholders have not had access to sufficient and timely information about the operations and financial position of the public entity such that they have been unable to effectively evaluate whether the board or management have effectively discharged their duties.²⁵⁸

²⁵³ Sule OE and Ugoji IE "Impact of Personal Recruitment on Organisational Development: A Survey of Selected Nigerian Workplace" (2013) 4(2) *International Journal of Business Administration* 79-103. See also Ileri E *Appointment of Board of Directors to State Owned Enterprises in Kenya: Towards A Stricter Regulatory Framework* Unpublished Thesis (University of Nairobi 2009) 28-29.

²⁵⁴ Ibid. See also Indreswari M *Corporate Governance in the Indonesian State Owned Enterprises* (2006) 106-107.

²⁵⁵ Wong SCY "Improving Corporate Governance in SOEs: An Integrated Approach" (2004) 5-15 and Salleh MFM and Ahmad A "Political Influence on Economic Decision-Making in Government-Owned Companies: From the Perspectives of Key Players" (2012) 2716-2726.

²⁵⁶ Vagliasindi M *The Effectiveness of Boards of Directors of State Owned Enterprises in Developing Countries* (2008) 3-4.

²⁵⁷ Ibid.

²⁵⁸ Wickberg S *Transparency of State-Owned Enterprises* (Transparency International 2013) 1-3 available at http://www.transparency.org/files/content/corruptionqas/Transparency_of_state_owned_enterprises.pdf (accessed on 25 September 2014). See also Xu X and Xu X "Information Disclosure of State-Owned Enterprises in China" (2012) 4(1) *Tsinghua China Law Review* 3-10 available at <http://ssrn.com/abstract=2505713> (accessed on 25 September 2014). Best practice of corporate governance requires that public entities should report annually to inform the public of their activities and performance (For example, para 5.2.13 of the South African *Protocol on Corporate Governance in the Public Sector*, Part 3 of the Australian Commonwealth Government Business Enterprise (GBE) *Governance and Oversight Guidelines*, schedule C of the *Combined Code* and section 20 of the *Malawi Code II: Sector Guidelines for Parastatal Organisations and State Owned Enterprises*).

Evaluation of board performances have been complicated further by the requirement for public entities to accomplish numerous and contradictory objectives.²⁵⁹ The entities are expected to operate in a commercially efficient and profitable manner whilst required to provide goods and services at subsidised prices, create employment and to make other decisions “based on political rather than commercial criteria”.²⁶⁰ Thus, by acting in the best interest of a public entity, the board may violate the shareholder’s social, economic or political goals. All these challenges make it complicated to evaluate and conclude whether or not a board has effectively performed its duties.

However, where board evaluations have been properly implemented, enormous benefits have been derived.²⁶¹ As indicated above, the evaluation of board performance assists government authorities to assess the overall functioning of the board, determine the characteristics that the board should have and, in doing so, to improve future board nominations and its supervisory functions. Board evaluations also assist the board to identify its weaknesses (the areas that need to be worked on), areas of strength and help it to cooperate more efficiently and to perform better in future.

3.6.6 Enforcement of Corporate Governance Compliance

The King Committee made the following observation regarding compliance and enforcement: “all principles embodied in a code of corporate governance are effective only if adequate remedies and sanctions exist to enforce compliance with those principles.”²⁶² According to the Committee, rules are only as effective as their enforcement. This is also supported by

²⁵⁹ Omasa JMM *Failure of Good Corporate Governance in State Owned Corporations in Kenya: Towards a More Effective Parliamentary Monitoring Role* Unpublished Thesis (University of Nairobi 2014) 27-28.

²⁶⁰ Ashipala SM *An Analysis of Corporate Governance within the Framework of State Owned Enterprises Governance Act in Namibia with Specific Focus on Namwater, Nampower And Transnamib* Unpublished Thesis (University of Stellenbosch 2012) 3.

²⁶¹ Examples of countries that have seriously and formally implemented board evaluations are Mexico, Poland, Sweden, Switzerland and Finland (OECD *Board of Directors of State-Owned Enterprises: An Overview of National Practices* (2012) 50-53).

²⁶² “Introduction and Background” to the *King III Report*.

Berglöf and Claessens who found that corporate governance and enforcement mechanisms are “intimately linked”.²⁶³

Originally, countries left the issues of corporate governance to self-regulation²⁶⁴ but the continued increase in poor corporate governance practices and their disastrous consequences led a number of countries to consider self-regulation as insufficient on its own.²⁶⁵ For this reason, it was considered necessary to complement self-regulation with some legal and regulatory mechanisms so as to encourage companies to comply with good corporate governance principles.²⁶⁶ As a result, most countries have resorted to applying a combination of codes and principles on one hand, and legal and regulatory instruments on the other.²⁶⁷ In fact, in a number of countries, it is obligatory to disclose and provide explanations where certain code recommendations are not observed.²⁶⁸ The countries have, therefore, not

²⁶³ Berglöf E and Claessens S *Corporate Governance and Enforcement* (2004) 1.

²⁶⁴ Several corporate governance codes acknowledge that there is no “one size fits all” solution to corporate governance hence the reason they have sought to promote self-regulation in corporate governance. As an example, the *King III Report* recommends an “apply or explain” approach which means that where entities have applied the Code and best practice recommendations in the *Report*, a positive statement should be made to the stakeholders to this effect and where the entities have not complied with any principle or recommendation they should fully explain the reasons to the stakeholders (“Introduction and Background” to the *King III Report*). The UK *Corporate Governance Code* recommends a “comply or explain” approach which requires corporations to indicate how the principles of the *Code* have been applied and to provide an explanation when they do not comply with certain provisions of the *Code* (UK *Corporate Governance Code* 4).

²⁶⁵ Bhasin ML “Corporate Governance Disclosure Practices: The Portrait of a Developing Country” (2010) 5(4) *International Journal of Business and Management* 150-167. See The World Bank *Corporate Governance Country Assessment* (Report on the Observance of Standards and Codes (ROSC) Corporate Governance 2006) 10-12 available at http://www.worldbank.org/ifa/rosc_cg_bhutan.pdf (accessed on 15 October 2014). The continued increase in corporate collapses has made a number of policy makers and researchers to concede to the fact that the development of corporate governance in a country is largely determined by the availability and proper enforcement of legal and regulatory systems (La Porta R *et al* “Investor Protection and Corporate Valuation” (2002) 1147-1170).

²⁶⁶ The main elements of the legal and regulatory framework include company law, securities law and other relevant regulations on corporate governance. A number of countries’ legislative frameworks provide for penalties to be imposed on those who fail to implement good corporate governance standards. (The World Bank *Corporate Governance Country Assessment* (2006) 10-12). See also Chu Ngum P *Using the OECD Principle of Corporate Governance as an International Benchmark: A Comparative Analysis of Corporate Governance Legislation in the UK, US and South Africa* Unpublished Thesis (Anglia Ruskin University 2009) 7-9 and OECD *Corporate Governance Factbook* (OECD Publishing 2014) 13 available at <http://www.oecd.org/daf/ca/CorporateGovernanceFactbook.pdf> (accessed on 12 October 2014).

²⁶⁷ Picciotto S “Rights, Responsibilities and Regulation of International Business” (2003) 42(131) *Columbia Journal of Business Law* 133-151 available at www.lancaster.ac.uk/staff/1wasp/coljtnl03.doc (accessed on 13 October 2014). Examples are South Africa, Australia and the UK. South Africa has prescriptive rules and regulations (for example the Companies Act, PFMA, Johannesburg Stock Exchange *Listing Requirements*) but continues to strive to promote self-regulation in corporate governance as evidenced by the provisions of its *King Reports*. Australia’s self regulatory regime is supported by the ASX CGC *Corporate Governance Principles and Recommendations* and GBE *Governance and Oversight Guidelines* and the legislative framework comprising of the Corporations Act 50 of 2001, Commonwealth Authorities and Companies Act 153 of 1997, the Public Governance, Performance and Accountability Act 123 of 2013, among others. Similarly, the UK framework has prescriptive rules and regulations (for example the Companies Act 2006, the Financial Services Authority (FSA) *Listing Rules*) and best practice principles as stipulated in the UK *Corporate Governance Code*.

²⁶⁸ In the majority of countries, stock exchanges are responsible for monitoring and analysing whether listed companies are adequately disclosing the matters relating to adherence to the provisions of the Codes and whether they provide adequate explanations for non-compliance. The non-disclosure or false disclosure could lead to a range of legal penalties such as,

prescribed corporate governance behaviour per se, but require entities to voluntarily implement the recommendations in the corporate governance codes and provide justifications for non-compliance.

Some countries have resorted to a more prescriptive regulatory approach which makes compliance with good corporate governance principles mandatory.²⁶⁹ These countries do not have national codes or principles under the “comply or explain” framework, instead all corporate governance issues are covered by either laws or regulations (including listing rules).²⁷⁰ An example is the Sarbanes-Oxley Act²⁷¹ which is legislation passed by the United States of America Congress to protect shareholders and the general public from accounting errors and fraudulent practices in the enterprises, as well as to improve corporate governance and accountability.²⁷² Another example is the Securities and Exchange Board of India Act²⁷³ which seeks to protect the interests of investors in securities and to promote the development of, and to regulate, the securities market, all of which have a significant impact on corporate governance in India.²⁷⁴

among others, fines, legal liability for damages and holding a person inappropriate for acting as a director in cases of extreme disobedience (OECD *Corporate Governance Factbook* (2014) 15). See also Study on *Monitoring and Enforcement Practices in Corporate Governance in the Member States* conducted by RiskMetrics Group in September 2009 61-63 available at http://ec.europa.eu/internal_market/company/docs/ecgforum/studies/comply-or-explain-090923_en.pdf (accessed on 17 October 2014).

²⁶⁹ Picciotto S “Rights, Responsibilities and Regulation of International Business” (2003) 133- 151. See also OECD *Corporate Governance Factbook* (OECD 2014) 13.

²⁷⁰ Ibid. See also OECD *Corporate Governance: A Survey of OECD Countries* (OECD Publishing 2004) 40-41 available at <http://www.oecd.org/corporate/ca/corporategovernanceprinciples/21755678.pdf> (accessed on 21 October 2014).

²⁷¹ Sarbanes-Oxley Act of 2002.

²⁷² “Preamble” to the Sarbanes-Oxley Act. The Sarbanes-Oxley Act was drafted by U.S. Congressmen Paul Sarbanes and Michael Oxley and enacted by the U.S Congress in response to a series of high-profile financial scandals that occurred in the early 2000s at companies including Enron, WorldCom and Tyco. The Act was designed to improve corporate governance and accountability and to protect investors from the possibility of fraudulent accounting activities by corporations. All public companies must comply with the Act (Jahmani Y and Dowling WA “The Impact of Sarbanes-Oxley Act” (2008) 6(10) *Journal of Business & Economics Research* 57-66 and Clark KN *The Effects of Sarbanes Oxley on Current Financial Reporting Standards* Unpublished Thesis (Liberty University 2012) 4-7).

²⁷³ Securities and Exchange Board of India Act 15 of 1992.

²⁷⁴ “Preamble” to the Securities and Exchange Board of India Act. The overall objectives of SEBI are to protect the interest of investors, promote the development of stock exchange, regulate the activities of stock market and to prevent fraudulent and malpractices by having balance between self-regulation of business and its statutory regulations (Pujari S *The Purpose, Objective and Functions of SEBI* Published Article available at <http://www.yourarticlelibrary.com/education/sebi-the-purpose-objective-and-functions-of-sebi/8762/> (accessed on 12 February 2015).

A number of researchers have strongly argued that an overly prescriptive approach as contained in the Sarbanes-Oxley and Securities and Exchange Board of India Acts might not solve the corporate governance challenges as there are restrictions to legislating on corporate governance.²⁷⁵ Much depends on the reliability and ethical values of the directors and management.²⁷⁶ In support of this assertion Keutgen states that “one must above all be wary of the temptation to believe that salvation can only come from the law to the extent that corporate governance, correctly understood, is more a matter of ethics than for regulatory restraint”.²⁷⁷ Policymakers, investors and other stakeholders have therefore, acknowledged that, although the law is necessary, it is not an adequate factor in coercing directors and management to comply with good corporate governance practices as even the strictest corporate governance standards may not be enough to restrain fraud and other corrupt tendencies.²⁷⁸

From the above, it can be concluded that there is no single prescribed way of enforcing good corporate governance principles hence most countries have tried to match whatever enforcement mechanisms they consider necessary to their local environment.²⁷⁹ Corporate governance practices tend to reflect the country’s underlying cultural values.²⁸⁰ Transplanted laws may, therefore, not be as effective in addressing the corporate governance challenges

²⁷⁵ Anand AI “An Analysis of Enabling vs. Mandatory Corporate Governance Structures Post Sarbanes-Oxley” (2006) 31 *Delaware Journal of Corporate Law* 229-252 available at <http://www.djcl.org/wp-content/uploads/2014/08/> (accessed on 22 April 2015). See also DeJong A *et al* “The Role of Self-Regulation in Corporate Governance: Evidence and Implications from The Netherlands” (2005) 11 *Journal of Corporate Finance* 473–503 and Andreadakis S *Corporate Governance in the Aftermath of the Scandals: The EU Response and the Role of Ethics* Unpublished Thesis (University of Leicester 2010) 282-284.

²⁷⁶ Ibid. See also Cunningham GM and Harris JE “Enron and Arthur Andersen: The Case of the Crooked E and the Fallen A” (2006) 3(1) *Global Perspectives on Accounting Education* 27-48.

²⁷⁷ Van den Bergh L *International Standardisation of Good Corporate Governance: Best Practices for the Board of Directors* (Springer Science & Business Media 2012) 55. For similar comments, see also Anand AI “An Analysis of Enabling vs. Mandatory Corporate Governance Structures Post Sarbanes-Oxley” (2006) 229-252.

²⁷⁸ Ibid.

²⁷⁹ Trebeck K “Exploring the Responsiveness of Companies: Corporate Social Responsibility to Stakeholders” (2008) 4(3) *Social Responsibility Journal* 349-365. See also Langtry S *Corporate Governance (A Discussion Paper to Assist with the Preparation of South Africa’s African Peer Review Mechanism (APRM) Self Assessment Report 2005)* available at www.aprm.org.za/docs/APRMOpinionPiece-CorporateGovernance (accessed on 15 October 2014).

²⁸⁰ Miles L *Transplanting the Anglo American Corporate Governance Model into Asian Countries: Prospects and Practicality* Unpublished Thesis (Middlesex University 2010) 49-50. See also Reyes MP *The Challenges of Legal Transplants in a Globalized Context: A Case Study on ‘Working’ Examples* Unpublished Thesis (University of Warwick 2014) 36-37.

especially in developing countries.²⁸¹ A similar argument on the applicability of transplanted laws has been made in respect of other areas of corporate law.²⁸²

Despite the acknowledgement of the need to enforce compliance with corporate governance principles, many countries, especially developing and transitional countries, do not have effective institutions to enforce such compliance.²⁸³ This is mostly because few developing and transitional countries have “adequate courts, judges and public enforcement agencies, and the means for shareholders to institute legal actions on their own”.²⁸⁴ As a result, enforcing compliance has not been effective enough to produce desired results in a number of countries as proved by the continued occurrence of corporate scandals and collapses.

3.7 PRELIMINARY CONCLUSIONS

This chapter defined corporate governance for purposes of this thesis, discussed its importance and the value it adds to an organisation. It also outlined some international corporate governance developments, examined the crucial elements in ensuring an effective board and reviewed mechanisms put in place by countries to enforce compliance with good corporate governance practices. Five major areas were considered as crucial in improving board effectiveness, namely its role, selection and appointment, composition, remuneration and performance evaluation. These five aspects were considered especially to ascertain how they should be structured and managed to enable the boards of public entities to effectively discharge their duties.

²⁸¹ Researchers have, in some instances, attributed the poor corporate governance in developing countries to the fact that laws in these countries were transplanted from developed countries (mostly colonial masters) rather than derived from local practices (Berglof E and Claessens S *Enforcement and Corporate Governance: Three Views* (World Bank Policy Research Working Paper No. 3409, September 2004) 4-5, available at <http://ssrn.com/abstract=625286> (accessed on 2 September 2014)). See also Graham D and Woods N “Making Corporate Self-Regulation Effective in Developing Countries” (2006) 34(5) *World Development* 868–883 available at <http://www.uio.no/studier/emner/annet/sum/SUM4022/h08/Graham.pdf> (accessed on 17 May 2015).

²⁸² As an example, commenting on the applicability of English law to the South African situation, Pretorius and Others indicated that English law could not be binding in South Africa but could only be persuasive (Pretorius JT *et al Hahlo’s South African Company Law Through the Cases* (1999) 2). See also Havenga M “The Business Judgment Rule – Should We Follow the Australian Example?” (2000) 12 *South African Mercantile Law Journal* 25-37 and Jones E “Directors’ Duties: Negligence and the Business Judgment Rule” (2007) 19 *South African Mercantile Law Journal* 326–336.

²⁸³ Millstein IM *Non-Traditional Modes of Enforcement* (Paper presented at the Lex Mundi North America Regional Conference jointly organised by Lex Mundi and the Global Corporate Governance Forum in 2003) 1 available at <http://www-wds.worldbank.org/external/.../357100Focus1ENFCorpGov3.pdf> (accessed on 10 October 2014).

²⁸⁴ *Ibid.*

Corporate governance essentially concerns how organisations are directed, managed, controlled and held accountable to their stakeholders. The purpose of any corporate governance system is to concurrently improve corporate performance and accountability as a means of attracting financial and human resources and to prevent corporate failure. Following rampant worldwide corporate collapses, a number of international organisations have come up with guidelines and procedures on corporate governance to address the various challenges. Public entities have not been spared of the need to observe good corporate governance principles especially considering their importance both economically and socially.

A number of analysts and researchers have established that having an effective board is one of the key elements to a successful public entity. According to the literature analysed, the effectiveness of the boards in public entities is achieved through clear and comprehensively articulated roles, empowering boards to discharge their duties with minimum interference, transparent and proper appointment of directors, appropriately composed boards in terms of independence and diversity, evaluating boards' performance and payment of adequate remuneration to motivate board members to exert their best efforts. It has been established that the majority of countries apply a combination of self-regulatory codes and principles and legal and regulatory instruments. But, a number of countries, particularly developing countries, have not had adequate resources to effectively enforce compliance with good corporate governance standards.

Having looked at the corporate governance framework from a general perspective, the next chapter analyses Zimbabwe's corporate governance framework with particular focus on measures put in place to enhance the effectiveness of boards of public entities.

CHAPTER 4

ZIMBABWE'S CORPORATE GOVERNANCE FRAMEWORK

4.1 INTRODUCTION

Zimbabwe obtained its independence in April 1980. The country's first ten years of independence were characterised by rigorous policy making efforts to address inequalities and injustices created by policies before independence.¹ However, in spite of the commendable efforts by the policy makers, the country started experiencing economic and social challenges in the 1990s resulting in huge debts,² worsened poverty levels and retardation in economic growth.³ Since then, the country has implemented a number of policies to economically and socially resuscitate the country. Examples of the recovery programmes are the *Economic Structural Adjustment Programme (ESAP)*,⁴ the *Zimbabwe Programme for Economic and Social Transformation (ZIMPREST)*,⁵ the *Short Term*

¹ Zhou G and Zhou H "Public Policy Making in Zimbabwe: A Three Decade Perspective" (2012) 2(8) *International Journal of Humanities and Social Science* 212-222.

² The country experienced a plethora of economic hardships which resulted in the need to control government expenditure, particularly the huge subsidies to the public entity sector (Bulbuena SS *State-owned Enterprises in Southern Africa: A Stocktaking of Reforms and Challenges* (2014) 49.

³ Saunders R "Economic Structural Adjustment Programme (ESAP)'s Fables II" (1996) 11(4) *Southern Africa Report (SAR)* 8 available at <http://www.africafiles.org/article.asp?ID=3876> (accessed on 13 November 2014).

⁴ Zimbabwe's ESAP was launched in 1990 and lasted until 1995. ESAPs were adopted across Africa and the rest of the world in line with International Monetary Fund (IMF) and World Bank recommendations. The recommended policy measures involved, *inter alia*, reducing government budget deficit, raising investment and reducing inflation. During the same period Zimbabwe implemented public enterprise reforms, like deregulating sectors in which public entities operate and restructuring them (commercialising and privatising), as part of structural adjustment programmes. However, an assessment of the results derived from implementing ESAP indicates that the desired results were not achieved as the budget deficit increased, inflation worsened, level of investment declined and public entities continued to incur losses (Zhou G and Zhou H "Public Policy Making in Zimbabwe: A Three Decade Perspective" (2012) 212-222).

⁵ The ZIMPREST programme was implemented in 1998. The programme sought to address the limitations of ESAP through restoration of "macro-economic stability, poverty alleviation as well as facilitating public and private savings and investment". Nonetheless, the programme was not so successful due to the fact that the programme's goals were too "ambitious", absence of political will to implement, lack of international financial support to fund programme implementation and absence of enabling legal and institutional frameworks (Shizha E and Kariwo MT *Education and Development in Zimbabwe: A Social, Political and Economic Analysis* (Springer Science & Business Media 2012) 8-9 and Zhou G "From Interventionism To Market-Based Management Approaches: The Zimbabwean Experience" (2001) XXVIII (ii) *Zambezia* 229-261).

Emergency Recovery Programme (STERP),⁶ the Indigenisation and Economic Empowerment Policy (IEEP)⁷ and the Zimbabwe Agenda for Sustainable Socio-Economic Transformation (Zim Asset).⁸

Despite the significant number of policy initiatives, the country has continued to encounter a number of economic and social challenges. These challenges have not spared public entities which have continued to be a drain to the fiscus due to poor performance financially and otherwise.⁹ Over the last two decades, a number of major public entities have been found not to be financially sustainable and there have been revelations of increased misappropriation of funds allegedly due to a lack of efficient corporate governance systems.¹⁰ Furthermore, the entities and the whole country have also experienced pressure from international investors

⁶ STERP was a 2009 emergency short term government stabilisation programme, whose key objectives were to stabilise the economy, “recover the levels of savings, investment and growth, and lay the basis of a more transformative midterm to long term economic programme” that would turn Zimbabwe “into a progressive developmental State”. The key priorities for STERP were political and governance issues, social protection and stabilisation (STERP document is available at www.zimtreasury.gov.zw/zim-asset (accessed on 1 December 2014).

⁷ The IEEP was formulated in 2008. The objective of promulgating the IEEP is to empower black populations which were disadvantaged in the colonial era by giving them an opportunity to participate in the national economy through owning businesses and increasing their share in the corporate sector (“Preamble” to the Indigenisation and Economic Empowerment Act (Chapter 14:33) (Act No. 14 of 2007). The main challenge with this policy is that it has stalled investment into the country allegedly because it has a lot of ambiguities and has the effect of disempowering investors (Sibanda A “The Corporate Governance Perils of Zimbabwe’s Indigenisation Economic Empowerment Act 17 of 2007” (2014) 4(1) *International Journal of Public Law and Policy* 24-36). See also Mzumara M *Indigenisation Act Continues to Create Confusion (The Financial Gazette of 5 June 2014 available at www.financialgazette.co.zw/newspaper)* 8 and Ncube S *Indigenisation Act’s Ambiguities Repelling Investors – EU Block, (The Zimbabwe Mail of 22 November 2014)* 6 available at <http://www.thezimbabwemail.com>.

⁸ Zim Asset is a government economic blueprint that aims to spearhead the turnaround and development of the economy over the next five years (2014-2018). Its main aim is “to achieve sustainable development and social equity anchored on indigenization, empowerment and employment creation”. It identifies four, but all-encompassing clusters namely; food security and nutrition, social services and poverty reduction, infrastructure and utilities and value addition and beneficiation (*Zim Asset Policy Document* is available at www.zimtreasury.gov.zw/zim-asset (accessed on 1 December 2014). It is premature to assess whether the policy has been implemented successfully or not although some of the programmes have not been implemented as per plan.

⁹ Zvavahera P “Corporate Governance and Ethical Behaviour: The case of the Zimbabwe Broadcasting Corporation” (2014) 9 *Journal of Academic and Business Ethics* 1-8 and Moyo G *The State of Corporate Governance in Zimbabwe’s State Enterprises: Can the Situation be Rescued?* (2012). During the period 2012 to 2014, seven public entities were reported to have received US\$110 million “draining Treasury which last year failed to pay civil servants” (Makoshori S *Parastatals Bleed Broke Govt (The Financial Gazette of 11-17 June 2015)* 1). According to a report produced by the then Ministry of State Enterprises and Parastatals on the performance of parastatals in 2011, “the National Railways of Zimbabwe (NRZ), Grain Marketing Board (GMB), Industrial Development Corporation (IDC) and TelOne were draining the fiscus, while those performing well, which included Zimbabwe Power Company, Petrol Trade and National Oil Infrastructure Company of Zimbabwe only made marginal profits” (Mambo E *CEO Salaries Bleed Parastatals (Zimbabwe Independent of 11 October 2013)* 1).

¹⁰ Ibid. Examples of inefficiently performing public entities are Air Zimbabwe Ltd, Zimbabwe Mining Development Corporation (ZMDC) Zimbabwe United Passengers Company (ZUPCO), Grain Marketing Board (GMB) and National Railways of Zimbabwe (NRZ) which have failed to efficiently render air, mining related, public transport, grain related and railway services to the public, respectively (Mutanda D “The Impact of the Zimbabwean Crisis on Parastatals” (2014) 5(2) *International Journal of Politics and Good Governance* 1-14). See also *State Entities, Parastatals in Shambles and Govt Tackles US\$600m Inter-Parastatal Debt (The Zimbabwe Independent of 5-12 April 2012 and 17-23 October 2014 respectively)* available at <http://www.theindependent.co.zw> (accessed on 3 December 2014).

who demand good standards of corporate governance before investing their monies.¹¹ The poor corporate governance practices by public entities have adversely affected their service delivery and have retarded the economic growth and social development of the country.¹²

Following the economic and social challenges that Zimbabwe continued to experience and encouraged by international social and economic developments, the country made concerted efforts to restore investor confidence and enhance corporate transparency and accountability in its public and private sectors.¹³ This chapter analyses Zimbabwe's public entity corporate governance framework.¹⁴ The ultimate goal is to establish the extent to which the framework has enabled boards of public entities to effectively discharge their duties, with the aim of recommending measures which can strengthen this effectiveness so that the boards and public entities can significantly contribute to economic and social development.¹⁵

4.2 ZIMBABWE'S CORPORATE GOVERNANCE FRAMEWORK

4.2.1 Overview of Corporate Governance Developments in Zimbabwe

Zimbabwe responded to international developments and challenges of poor corporate governance practices by creating a solid corporate governance framework to mitigate further occurrences of corporate failure. In developing its corporate governance systems, Zimbabwe adopted a mixture of aspects of the corporate governance structures found in developed

¹¹ Tsumba LL *Corporate Governance Country Case Experience - Perspectives and Practices: Zimbabwe* (Reserve Bank of Zimbabwe Paper 2004) 15-18.

¹² Zvavahera P "Corporate Governance and Ethical Behaviour: The case of the Zimbabwe Broadcasting Corporation" (2014) 1-8. See also Chisango FFT and Dube LG "Perception on the Impact of Corruption and Salary Gate Scandals on the Image and Reputation of Parastatal Entities in Zimbabwe: A Case of Premier Service Medical Aid Society PSMAS and Zimbabwe Broadcasting Corporation ZBC, Gweru" (2015) 4(4) *International Journal of Innovative Research & Development* 345-351 available at <http://www.ijird.com/index.php/ijird/article/viewFile/69977/54948> (accessed on 17 December 2015) and Mhlanga P *Chidhakwa Slams Parastatal Boards* (*The Financial Gazette* of 28 January 2016) C5.

¹³ To prove the concerted efforts and seriousness good corporate governance is being given, the Institute of Chartered Secretaries and Administrators in Zimbabwe (ICSAZ) has introduced annual awards that seek to cultivate a culture of good corporate governance (Chenga N *Poor Corporate Governance behind Corporate Failures* (*Financial Gazette* of 21 November 2013) 3 available at [www.financialgazette.co.zw/News/Companies & Markets](http://www.financialgazette.co.zw/News/Companies%20&%20Markets) (accessed on 27 October 2014).

¹⁴ As highlighted before (Chapter 1, para 1.5), the research focuses on five major areas namely; the role, selection and appointment, composition, remuneration and evaluation of the board.

¹⁵ These are the subject matters of chapters 7 and 8 below.

markets¹⁶ and other developing countries.¹⁷ The corporate governance framework in Zimbabwe has been self-regulatory.¹⁸ Although Zimbabwe has relied on a self-regulatory environment in its approach to corporate governance, some statutory institutions and instruments, such as the Zimbabwe Stock Exchange and the Public Finance Management Act, make it a requirement that specific entities comply with and subscribe to the recommendations of certain corporate governance codes.¹⁹

The Institute of Directors of Zimbabwe (IoDZ) spearheaded the campaign to adopt principles enshrined in the *Cadbury Report*, the *Combined Code*, the *King Reports* of South Africa, the Malawi's *Code of Best Practice for Corporate Governance* and other international corporate governance codes.²⁰ Technical assistance, to enhance the country's corporate governance, was provided by the International Finance Corporation (IFC), the World Bank, the African Management Services Company (AMSCO) and the Government of Denmark.²¹ Valuable insights were also drawn from the *CACG Guidelines*, *ICGN Principles* and *OECD Principles of Corporate Governance*.²²

¹⁶ For example, the Zimbabwean framework has been predominantly based on the UK *Cadbury Report* and its legal system (based on Roman-Dutch law) has been biased towards the British legal system due to its colonial history. It has been established that most developing countries have adopted similar institutional arrangements and laws to those found in their colonial masters (La Porta R *et al* "Investor Protection and Corporate Governance" (2000) 3-27).

¹⁷ The country borrowed from neighbouring countries like South Africa, Malawi and Namibia in developing its corporate governance framework. It borrowed considerably from the South African *King Reports* and *Protocol on Corporate Governance in the Public Sector* and the State Owned Enterprises Governance Act of Namibia (Act No. 2 of 2006) ("Introduction" to the *CGF* and Moyo G *The state of Corporate Governance in Zimbabwe's State Enterprises: Can the Situation be Rescued?* (2012)).

¹⁸ This is confirmed by the provisions of the country's corporate governance codes namely; the *Manual*, *CGF* and *National Code*. See also Maune A "Corporate Governance in Zimbabwe: An Overview of Its Current State" (2015) 167-178.

¹⁹ Section 7.F.5 of *ZSE Listing Requirements* (2002) and section 50 of the Public Finance Management Act. The *ZSE Listing Requirements* compel companies to include a statement in their annual reports indicating the extent to which they comply with "the principles set out in the Code of Corporate Practice and Conduct as set out in the King Report or Cadbury Report on Corporate Governance" to enable shareholders and potential investors to evaluate how the principles have been applied (Section 7.F.5 of *ZSE Listing Requirements* (2002)).

²⁰ Mangena M and Taurigana V "Disclosure, Corporate Governance and Foreign Share Ownership on the Zimbabwe Stock Exchange" (2007) 18(2) *Journal of International Financial Management & Accounting* 53-85. See also Maune A "Corporate Governance in Zimbabwe: An Overview of Its Current State" (2015) 167-178, "Introduction" to the *CGF* and The World Bank *Zimbabwe: Corporate Governance Assessment and ROSC Module* (World Bank ROSC Reports on the Observance of Standards and Codes) available at [Modulehttp://www.worldbank.org/ifa/rosc_cg_zimbabwe.html](http://www.worldbank.org/ifa/rosc_cg_zimbabwe.html) (accessed on 3 December 2014).

²¹ *Ibid*. See also "Foreword" to the *Manual*.

²² Section C of the *Manual* and Moyo G *The State of Corporate Governance in Zimbabwe's State Enterprises: Can the Situation be Rescued?* (2012). The Pan African Consultative Forum on Corporate Governance, United Nations Economic Commission for Africa (UNECA), African Union (AU), Common Market for Eastern and Southern Africa (COMESA) and Southern African Development Community (SADC) have assisted Zimbabwe in developing its corporate governance framework (Tsumba LL *Corporate Governance Country Case Experience - Perspectives and Practices: Zimbabwe* (2004) 17-18).

Zimbabwe also participated in and benefited from Africa specific corporate governance initiatives like *New Partnership for Africa's Development*, *African Peer Review Mechanism*, *Africa Governance Forum* and *Africa Governance Inventory*.²³ The African Development Bank and Centre for Corporate Governance programs targeted at promoting good corporate governance standards were of additional benefit in the development of the Zimbabwean corporate governance framework.²⁴ To further confirm its commitment to good corporate governance, Zimbabwe is one of the twelve African countries who are founder members of the African Corporate Governance Network launched in October 2013.²⁵

The corporate governance framework in Zimbabwe is determined by the *Principles for Corporate Governance in Zimbabwe: Manual of Best Practices*, the Constitution, various Acts of Parliament governing public entities, for example, the Companies Act, Acts establishing public entities²⁶ and the Public Finance Management Act (PFMA), *National Code of Corporate Governance*, *Corporate Governance Framework for State Enterprises and Public Entities*, the Zimbabwe Stock Exchange *Listing Requirements*, common law and the *Corporate Governance and Remuneration Policy Framework*.²⁷ However, as indicated above,²⁸ a number of organisations in Zimbabwe have adopted, in addition to the above instruments, corporate governance principles as outlined in other internationally recognised corporate governance codes and guidelines to promote good corporate governance.²⁹

²³ Tumba LL *Corporate Governance Country Case Experience - Perspectives and Practices: Zimbabwe* (2004) 16-18.

²⁴ AfDB *Zimbabwe Country Brief 2013-2015* (African Development Bank (AfDB) Group 2013) 5-7 available at <http://www.afdb.org/.../afdb/Docs/Project-and-Operations/2013-2015 - Zimbabwe - Country Brief.pdf> (accessed on 12 February 2015).

²⁵ See Chapter 3, para 3.5 above.

²⁶ For example, the Minerals Marketing Corporation of Zimbabwe Act 2 of 1982, Zimbabwe Mining Development Corporation Act 31 of 1982 and the Grain Marketing Act 20 of 1966. It should be noted that all the Acts governing the public entities follow the same format and wording except in very few sections. The main difference in the Acts is in connection with the different functions for which the entities were created. In the discussion of these statutes, sections from any of them will be used as examples. The comparable sections in the other Acts are only referred to where the provisions differ.

²⁷ Maune A "Corporate Governance in Zimbabwe: An Overview of Its Current State" (2015) 167-178.

²⁸ Chapter 1, para 1.5.6 above.

²⁹ Maune A "Corporate Governance in Zimbabwe: An Overview of Its Current State" (2015) 167-178. For example, the *MMCZ 2009 Annual Report* states that "the Board regularly reviews the Corporation's policies and procedures to ensure compliance and consistency with the principles enshrined in the *King III Report* and other reports on corporate governance" (*MMCZ 2009 Annual Report*) 7. See also Delta Corporation Zimbabwe's *2013 Annual Report*, where it was reported that the company has put in place "responsive systems of governance and practice which the Board and management regard as entirely appropriate and in accordance with the code of Corporate Practices and Conduct contained in the Cadbury and King

4.2.1.1 The Principles for Corporate Governance in Zimbabwe: Manual of Best Practices

The first corporate governance instrument to be established by Zimbabwe, in 2001, was “*The Principles for Corporate Governance in Zimbabwe: Manual of Best Practices*”.³⁰ The Manual was produced by concerted efforts of several institutions and individuals under the leadership of Minor C A (African Management Services Company) and Van Hoestenbergh K (Carl Bro Group, Denmark).³¹ It was developed based on existing local conditions to ensure local ownership and participation.³² The main aim of the *Manual* is to encourage the highest standard of corporate governance in Zimbabwe by recommending standards of conduct for directors and emphasising the need for responsible corporate conduct.³³

The other objectives are stated as to create an enabling environment for business and attract outside investment and to “improve the institutional capacity to build good corporate governance in Zimbabwe”.³⁴ The *Manual* focuses more on the qualitative rather than quantitative aspects of good corporate governance in that it extends beyond the existing legal and regulatory framework and seeks to identify key areas of good corporate governance practice which would be voluntarily and effectively applied by all companies,³⁵ directors and management.³⁶

Reports on Corporate Governance” (*Delta 2013 Annual Report* 30 available at <http://www.investinginafrica.net/wp-content/uploads/2013/12/Delta-Annual-Report-2013.pdf> (accessed on 15 July 2014).

³⁰ Hereinafter referred to as the *Manual*.

³¹ Examples of institutions that participated in the development of the *Manual* are the International Finance Corporation, the World Bank, the African Management Services Company, the Government of Denmark and People & Systems Inclusive Management Consultants of Zimbabwe. Examples of the individuals include G Mundela, J Kimemiah, D Pasipanodya and P Mugoni who worked with a Taskforce of Zimbabwe Business leaders. Prof B Garatt and Mr. M Masunda (corporate governance experts) reviewed the *Manual* (“Foreword” to the *Manual*).

³² “Introduction” to the *Manual*.

³³ The *Manual* seeks to create an enabling environment for business and to attract outside investment. It “intends to complement the Commonwealth Association for Corporate Governance (CAGG) Guidelines and to articulate, expand and clarify these guidelines” (“Introduction” to the *Manual*).

³⁴ “Introduction” to the *Manual*.

³⁵ These include both public and private entities (“Introduction” to the *Manual*).

³⁶ “Introduction” to the *Manual*. The *Manual* is therefore a voluntary code intended to promote good corporate governance in all entities in Zimbabwe.

4.2.1.2 Constitution of Zimbabwe

Zimbabwe repealed its Constitution of 1980 and developed a new Constitution in 2013.³⁷ The Constitution of Zimbabwe, which is the supreme law of the country, raises the quality of governance demanded of the Zimbabwean society and sets out corporate governance as an inherently vital part of a healthy and prosperous nation.³⁸ The Constitution states that Zimbabwe is founded on respect for internationally accepted principles of good corporate governance.³⁹ Section 9 of the Constitution provides for good governance. It states that the government must adopt and implement policies and legislation “to develop efficiency, competence, accountability, transparency, personal integrity and financial probity” in all institutions.

The same section states that public office bearers must be appointed based on merit and measures must be taken to “expose, combat and eradicate all forms of corruption” by such officers. In addition, section 195 of the Constitution provides that companies and other commercial entities owned or wholly controlled by the state must conduct their operations so as to maintain commercial viability and abide by generally accepted standards of good corporate governance namely transparency, justice, accountability and responsiveness, among others.⁴⁰ Other examples of sections of the Constitution that seek to promote good corporate governance include sections 56(2),⁴¹ 165,⁴² 194-198,⁴³ 265(1),⁴⁴ and 298(1).⁴⁵

³⁷ Constitution of Zimbabwe Amendment Act (No. 20 of 2013).

³⁸ The Constitution states that Zimbabwe is founded on respect for internationally accepted principles of good corporate governance (Section 3 (1) (h) and (2) (g) of the Constitution of Zimbabwe).

³⁹ Section 3 (1) (h) and (2) (g) of the Constitution of Zimbabwe.

⁴⁰ See also sections 9(1), 56(2), 73, 165 (1) and (2), 194-198, 255(1), 264, 265(1), 270(1), 298(1) and 308(2-4) of the Constitution which also seek to promote good corporate governance in Zimbabwe.

⁴¹ This section provides for equality and non-discrimination and requires that all persons should have the right to be protected and benefit from the law. The Constitution mandates the government to put in place legislative and other measures to promote the achievement of equality and protection of all persons.

⁴² This section compliments section 56 by providing that justice should be done to all persons, regardless of status.

⁴³ Sections 194-198 provide for how public entities should be governed to achieve good corporate governance. For example, section 194 provides for a high level of professional ethics, transparency and economical and efficient uses of resources in public entities.

⁴⁴ This section provides that provincial, metropolitan councils and local authorities must ensure good governance by being “effective, transparent, accountable and institutionally coherent”.

The Constitution also borrows from the UN *Global Compact Guiding Principles* as regards the universally accepted principles in the areas of human rights, labour, environment and anti-corruption, factors which have a bearing on good corporate governance.⁴⁶ The UN *Global Compact's Guiding Principles* are derived from the *Universal Declaration of Rights*,⁴⁷ the *International Labour Organization's Declaration on Fundamental Principles and Rights at Work*,⁴⁸ the *RIO Declaration on Environment and Development*⁴⁹ and the *United Nations Convention Against Corruption*.⁵⁰ The UN Global Compact was officially launched at UN Headquarters in July 2000 with nine principles and the tenth principle was added in June 2004 during the first Global Compact Leaders' Summit.⁵¹

The *Guiding Principles* seek to “provide an authoritative global standard for preventing and addressing the risk of adverse human rights impacts linked to business activity”.⁵² The *Guiding Principles* are a strategic policy initiative that is voluntary in nature and targeted

⁴⁵ Section 298 refers to the principles of public financial management and requires that there must be transparency, prudence and accountability in public finance management.

⁴⁶ Chapter 4 of the Constitution. See the UN *Global Compact Guiding Principles on Business and Human Rights* (UN, New York and Geneva, 2011) available at http://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf (accessed on 17 April 2015).

⁴⁷ The *Universal Declaration of Human Rights* (UDHR) is a declaration adopted by the United Nations General Assembly on 10 December 1948 in Paris. Member states pledged themselves “to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms”. The declaration has twelve articles that focus on human rights and fundamental freedoms and is available at www.un.org/en/documents/udhr/ (accessed on 22 September 2015).

⁴⁸ The *Declaration on Fundamental Principles and Rights at Work* was adopted in June 1998, at the 86th International Labour Conference held in Geneva. It is a statement made by the International Labour Convention (ILO) requiring all its members “to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights” which are the subject of four Conventions. The Conventions are freedom of association and the effective recognition of the right to collective bargaining; the elimination of all forms of forced or compulsory labour; the effective abolition of child labour and the elimination of discrimination in respect of employment and occupation. ILO members, by virtue of being members of the Organisation, are required to comply with the declaration whether or not they have ratified the Conventions in question. The declaration is available at www.ilo.org/public/english/standards/relm/ilc/ilc86/com-dtxt.htm (accessed on 22 September 2015).

⁴⁹ The *Rio Declaration on Environment and Development* was adopted at a United Nations Conference on Environment and Development held Rio 4 de Janeiro in June 1992. The declaration has 27 principles which aim to promote future global sustainable development with regard to environmental and developmental systems. Visit <http://www.jus.uio.no/lm/environmental.development.rio.declaration.1992/portrait.a4.pdf> for more information.

⁵⁰ United Nations Global Compact *The UN Guiding Principles on Business and Human Rights: Relationship to UN Global Compact Commitments* (June 2014) 1 available at https://www.unglobalcompact.org/docs/issues_doc/human_rights/Resources/GPs_GC%20note.pdf (accessed on 27 September 2015).

⁵¹ Ibid.

⁵² Ibid.

towards businesses that are committed to aligning their operations and strategies with the ten universally accepted principles.⁵³ Participating states are required to enact and enforce effective policies, legislation and regulations to align their operations and strategies with the principles.⁵⁴

4.2.1.3 Companies Act

The Companies Act⁵⁵ has been in existence since 1951 although part amendments have been undertaken where considered necessary.⁵⁶ The Act governs the constitution, incorporation, registration, management, administration and winding up of companies and other institutions and provides for regulation of powers, duties and remuneration of directors.⁵⁷ It imposes a number of statutory duties on directors which, if properly observed, should result in good corporate governance practices.⁵⁸ Although the Companies Act does not specifically provide for corporate governance, it ascribes liability on directors for conducting the business of a company fraudulently or recklessly and for falsification of information.⁵⁹ It can be argued, for instance, that disregarding good corporate governance principles may amount to fraud and/or recklessness.⁶⁰

⁵³ UN Office of the High Commissioner of Human Rights *Business and Human Rights* (UN Publication of 2015) available at <http://www.ohchr.org/EN/Issues/Business/Pages/BusinessIndex.aspx> (accessed on 27 September 2015).

⁵⁴ UN Global Compact The UN Guiding Principles on Business and Human Rights: Relationship to UN Global Compact Commitments (2014) 1.

⁵⁵ Companies Act (Chapter 24:03) (Act 47 of 1951).

⁵⁶ Efforts are underway to update the Companies Act (Chizana T *Business Rescue and the Companies Act (The Independent of October 2013)* 3). See also World Bank Report on the Observance of Standards and Codes (ROSC) Zimbabwe: Accounting and Auditing of 15 February 2011 6-8 available at [http://www.worldbank.org/ifa/rosc_aa_zimbabweZimbabwe-ROSC\).pdf](http://www.worldbank.org/ifa/rosc_aa_zimbabweZimbabwe-ROSC).pdf) (accessed on 29 November 2014).

⁵⁷ *Ibid.* The Companies Act applies to companies registered in terms of this Act and that are wholly owned by the government either directly or through existing public entities. For a detailed discussion on the provisions of the Companies Act that are relevant from a corporate governance perspective, see paras 4.2.2-4.2.7 below.

⁵⁸ Sections 169-189 of the Companies Act. Discussions on the provisions in the Act that are relevant from a corporate governance perspective are made in paras 4.2.2-4.2.7 below.

⁵⁹ Sections 340-345 of the Companies Act. The provisions of the Zimbabwean Companies Act are therefore an enforcement mechanism that can be used to ensure good corporate governance practices.

⁶⁰ Moyo NJ *South African Principles of Corporate Governance: Legal and Regulatory Restraints on Powers and Remuneration of Executive Directors* Unpublished Thesis (UNISA 2010) 54.

4.2.1.4 Acts Establishing Public Entities

In Zimbabwe, the majority of the public entities are established through an Act of Parliament.⁶¹ The specific Act provides the main objective of establishing the public entity, how it should be governed and stipulates the functions, powers and duties of the entity. For example, the Grain Marketing Act provides that the public entity should be directed by a board, known as the Grain Marketing Board and the board should be appointed by the Minister, in consultation with the country's President.⁶² The Act further stipulates the entity's main objectives, functions, powers and duties.⁶³ The establishing Acts make various provisions aimed at ensuring that the public entities are properly governed.⁶⁴ For example, the MMCZ Act provides that when exercising any power or performing any function or duty in terms of this Act, the public entity should, at all times, take into account the national interest of Zimbabwe and the common interests of all producers of minerals.⁶⁵ In performing the functions, the entity is also required to "keep its expenses as low as is consistent with the provision of efficient services to producers and sellers of minerals".⁶⁶

4.2.1.5 Public Finance Management Act (PFMA)

The PFMA⁶⁷ was enacted in 2009 to provide for the control and management of public resources and the protection and recovery thereof; the regulation and control of public entities; general treasury matters; the examination and audit of public accounts and to provide for matters pertaining to financial misconduct of public officials.⁶⁸ The PFMA requires every

⁶¹ Examples are the Minerals Marketing Corporation of Zimbabwe Act, Zimbabwe Mining Development Corporation Act, the Grain Marketing Act and Tourism Act 15 of 1995.

⁶² Sections 4 and 5 of the Grain Marketing Act.

⁶³ Sections 26-28 of the Grain Marketing Act.

⁶⁴ For example, Part II and III of the Grain Marketing Act and Part II and III of the MMCZ Act. These sections stipulate that the entity should act only in accordance with the law, provide for the establishment of a board and how it should operate and states the principles that the entity should observe (e.g. observing national interest of the country).

⁶⁵ Section 22 of the MMCZ Act. See also section 23 of the ZMDC Act.

⁶⁶ Ibid.

⁶⁷ Public Finance Management Act (Chapter 22:19) (No. 11 of 2009).

⁶⁸ "Preamble" to the PFMA.

state enterprise or parastatal to adhere to and implement the principles of sound corporate governance policies, procedures and practices.⁶⁹ The Act provides for penalties for noncompliance with principles of sound corporate governance policies, procedures and practices which makes it mandatory for public entities to comply.⁷⁰

4.2.1.6 Zimbabwe National Code of Corporate Governance

The *National Code of Corporate Governance* (hereinafter referred to as *National Code*) was developed under the chairmanship of Dube C F, signed by the country's President in 2014 and officially launched in April 2015. According to the Chairman's words, "the crafting of the Code benefited immensely from the codes of other countries, such as South Africa, which have had national codes for a long time. This ensured that the Code would be comparable to the codes in countries which are our major trading partners and its principles and practices would meet international standards".⁷¹ The new corporate governance *Code* is expected not only to enhance the country's standing with the business community internationally and regionally, but also to help entrench sustainable practices through clearly outlined rules, responsibilities and benchmarks for measuring success, all of which ultimately stand to benefit the country over the long term.

The purpose of the *National Code* is precisely to assist business entities at all levels regardless of the manner and form of their incorporation or establishment, address the corporate governance problems in Zimbabwe and to achieve favourable corporate governance practices which are respected internationally.⁷² The *National Code* adopts the "apply or explain" approach, which means that business entities should apply the provisions of the *Code* and, where they fail to do so, they should explain or give reasons for the failure or for

⁶⁹ Section 50 of the PFMA.

⁷⁰ Section 91 of the PFMA.

⁷¹ According to the Project Chairman, the research unit carried out the necessary research into corporate governance issues and studied over one hundred governance codes from other countries. The main objective was to develop a *National Code* that is unique and specific to Zimbabwe's corporate needs and history (KPMG *Demystifying the Zimbabwe Code of Corporate Governance* (The Zimbabwe Independent of 16-22 October 2015 X4)).

⁷² "Introduction and Background" and Chapter 1 of the *National Code*. See also Besada H and Werner K *The Environment and Corporate Governance in Zimbabwe* (The Centre for International Governance Innovation Policy Brief No. 19 of July 2010) 2-3 available at www.cigionline.org/publications (accessed on 29 September 2014).

adopting a different principle or approach.⁷³ Although the country has adopted its own code of corporate governance, the *King Report*, *Combined Code*, *OECD Principles of Corporate Governance*, *CAGG Guidelines* and other corporate governance codes have been adopted or used as a basis for developing internal codes by a reasonable number of entities in Zimbabwe.⁷⁴ To confirm this assertion, some organisations report that their operations are guided by universally recognised corporate governance codes like the *King Reports* and *Combined Code*.⁷⁵

4.2.1.7 Corporate Governance Framework for State Enterprises and Public Entities

The *Corporate Governance Framework for State Enterprises and Public Entities* (hereinafter referred to as the *CGF*) was a result of a series of extensive stakeholder consultations and officially launched in November 2010. Regional and international best practices were taken into account in drafting the *CGF*.⁷⁶ The Zimbabwean government introduced the *CGF* “after realising that corruption and unethical behaviours were rampant” in public entities.⁷⁷ The main objective of the *CGF* is to “promote the efficient use of public resources and to require accountability for the stewardship of those resources” in order to enable public entities to make a “positive contribution to the economy”.⁷⁸ The *CGF* provides the government, public entities and stakeholders “with a common frame of reference on corporate governance issues”

⁷³ Ibid.

⁷⁴ Sifile O *et al* “Corporate Board Failure in Zimbabwe: Have Non – Executive Directors Gone to Sleep?” (2014) 78-86. See also Tsumba LL *Corporate Governance Country Case Experience - Perspectives and Practices: Zimbabwe* (2004) 16-18. However, for the purpose of this chapter, the research focuses only on Zimbabwe’s corporate governance instruments.

⁷⁵ Some corporate entities have developed their own in-house corporate governance manuals based on internationally recognised corporate governance codes. For example, Zimplats’ Annual Report indicated that the group “had integrated the majority of King III principles into its internal controls, policies, terms of reference and overall procedures” (*Zimplats 2012 Annual Report* 102 available at http://financialresults.co.za/2012/implats_ir2012/downloads/04_responsibility_reporting.pdf (accessed on 21 July 2014). See also Delta Corporation Zimbabwe’s *2013 Annual Report*, which reported that the company has in place systems of governance and practice which are “in accordance with the code of Corporate Practices and Conduct contained in the Cadbury and King Reports on Corporate Governance” (*Delta 2013 Annual Report* 30).

⁷⁶ These include “the Malawi Code, the King III Code of Governance for South Africa, the Organization for Economic Cooperation and Development (OECD) Guidelines on Corporate Governance of State Owned Enterprises, the United States’ Corporate and Auditing Accountability and Responsibility Act (Sarbanes-Oxley) of 2002 and subsequent revisions to the Act following the global economic crisis, and practices in the East, especially in China” (section 1 of the *CGF*).

⁷⁷ Zvavahera P “Corporate Governance and Ethical Behaviour: The case of the Zimbabwe Broadcasting Corporation” (2014) 1-8.

⁷⁸ “Preface” to the *CGF* and para 1.2 of the *CGF*. According to the *CGF*, the objective will be achieved by ensuring that boards of public entities “have the necessary authority, competencies and objectivity to carry out their function of strategic guidance and monitoring of management” with integrity and in an accountable manner.

but is not mandatory.⁷⁹ It is applicable to parastatals established through an Act of Parliament and to state enterprises registered under the Companies Act.⁸⁰ The *Framework* was designed around four pillars of corporate governance namely; responsibility, accountability, fairness and transparency.⁸¹

4.2.1.8 Zimbabwe Stock Exchange Listing Requirements

The Zimbabwe Stock Exchange (ZSE)⁸² is a body corporate established by the Stock Exchange Act⁸³ and has extensive regulatory powers.⁸⁴ It “provides facilities for the listing of the securities of companies (domestic or foreign) and provides its users with an orderly market place for trading in such securities and regulates accordingly”.⁸⁵ The ZSE is responsible for developing and periodically reviewing the *Listing Requirements*, thus ensuring legislative changes and market practice (locally and internationally) are accounted for.⁸⁶

The *ZSE Listing Requirements* apply to both applicants for listing and presently listed companies and are aimed at ensuring that the business of the ZSE is carried on with due regard to the public interest.⁸⁷ The *Requirements* indicate, *inter alia*, the rules and procedures governing new applications, proposed marketing of securities and the continuing obligations

⁷⁹ Section 1 of the *CGF*.

⁸⁰ Para 1.4 of the *CGF*.

⁸¹ “Preface” to the *CGF*.

⁸² The ZSE was established in 1896, initially to provide a forum through which mining companies could raise equity financing to fund operations. However, today, the majority of companies listed on the ZSE are non-mining. The ZSE is organised as a body corporate under the supervision of a committee of the exchange which falls under the Ministry of Finance. Although the ZSE is small by global standards, it is the second largest and most active in the Southern African region after the JSE Securities Exchange.

⁸³ Chapter 24:18 (No. 27 of 1973). The Act provides for the establishment and regulation of the ZSE, the appointment of the Registrar of the Stock Exchange, procedures for the registration of stock brokers, regulation of the financial affairs of the Exchange and prohibits the issuing of misleading circulars/statements and fraudulent acts in conducting the business of the Exchange, among others (Part II-VII of the Stock Exchange Act).

⁸⁴ Mangena M and Taurigana V “Disclosure, Corporate Governance and Foreign Share Ownership on the Zimbabwe Stock Exchange” (2007) 53-85.

⁸⁵ “Preface” to the *ZSE Listing Requirements* (2002).

⁸⁶ *Ibid*.

⁸⁷ “Introduction” to the *ZSE Listing Requirements* (2002). However, worth noting is that currently very few of Zimbabwe’s public entities are listed on the Stock Exchange hence the minimal applicability of the *Listing Requirements*.

of issuers. The *Listing Requirements* compel companies to include a statement in their annual reports indicating the extent to which they comply with “the principles set out in the Code of Corporate Practice and Conduct as set out in the King Report or Cadbury Report on Corporate Governance” to enable shareholders and potential investors to evaluate how the corporate governance principles have been applied.⁸⁸ In cases where the recommended governance structures were not applied, the company is expected to provide an explanation for the noncompliance in the annual reports to shareholders.⁸⁹

4.2.1.9 Corporate Governance and Remuneration Policy Framework.

In 2014, Zimbabwe developed a draft *Corporate Governance and Remuneration Policy Framework*, that governs the operations of state-owned enterprises and local authorities with regard to remuneration and corporate governance practices.⁹⁰ The *Framework* was approved by Cabinet at its Fifth Meeting of 4 March 2014.⁹¹ The adopted policy framework is still to be enacted as an Act of Parliament (the Public Sector Corporate Governance Act) so that it can have the force of law and carry legal sanctions.⁹² Nevertheless, it is important to note that the public entities have already been instructed by the government to implement the provisions of the *Framework* whilst awaiting its promulgation.⁹³

In addition to existing laws and regulations governing operations of business entities, entities in Zimbabwe are also affected by rules and regulations of national voluntary business associations such as Chamber of Mines,⁹⁴ Zimbabwe National Chamber of Commerce⁹⁵ and

⁸⁸ Section 7.F.5 of *ZSE Listing Requirements* (2002). The *ZSE Listing Requirements* were last officially amended in 2002 hence the lack of reference to more recent reports. However, the Zimbabwe Stock Exchange, in consultation with stakeholders, is in the process of reviewing the *Listings Rules* (*The Newsday* of 13 March 2014 11 (available at <https://www.newsday.co.zw>), *The Herald* of 14 July 2013 B4 (available at www.herald.co.zw) and *The Financial Gazette* of 17-23 September 2015 C2 (available at www.fingaz.co.zw).

⁸⁹ Ibid.

⁹⁰ *The Zimbabwe Mail* of 16 April 2014 13 and *The Herald* of 16 April 2014 1 and 19 June 2014 1.

⁹¹ Ibid.

⁹² Ibid.

⁹³ The instructions were in the form of directives issued to the public entities to start implementing the provisions of *Framework* (*The Herald* of 19 June 2014 1).

⁹⁴ The Chamber of Mines of Zimbabwe is a private sector voluntary organisation established in 1939 by an Act of Parliament. Its membership includes mining companies, suppliers of mining related equipment and consumables, service providers such as banks, insurance companies, consulting engineers and various mining related professional bodies and

Confederation of Zimbabwe Industries⁹⁶ and professional bodies such as Institute of Bankers,⁹⁷ Institute of Chartered Secretaries & Administrators⁹⁸ and Zimbabwe Institute of Management,⁹⁹ among others.¹⁰⁰ Membership to these associations requires that the individuals observe the rules and regulations thereof. These associations have greatly assisted in the reinforcement of professionalism and ethical conduct as members are obliged to observe these and other values, failure of which they are struck off the membership register.¹⁰¹

In the discussion below, the provisions of the various Zimbabwean corporate governance instruments that seek to enhance the effectiveness of the boards of public entities are discussed. In Chapter 7 it is considered whether these provisions have yielded positive results in assisting boards of public entities to effectively discharge their duties.

individuals. The primary objectives of the COMZ are “to advocate and lobby in order to promote, encourage and protect the interests of the mining industry in Zimbabwe”. Visit <http://www.chamberofminesofzimbabwe.com/> for more information.

⁹⁵ The Zimbabwe National Chamber of Commerce (ZNCC) is a non-profit making membership-based organisation that provides services designed to support its members in business development through lobbying, collaboration and facilitation. Visit <http://www.zncc.co.zw/> for more information.

⁹⁶ The Confederation of Zimbabwe Industries (CZI) was established in 1923. It is “an independent, self-financed, legally constituted not-for-profit Business Membership Organisation that represents and serves interests of members in a wide array of matters affecting their viability and competitiveness”. Visit <http://www.czi.co.zw/> for more information.

⁹⁷ The Institute of Bankers of Zimbabwe (IOBZ) was founded in 1947. It is a supervisory board for bankers and any prospective professionals in the banking and financial services. Its main objective is to “equip students with industry-specific skills and towards this end, it offers Banking examinations at Certificate, Intermediate and Diploma levels”. Visit <http://www.icsaz.co.zw/> for more information.

⁹⁸ The Institute of Chartered Secretaries & Administrators of Zimbabwe (ICSAZ) is an international organisation with established offices in Zimbabwe. The ICSAZ’s main objective is to promote and advance the “efficient administration of commerce, industry and public affairs by the continued development of the study and the practice of secretaryship and administration of companies and other bodies.” Its activities include holding of professional conferences and seminars, conducting examinations and professional supervision over the membership and taking appropriate action to promote and safeguard the professional standing of the Institute’s members. Visit <http://www.icsaz.co.zw/> for more information.

⁹⁹ Zimbabwe Institute of Management (ZIM) is an autonomous, non-profit making, membership-based organization founded in 1957. Its objectives include promotion and development of best practices in management and leadership. ZIM facilitates and organises a range of activities and functions where executives from organisations in the public and private sector converge to discuss topical issues, exchange information and ideas. It has also established a network system with other management institutes and training organisations locally, regionally and internationally. Visit <http://www.zim.ac.zw/> for more information.

¹⁰⁰ Para 17 of the *Manual*.

¹⁰¹ For examples, see Bankers Association of Zimbabwe *Code of Best Practice* available at <http://baz.org.zw/> and the Institute of Chartered Secretaries & Administrators of Zimbabwe *Members Code of Conduct* available at <http://www.icsaz.co.zw/>.

4.2.2 Role of the Board

The necessity for good corporate governance ignited more interest in the duties of company directors.¹⁰² A director is defined as including “any person occupying the position of director or alternate director of a company, by whatever name he may be called”.¹⁰³ With the objective of ensuring that the management of companies is in responsible hands, the Companies Act disqualifies certain persons from appointment as a director.¹⁰⁴ Those disqualified include a body corporate, a minor or other person under legal disability, an unrehabilitated insolvent, a person previously convicted and sentenced for theft, fraud, forgery or uttering and a person disqualified by a court order under section 344 of the Act.¹⁰⁵

Most Memorandum and Articles of Association provide for the management of the company by directors who may act individually, corporately as a board or in committees.¹⁰⁶ Directors can also delegate their powers to management or any other person but such delegation does not exonerate them from personal liability.¹⁰⁷ Any effort to relieve the directors from personal liability, whether by the Memorandum and Articles of Association, contract of service or any

¹⁰² Bryne M “Directors to Hide From a Sea of Liabilities in a New Safe Harbour” (2008) 22 *Australian Journal of Corporate Law* 255-274. See also Van Der Linde K “The Personal Liability of Directors for Corporate Fault –An Exploration” (2008) 20 *South African Mercantile Law Journal* 439–461 and Meyer E and de Wet JH “The Impact of Board Structure on the Financial Performance of Listed South African Companies” (2013) 9(3) *Corporate Board: Role, Duties & Composition* 19-31.

¹⁰³ Section 2 of the Companies Act. The establishing Acts refer to a director as a “member of the Board” (section 2 of the Grain Marketing, ZMDC and MMCZ Acts). The ZSE *Listing Requirements* define a director as “any person occupying the position of director or alternate director of a company, by whatever name he or she may be designated and, in relation to an issuer which is not a company, a person with corresponding powers and duties” (“Definitions” section of the ZSE *Listing Requirements*).

¹⁰⁴ Section 173 of the Companies Act.

¹⁰⁵ When considering the application of a person who has been previously disqualified for issues relating to, for example, insolvency, fraud and forgery, the court requires to be satisfied that the applicant has rehabilitated himself and is worthy of trust (*Tengende v Registrar of Companies* (1988) (2) ZLR 259 (S)).

¹⁰⁶ Christie RH *Business Law in Zimbabwe* (1998) 409. Board committees are a mechanism to aid the board and its directors in giving detailed attention to specific areas of their duties and responsibilities in order to evaluate more comprehensively certain issues, such as audit, internal control, risk management and remuneration. Given that the time available to the board to accomplish all its tasks in a single meeting is not sufficient, some issues need to be dealt with in a focused way at committee level, and then later presented to the board as a whole (Adams RB, Hermalin BE and Weisbach SM “The Role of Boards of Directors in Corporate Governance: A Conceptual Framework and Survey” (2010) 48(1) *Journal of Economic Literature* 58-107)).

¹⁰⁷ *Ibid.*

other means is rendered void by the Companies Act.¹⁰⁸ However, the court is empowered to relieve a director from liability if it can be proved that he acted honestly and reasonably.¹⁰⁹

Traditionally, Zimbabwean directors owed their fiduciary duties almost exclusively to the company and its members but there has been a considerable departure from this traditional notion and the interests of other stakeholders¹¹⁰ are now part of directors' fiduciary duties.¹¹¹

In Zimbabwe directors derive their powers from the Companies Act, the enabling statutes (in the case of parastatals or state-owned enterprises),¹¹² common law,¹¹³ the company's Memorandum and Articles of Association,¹¹⁴ PFMA, Stock Exchange *Listing Requirements*¹¹⁵ as well as corporate governance codes.¹¹⁶ Directors' duties are categorised

¹⁰⁸ Section 190 of the Companies Act. See also Volpe PL "The Duties of Company Directors in Zimbabwe (1979) 19(2) *The Zimbabwe Law Journal* 114-139.

¹⁰⁹ Section 349 of the Companies Act.

¹¹⁰ The other stakeholders include employees, creditors, suppliers, among others. Directors are also expected to "consider not only financial performance but also the impact of the company's operations on society and the environment, protect, enhance and invest in the wellbeing of the economy, society and the environment". As a result, the company is expected to put measures in place that protect and enhance the wellbeing of the economy, society and the natural environment (paras 22 & 28 of the *National Code*). See also para 21 of the *Manual*.

¹¹¹ Sifile O, Susela DKS, Mabvure JT, Chavunduka MD and Dandira M "Corporate Board Failure in Zimbabwe: Have Non – Executive Directors Gone to Sleep?" (2014) 78-86. According to Mervyn King, "Directors in the twenty-first century have to be seen to be directing companies to be good corporate citizens. The inclusive approach recognizes that a company is a link that brings together the various stakeholders relevant to the business of the company" (King M *Governance for all Entities* (The Corporate Citizen, Johannesburg 2006) 14). Although the *Manual* (para 21) and *National Code* (paras 22 & 28) do not specifically state that they have adopted the enlightened shareholder value approach as far as the protection of the interests of stakeholders is concerned, I submit that they do follow it.

¹¹² For example, the Minerals marketing Corporation of Zimbabwe (MMCZ) Act which brought into existence MMCZ provides how board members should exercise the powers granted to them. The Act stipulates how board meetings should be conducted, how urgent transactions should be dealt with and how contracts and instruments by Corporation should be executed, among other things (sections 11-19).

¹¹³ As indicated above, Zimbabwean company law is mostly derived from both the statutory and common law position in the UK. The law on directors' duties is considerably based on case law and the courts, when interpreting or applying the provisions of the Companies Act, may consider foreign company law (Nkala J and Nyapadi TJ *Nkala & Nyapadi on Company Law in Zimbabwe* (Zimbabwe Distance Education College (ZDECO) Publishing House 1995) 21-23).

¹¹⁴ The Companies Act defines "memorandum" as "the memorandum of association of a company as originally framed or as altered in pursuance of any law hitherto in force or of this Act". The Memorandum should state the name of the company, the objects of the company; that the liability of the members is limited; the amount of share capital with which the company proposes to be registered and the division thereof into shares of a fixed amount. The "articles" are defined as "the articles of association of a company as originally framed, or as altered by special resolution, and includes, so far as they apply to a company, the regulations set out in Table A in the First Schedule to the Companies Ordinance, 1895, or Table A in the First Schedule". A company may choose to adopt all or any of the regulations contained in Table A in the First Schedule in developing its Articles of Association (sections 2, 8-19 of the Companies Act).

¹¹⁵ A few public entities are listed on the Zimbabwe Stock Exchange, e.g. Hwange Colliery Company Limited (HCCL), Dairibord Zimbabwe Limited (DZL) and Commercial Bank of Zimbabwe (CBZ) Holdings Limited. This means that only a few public entities are governed by the *Listing Requirements*. However, the government is considering setting up a specific stock exchange for state-owned enterprises and parastatals to raise fresh capital for their operations (*The Standard* of 16 September 2012 3 available at <http://www.thestandard.co.zw> (accessed on 9 November 2013)).

into fiduciary duties of good faith and the duty to act with the necessary care and skill when performing company duties.¹¹⁷ The directors must act honestly, in good faith (*bona fide*) and in the best interests of the company.¹¹⁸ The duty to act in good faith in the interests of the company applies equally to all directors, whether executive or non-executive.¹¹⁹

The Companies Act specifically provides that directors have the duty to act in good faith, duty to act in the interest of the company, duty to disclose the directors' emoluments and pensions and duty to declare interests in contracts.¹²⁰ The duty to act in good faith includes the duty to prevent a conflict of interests,¹²¹ not exceed the limitation of their power,¹²² maintain an unfettered discretion and exercise their powers for the purpose for which they were conferred.¹²³ The duty to act in the interests of the company is reinforced by section 186 of the Companies Act which requires a director to inform his company of any personal financial interests he may, directly or indirectly, have in a contract which has been or is to be entered into by the company.¹²⁴ The company must maintain a register of such interests.¹²⁵ To ensure that directors observe this obligation, any director or officer of a company who fails to comply with any of the provisions regarding declaration of interest is guilty of an offence.¹²⁶

¹¹⁶ The corporate governance codes include the *Manual*, *CGF* and *National Code*.

¹¹⁷ Christie RH *Business Law in Zimbabwe* (1998) 410-411 and Nkala J and Nyapadi TJ *Nkala & Nyapadi on Company Law in Zimbabwe* (Zimbabwe Distance Education College (ZDECO) Publishing House 1995) 21-23.

¹¹⁸ Christie RH *Business Law in Zimbabwe* (1998) 410. See also *L Piras & Son (Pvt) Ltd v Piras* (1993) (2) ZLR 245 (S) where it was held that a director is under an obligation to observe the utmost good faith towards the company; to exercise his powers for its benefit, not his own; and to ensure that he avoids a conflict between the company's interests and his own..

¹¹⁹ *Ibid*.

¹²⁰ Sections 170 -189 of the Companies Act.

¹²¹ The directors may not put themselves in a position where their personal interests and duties conflict with the duties that they owe to the company. The duty to the company requires that, where a director enters into a transaction on behalf of the company, he should ensure that the company gets as much as it can out of the transaction and not seek to satisfy his own interest (Christie RH *Business Law in Zimbabwe* (1998) 411).

¹²² Directors must exercise their powers for a proper purpose which means that they should exercise their powers only for the purpose for which they are conferred. They should act within the confines of the company's Memorandum of Incorporation and all relevant legislation (Tett M, Chadwick N and Volpe PL *Zimbabwe Company Law* 2nd ed. (Department of Law, University of Zimbabwe 1986) 205-214).

¹²³ Tett M, Chadwick N and Volpe PL *Zimbabwe Company Law* (1986) 205-214.

¹²⁴ See *Robinson v Randfontein Estates Gold Mining Company Limited* 1921 (AD) 168 where it was held that "where one man stands to another in a position of confidence involving the duty to protect the interests of that other, he is not allowed to make a secret profit at the other's expense or place himself in a position where his interests conflict with his duty".

¹²⁵ Sections 187 of Companies Act.

The main reason for imposing penalties is to deter directors from deriving personal benefits at the expense of the company as well as to enhance transparency and independence.¹²⁷

In discharging his duties, a director is also required to act with the necessary care and skill which an ordinary man might be expected to take in the circumstances.¹²⁸ He is, therefore, not expected to, in the performance of his duties, exhibit a greater degree of care and skill than may reasonably be expected from a person of his knowledge, skill and experience.¹²⁹ The Companies Act does not explicitly provide for a director's duty to act with the necessary degree of skill and care but common law has been used to establish whether or not a director has exercised due skill and care.¹³⁰ A director who fails to observe his duty of care and skill is liable to the company for any loss suffered as a result of such failure.¹³¹ A director may, however, be excused from liability if he took reasonably diligent steps to become informed about the matter, has no material financial interest in the matter or had properly disclosed such interest, and made a decision rationally in the belief that it was in the best interests of the company.¹³²

To assist the directors in performing their duties, the Companies Act provides for the appointment of a company secretary who should be ordinarily resident in Zimbabwe.¹³³ The secretary qualifies as an officer of the company¹³⁴ and therefore, is expected to, like the directors and managers, observe the statutory duties imposed on officers.¹³⁵ Because of the

¹²⁶ Ibid.

¹²⁷ Moyo NJ *South African Principles of Corporate Governance: Legal and Regulatory Restraints on Powers and Remuneration of Executive Directors* (2010) 23.

¹²⁸ Christie RH *Business Law in Zimbabwe* (1998) 410. See also *Re Brazilian Rubber Plantations and Estates Ltd* (1911) 1 Ch 425 at 437 where it was held that, when performing their duties, directors must attend carefully to the affairs of the company and must exhibit the "reasonable care" which any ordinary person might be expected to take under the same circumstances.

¹²⁹ Ibid. See also Volpe PL "The Duties of Company Directors in Zimbabwe" (1979) 114-139.

¹³⁰ Tett M, Chadwick N and Volpe PL *Zimbabwe Company Law* (1986) 209-211.

¹³¹ Section 190 of Companies Act imposes liability for negligent conduct of director's duties.

¹³² Section 349 of Companies Act and Christie RH *Business Law in Zimbabwe* (1998) 410.

¹³³ Section 169 of the Companies Act.

¹³⁴ Section 2 of the Companies Act defines "Officer" as including a director, manager or secretary.

¹³⁵ Tett M, Chadwick N and Volpe PL *Zimbabwe Company Law* (1986) 205-214. Traditionally, the position of a secretary was considered so inferior that a third party could not accept that the secretary had any authority to contract on the company's behalf, but the increased intricacies of company administration and the professional status of many secretaries

crucial role played by the secretary in the management of a company, the Act prohibits certain people from being appointed as secretaries, e.g. a minor or other person under legal disability, an unrehabilitated insolvent, a person previously convicted and sentenced for theft, fraud, forgery or uttering and one who has been removed by a competent court from any office of trust on account of misconduct.¹³⁶

The secretary's main role is to ensure that the company and its officers comply with the provisions of the Act and other relevant legislation.¹³⁷ Like the directors, the secretary may not be relieved of personal liability by the articles, his contract of service or other means.¹³⁸ The secretary's other duties include convening meetings of shareholders and directors, writing and keeping the minutes, rendering statutory returns (e.g. the annual return in terms of section 123) and maintaining the statutory registers (e.g. register of directors' shareholding and register of directors and secretaries) as required by section 338 of the Act.¹³⁹

Like the Companies Act, the statutes that established the public entities require that the directors should perform their duties in compliance with the relevant legislation.¹⁴⁰ Directors are also required to declare their direct or indirect interests with companies and institutions dealing with the entities they serve.¹⁴¹ Failure to observe any of the provisions may result in the directors being charged with misconduct and being stripped of their duties.¹⁴² The various Acts of Parliament which established the public entities also detail the roles and responsibilities of each of their boards which are derived from the functions and the powers

now entitles a third party to assume that the secretary has authority to contract on the company's behalf on administrative matters or matters related to the day-to-day running of the company (*Panorama Developments (Guildford) Ltd v Fidelis Furnishing Fabrics Ltd* (1971) 3 All ER 16 (CA)).

¹³⁶ Section 173A & 173B of the Companies Act.

¹³⁷ Tett M, Chadwick N and Volpe PL *Zimbabwe Company Law* (1986) 205-214.

¹³⁸ Section 190 of the Companies Act.

¹³⁹ Tett M, Chadwick N and Volpe PL *Zimbabwe Company Law* (1986) 205-214.

¹⁴⁰ Sections 21 & 22 of the MMCZ Act and 26 & 28 of the Grain Marketing Act.

¹⁴¹ Section 15 of the MMCZ Act, section 13 of the Railways Act and section 15 of the Grain Marketing Act.

¹⁴² Sections 9 and 53 of the MMCZ Act, section 9 of the Railways Act and section 9 of the Grain Marketing Act.

of respective the entities.¹⁴³ For example, sections 11-19 of the MMCZ Act and sections 11-18 of the Grain Marketing Act detail how the boards of these public entities should operate.

The Acts empower boards to source external advice and to meet the associated costs through the entity's financial resources.¹⁴⁴ They also provide for all acts, matters or things authorised or required to be done by the board to be decided by majority vote at a meeting of the board at which a quorum is present.¹⁴⁵ The board is further empowered, in consultation with the Minister, to establish one or more board committees for the better exercise of its functions and powers.¹⁴⁶ The board committees should be properly composed and given clear terms of reference so as to effectively conduct the business of the board.¹⁴⁷

Similarly, the PFMA provides that the board has fiduciary duties to “act with fidelity, honesty, integrity and in the best interests of the public entity in managing the affairs of the public entity” and “exercise the utmost care to ensure reasonable protection of the assets and records of the public entity”.¹⁴⁸ Directors are empowered to, in writing, delegate any of the powers entrusted or delegated to them under the Act to a committee or an employee of that public entity.¹⁴⁹ However, similar to the provisions of the Companies act, such delegation or instruction shall not divest the directors of the responsibility for the exercise of the delegated power or the performance of the assigned duty.¹⁵⁰

¹⁴³ Sections 20-24 of the ZMDC Act and sections 20-24 of the MMCZ Act and section 26-28 of the Grain Marketing Act.

¹⁴⁴ Section 13 of the ZMDC Act and MMCZ Act and section 14 of the Grain Marketing Act.

¹⁴⁵ See sections 11 and 12 of the MMCZ Act, ZMDC Act and Grain Marketing Act. Sections 128 and 138 of the Companies Act make similar provisions with regard to the holding of board meetings and making of decisions thereat. However, the Acts provide that no “decision or act of the Board or act done under the authority of the Board shall be invalid” due to the fact that the board was not properly constituted or that a disqualified person acted as a member at the time the decision was taken or the act was done (section 170 of the Companies Act and section 16 of the MMCZ and ZMDC Act).

¹⁴⁶ Ibid. The audit committee is mandatory and its main tasks are stated as to assist the board to fulfil its obligations relating to financial reporting, strengthen the independence of the external auditors and to enhance public confidence in the integrity of the company's financial statements (section 84 of the Public Finance Management Act).

¹⁴⁷ Para 29 of the *Manual* and para 97 of the *National Code*.

¹⁴⁸ Section 42 of the PFMA.

¹⁴⁹ Section 43 of the PFMA. The audit committee is mandatory in terms of section 84 of the PFMA.

¹⁵⁰ Ibid.

The directors are also prohibited from using their position or any confidential information obtained by virtue of their position, “for personal gain or to improperly benefit another person”.¹⁵¹ The Act also requires that the board should establish and maintain “effective, efficient and transparent systems of financial and risk management and internal controls” as well as comply and ensure compliance by the public entity, with the provisions of this Act and any other enactment applicable to the public entity.¹⁵² Failure to comply with the provisions of the PFMA constitutes an offence in terms of section 91 of the Act and the director so charged may, upon conviction, be liable to a fine or imprisonment or to both such fine and imprisonment.¹⁵³

The *ZSE Listing Requirements* make it mandatory for companies to comply with and subscribe to certain principles enshrined in the *Cadbury Report* and the *King Reports* and to disclose the extent of their compliance with the *Reports*.¹⁵⁴ Due to the fact that, to qualify for listing the business has to be registered in terms of the Companies Act, all listed companies are expected to comply with the provisions of the Companies Act. The ZSE also requires companies seeking a listing to submit each director’s declaration, demonstrating that the directors are free of conflicts of interest between the duties they owe the company and their personal interests.¹⁵⁵ It is also a listing requirement that directors of listed public entities should retire by rotation at least once in every three years.¹⁵⁶

Failure to observe the *Listing Requirements* may result in the suspension or termination of the company’s listing.¹⁵⁷ Directors who wilfully violate the provisions of the *Listing Requirements* may also be charged for misconduct which may result in a fine, imprisonment or both.¹⁵⁸ The sanctions are provided to ensure that directors do not abuse their powers,

¹⁵¹ Section 42 of the PFMA.

¹⁵² Section 44 of the PFMA. The Act clearly outlines how the board, as the accounting authority, is expected to conduct itself and details the responsibilities of the board in the management of the public entity.

¹⁵³ Due to the fact that the PFMA is an Act of Parliament, it may be considered as the ‘strongest’ source of corporate governance in public entities which provides for sanctions in cases of defaulters.

¹⁵⁴ Section 7.F.5 of *ZSE Listing Requirements* (2002).

¹⁵⁵ Sections 3- 4 & 7.B.16 of *ZSE Listing Requirements*.

¹⁵⁶ Para 3.68 (i) of the *ZSE Listing Requirements*.

¹⁵⁷ Paras 1.18-1.19 & 3.21 of the *ZSE Listing Requirements*.

¹⁵⁸ Sections 55 and 96 of the Stock Exchange Act.

recklessly carry out their duties and that they are held accountable for their actions. This has the effect of promoting good corporate governance as it encourages directors to observe some of the key principles of corporate governance namely; transparency, accountability and discipline.

The codes of corporate governance namely; the *Manual*, *CGF* and *National Code* complement the statutory instruments discussed above as regards public entity directors' duties and strongly influence the way that the performance of the directors is viewed. The codes of corporate governance confirm the position that all directors have a legal duty to act in good faith, with due care and skill and in the interests of the company as well as to exercise their powers only for the purpose for which they are conferred.¹⁵⁹ They also articulate what the role of the board is and provide guidance as to how the role should be exercised.¹⁶⁰

The *Manual* recommends that the directors should perform their roles in a careful, diligent and skilful manner to achieve the long-term growth of an organisation.¹⁶¹ In addition, the directors are required to act "in a transparent, accountable and responsible manner" in the interests of the organisation and all stakeholders.¹⁶² In conducting the duties, the board should determine the strategy and policy of the organisation, manage risks and monitor management to ensure that the objectives of the organisation are achieved in compliance with the relevant laws, regulations and corporate governance codes.¹⁶³

¹⁵⁹ Para 14 of the *Manual*, para 61 of the *National Code* and para 3.3.5 of the *CGF*. The *Manual*, *CGF* and *National Code* provide guidelines for directors in performing their duties of care and skill and stipulate requirements for the acquisition of knowledge, expertise and an understanding of the affairs of the company.

¹⁶⁰ For instance, the *CGF*, *Manual* and *National Code* acknowledge the main functions of the board as to monitor management, provide advisory services, set overall corporate strategy to achieve the company's purpose and to identify key risk areas and key performance indicators of the company (para 3.3 of the *CGF*, paras 17-19 of the *Manual* and paras 59-60 of the *National Code* and paras 9-10 of Annexure B of the *National Code*). According to the *Manual*, in Zimbabwe, "the primary accountability for acts of the company rests ultimately" with the board or officers of the company who may be members of the board or members of management (para 17 of the *Manual*)

¹⁶¹ The primary role of the board is to advance and protect the interests of the company (para 14 of the *Manual*). According to para 109 of the *Manual*, the director's duty of care requires a board member to, inter alia, "participate effectively in board and committee meetings" and to "communicate and work effectively with the Chairman of the Board and Managing Director". See also Chapter 2, para 2.6.1 above as to what acting in a careful, diligent and skilful manner entails.

¹⁶² Para 14 of the *Manual*. The stakeholders include shareholders, employees, creditors, communities, among others. The *Manual* adopts the traditional view of considering only shareholders' interests as discussed above.

¹⁶³ Para 14 of the *Manual*.

To assist the board in achieving this mandate, the *Manual* recommends that the role of the board should be clearly defined in a written document which should explain the board's authority when conducting organisational activities.¹⁶⁴ The main aim of the written document is to avoid conflict between shareholders, the board and management, mostly resulting from usurping each other's roles or powers.¹⁶⁵ As a second measure, it is recommended that new board appointees should be adequately inducted as regards the business of the organisation and be continuously trained so as to be up to date with internal and external developments.¹⁶⁶

Thirdly, the *Manual* recommends that board members should have unlimited access to records and information of the organisation and be able to consult external experts at the organisation's expense in order to maintain their independence from management.¹⁶⁷ In the fourth instance, the *Manual* recommends that the board should establish board committees, which should have clear terms of reference, to assist it in effectively discharging its duties.¹⁶⁸ It is also recommended that the board should appoint a competent board secretary who should be responsible for ensuring that the board functions effectively through provision of board secretarial and advisory services.¹⁶⁹

Similar to the *Manual*, the *CGF* provides that the board should be held accountable and responsible for the efficient and effective governance of the organisation¹⁷⁰ and for ensuring that the organisation complies with all applicable laws and/or the memorandum of association

¹⁶⁴ Paras 14 and 15 of the *Manual*.

¹⁶⁵ *Ibid*.

¹⁶⁶ Induction programs are necessary to allow new directors to understand their rights, duties and responsibilities so as to participate wholly and actively in board decision-making at the earliest opportunity (para 30 of the *Manual*). For similar sentiments, see Sifile O *et al* "Corporate Board Failure in Zimbabwe: Have Non – Executive Directors Gone to Sleep?" (2014) 78-86, Long T "Diving for Pearls: the Importance of Board Induction and Re-Induction" (2008) 4(1) *International Journal of Business Governance and Ethics* 40-50 and Hendricks K and Louw-Potgieter J "A Theory Evaluation of an Induction Programme" (2012) 10(3) *SA Journal of Human Resource Management* 421-471.

¹⁶⁷ External advice is necessary to augment directors' own skills and to ensure that directors perform their duties in accordance with the law and regulations, without having to entirely depend on the company and its management (paras 27 and 131 of the *Manual*).

¹⁶⁸ Para 29 of the *Manual*. Section 84 of the PFMA makes it mandatory for every public entity to have an audit committee.

¹⁶⁹ Para 121 of the *Manual*. As indicated at the beginning of this section, the appointment of a secretary is statutorily provided for in the Companies Act.

¹⁷⁰ The *CGF* summarises the role of the board as to establish, monitor and review corporate strategy for the entity and to ensure that it has effective management teams, the shareholders and other interested stakeholders are informed of its operations, effective risk management, internal control, internal audit processes and other key policies are in place as well as to adhere to and implement the principles of sound corporate governance policies, procedures and practices.

of the company, regulations, government policies and codes of business practice.¹⁷¹ To guide the operations of the board, enable its members to appreciate what is expected of them beforehand and to minimise on government interference in board operations, the *CGF* requires the Responsible Minister and board to sign a performance agreement which sets performance targets for the board.¹⁷² The performance of the board is then evaluated against the set performance targets.¹⁷³ To enable the board to make informed decisions and effectively discharge its duties, the *CGF* provides that board members should have unrestricted access to accurate, relevant and timely information about the public entity.¹⁷⁴

The *CGF* also recommends the establishment of board committees to assist the board to effectively discharge its duties.¹⁷⁵ The board should clearly and formally define the levels of materiality or sensitivity so that, upon delegation of authority, it reserves specific powers and authority to itself.¹⁷⁶ A fourth recommendation is that new and existing board members should be subjected to appropriate and effective induction, education and training programmes to improve and maintain the effectiveness of the board.¹⁷⁷ Fifthly, to achieve board efficiency, the board is expected to put in place measures to ensure that the public entity has an effective management team in place and that there is minimal conflict of interest, among board members and management.¹⁷⁸ The board as a whole and each individual director are not allowed to accept any unauthorised payment or commission, any

¹⁷¹ Para 3.3 of the *CGF*. Para 3.3.1 of the *CGF* states that the “Boards of SEPs have responsibility for the performance of the SEPs and are fully accountable to the shareholders for such performance and in all cases are guided by relevant legislation and/or the Memorandum of Association of the Company”. The board, thus, should ensure that the public entity is fully aware of and complies with applicable laws, regulations, government policies and codes of business practice. “SEPs” refers to State Enterprises and Parastatals.

¹⁷² The *CGF* provides that the “relationship between the shareholders and the Board of Directors shall be governed by a written agreement” makes it a requirement for the parent ministry and the board to sign performance contracts to guide the operations of the board (paras 3.4 and 3.5 of the *CGF*). Paras 14 and 15 of the *Manual* provide for a similar performance agreement. See also paras 4, 11-13 of Annexure B of the *National Code*.

¹⁷³ Para 3.5 of the *CGF*. To ensure that board members apply themselves whole heartedly, there are consequences for failure to meet performance targets. For example, the whole board or individual board members may be dismissed (para 3.4 of the *CGF*).

¹⁷⁴ See para 3.3.5 of the *CGF*. Paras 27 and 131 make similar provisions.

¹⁷⁵ Para 3.12 of the *CGF*.

¹⁷⁶ The *CGF* recommends that delegated authority must be in writing and evaluated on a regular basis (para 3.3.9 of the *CGF*).

¹⁷⁷ Para 3.3.11 of the *CGF*.

¹⁷⁸ Paras 3.3.8 and 3.3.13 of *CGF*.

form of bribery, gift or profit for itself or himself as these may compromise the way that duties are discharged.¹⁷⁹ Lastly, the *CGF* recommends the appointment of a board secretary who should be responsible for ensuring that the board functions effectively through provision of guidance and advisory services, arranging board and committee meetings and recording minutes thereof, facilitating board induction and training and guiding both the board and management on issues of corporate governance, among others.¹⁸⁰

The other corporate governance instrument, the *National Code*, recommends that, in the discharge of its role and functions, the board should conduct itself with honesty and integrity and, above all, it must always act in the best interests of the company that include the interests of the organisation and all stakeholders.¹⁸¹ The *National Code* recommends that the board should have a charter that sets out its role and functions.¹⁸² The *National Code* further recommends that board members, collectively and individually, should adopt clearly defined methods of work, systems, procedures and processes which are designed to achieve effective interaction, decision making and implementation.¹⁸³ A third recommendation is that the board should be adequately resourced, obtain independent professional advice when necessary and also put in place procedures and systems on the governance of information, knowledge and experience to act as checks and balances to enable it to effectively perform its functions.¹⁸⁴

The *National Code* also recommends the appointment of a company/board secretary to assist the board through provision of necessary advice and information, keeping custody of company documents, organising and duly recording proceedings at board meetings and

¹⁷⁹ Para 3.3.8 of the *CGF*.

¹⁸⁰ Para 3.16 of the *CGF*.

¹⁸¹ Para 61 of the Zimbabwe *National Code*. Para 3.3.5 of the *CGF* and para 14 of the *Manual* echo the same sentiments. The board members are required to observe the “legal duties of good faith, loyalty, care, skill and diligence in the discharge of their functions” (Para 65 of the *National Code*). See Chapter 2, para 2.6.1 above for more information about the duties of directors.

¹⁸² Para 60 of the *National Code*. In terms of the *Code*, the role of the board includes determining the company’s purpose, vision, mission and values; setting strategies for achieving the company’s purpose; ensuring that procedures, policies and practices are established and implemented; approving, monitoring and evaluating the implementation of strategies, policies, procedures and business plans and regularly assessing the company’s performance and effectiveness and that of individual directors, the whole board and the chief executive officer, among others.

¹⁸³ Para 147 and 144 of the *National Code*.

¹⁸⁴ Para 64 of the *National Code*.

attesting to the resolutions adopted by the board.¹⁸⁵ As a fifth measure, the *National Code* recommends that new and existing board members should be subjected to formal induction, on-going education and training programmes to enable them to effectively discharge their duties.¹⁸⁶ Furthermore, the *National Code* recommends the setting up of board committees to assist the board in efficiently discharging its obligations.¹⁸⁷

It is clear that Zimbabwe has significantly borrowed from internationally adopted principles of good corporate governance given the similarity of its provisions to those of other countries and those proposed by organisations such as the OECD, CAGG and ICGN.¹⁸⁸ The policy makers have tried to put in place measures to ensure that board members are adequately educated about what is expected of them, are equipped and empowered to undertake their duties and are regularly guided and advised by competent professionals.

4.2.3 Selection and Appointment of Board Members

In conformity with the universally accepted principles described above,¹⁸⁹ the Constitution requires that public office bearers, which include board members of public entities, must be appointed based on merit.¹⁹⁰ Similarly, the Companies Act specifies the kind of persons who should be appointed as directors and disqualifies certain persons from such appointment.¹⁹¹ In addition, the various Acts of Parliament which established Zimbabwean public entities detail

¹⁸⁵ Para 138-143 of the *National Code*.

¹⁸⁶ Para 188-190 of the *National Code*. According to the *National Code*, the formal induction programme should be established to familiarise incoming directors with the company's operations, its business environment and sustainability issues relevant to its business, introduce the directors to members of senior management and appraise them of their respective duties and responsibilities and enable new directors to make maximum contribution as quickly as possible.

¹⁸⁷ Para 97 of the *National Code*.

¹⁸⁸ See Chapter 3, para 3.6.1 above.

¹⁸⁹ Chapter 3, para 3.6.2 above.

¹⁹⁰ Section 9 of the Constitution. This is, according to the Constitution, to ensure that there is efficiency, accountability, transparency, competence, personal integrity and financial probity in the management of public entities and other government institutions. See also Chapter 2, para 2.6.2 above.

¹⁹¹ The persons disqualified include a body corporate, a minor or other person under legal disability, an unrehabilitated insolvent, a person previously convicted and sentenced for theft, fraud, forgery or uttering and a person disqualified by a court order under section 344 of the Act (sections 171 and 173 of the Companies Act). See also sections 169-180 of the Companies Act and Chapter 3, para 3.2.2 above for more information.

how members of the boards are to be selected and appointed.¹⁹² The Acts provide that board members should be chosen for their ability and experience in the relevant industry or administration and for their suitability otherwise for appointment as members.¹⁹³ The board members are also supposed to be “appointed by the Minister, after consultation and in accordance with any directions the President may give him”.¹⁹⁴ The main aim of requiring that the Minister consults and seeks presidential approval is to enhance transparency in the appointment process and to ensure that appropriate directors are appointed.¹⁹⁵

To complement the establishing Acts, the *CGF* provides that the appointment of the board shall be in accordance with “the provisions of the relevant legislation, that is, the enabling Acts of Parliament or Articles of Association of the Company”.¹⁹⁶ Likewise, the *Manual* and the *National Code* advocate for a formal, robust and transparent way of appointing directors to the board that reflects largely the diversity of the shareholders.¹⁹⁷ The *CGF*, *Manual* and *National Code* further require that board members should be selected based on their skills, qualifications, level of experience, good leadership qualities and core competencies required by the company so as to be able to effectively discharge their duties.¹⁹⁸ It is also recommended that board appointments should take into account the need for gender

¹⁹² Sections 6-10 of the MMCZ and ZMDC Act. The establishing Acts borrow significantly from the provisions of the Companies Act e.g. qualifications of prospective directors and persons disqualified to be directors (sections 171 and 173 of the Companies Act)

¹⁹³ See section 5 of the ZMDC Act, MMCZ Act, Railways Act and Grain Marketing Act. See also para 2.2.1 of the *CGF* which states that the Responsible Minister should ensure that “only competent and reliable persons with appropriate knowledge, skills and experience are appointed to the Board...”. According to Johnson, being knowledgeable about the intricacies of an industry determines how effectively directors process information and greatly impacts on the board’s performance (Johnson SG *et al* “Board Composition beyond Independence: Social Capital, Human Capital and Demographics” (2013) 39 *Journal of Management* 232–262).

¹⁹⁴ The Minister is also required to consult relevant industrial organisations (e.g. Chamber of Mines for MMCZ board appointments) and related ministries before nominating a person for appointment as a director (section 5 of the MMCZ Act and section 5 of the Grain Marketing Act). The criteria that is followed to appoint directors is not available to the public but the Acts simply indicate that the Minister should consult the cited organisations on potential board members as well as obtain guidance from the President of the country (section 5 of the MMCZ, ZMDC and Grain Marketing Act).

¹⁹⁵ Para 3.2.3 of the *CGF*.

¹⁹⁶ *Ibid*.

¹⁹⁷ Para 22 of the *Manual* and para 86 of the *National Code*. See also section 173 of the Companies Act as to whom can be appointed as a director. The main idea behind recommending that there be transparency in the appointment of directors is to curb potential for corruption in the appointment process. For instance, a chief executive officer can nominate directors who may further his and the board’s interest rather than the interests of shareholders and other stakeholders. (Boyd BK “Chief Executive Officer Duality and Firm Performance: A Contingency Model” (1995) 16 *Strategic Management Journal* 301-312).

¹⁹⁸ Paras 3.2.1 of the *CGF*, para 22 of the *Manual* and para 84, 99-100 of the *National Code*. Examples of core competencies are indicated as accounting or financial expertise, legal skills, business and managerial experience, industry knowledge, strategic planning experience and customer-based experience and knowledge.

balance.¹⁹⁹ The main reason for recommending gender balance in the board is to allow for diversity in perceptions and ideas.²⁰⁰

As a way of ensuring that board members have sufficient time to effectively render their services, it is recommended that nominated individuals should not be serving on any other board of a state enterprise or parastatal.²⁰¹ Furthermore, to promote new and sound viewpoints and ideas into discussions and decision-making for the growth of the entity, it has been recommended that board members should be appointed for a limited period.²⁰² No board member should serve on the same board for more than two successive terms except in exceptional circumstances.²⁰³ The main reason for rotating board members is to allow for new members to bring in new energy and perspectives because, generally, what an organisation needs on its board in terms of skills, demographics and professional experience changes with time and organisational growth level.²⁰⁴ The needs of a newly formed organisation may be very different from those of a fully developed one; what it needs during a period of growth may not necessarily be what it needs during a period of stability.²⁰⁵

¹⁹⁹ Paras 3.2.2 and 3.8.3 of the *CGF* and para 99 of the *National Code*. Section 17 of the Constitution mandates the state to take measures, including legislative measures, to promote full gender balance and full women participation in all spheres of Zimbabwean society. The draft *Corporate Governance and Remuneration Policy Framework* actually proposes a 50-50 gender representation on all boards (section 1 of the *Corporate Governance and Remuneration Policy Framework*). To further emphasise the importance the country attaches to gender equality, Zimbabwe subscribes to a number of international conventions or instruments on promotion of gender equality, for example, the *SADC Gender Policy*, *United Nations Convention on the Elimination of All Forms of Discrimination against Women, (CEDAW) (1979) and Optional Protocol to the Convention 1999* and *African Union Solemn Declaration on Gender Equality (2004) (United Nations Country Analysis Report for Zimbabwe* (Report prepared by Government of Zimbabwe in conjunction with United Nations Country Team in August 2010) available at http://www.undg.org/docs/12123/Zimbabwe-Country-Analysis-2010-Report_05-09-11.pdf (accessed 6 January 2015)).

²⁰⁰ See Chapter 3, para 3.6.2 above.

²⁰¹ Para 3.2.5 of the *CGF* and para 8 of Annexure B of the *Zimbabwe National Code*. The *National Code* recommends that board members should not serve on more than six boards at the same time and a person should not be appointed as chairperson of more than four boards except in exceptional circumstances based on good and sufficient reasons and demonstration of ability, availability and capacity to discharge duties effectively (paras 103-104 of the *National Code*).

²⁰² Para 3.2 of the *CGF* and paras 110-111 of the *National Code*. However where the statutes do not indicate the term of office, the term should not exceed three years. Once retired, an ex-board member should not be eligible for re-appointment to the same board for a period equivalent to the number of years he/she served that public entity (Para 3.7.3 of the *CGF*).

²⁰³ Para 2.2.2 and 3.2.4 of the *CGF*. See also para 7 of Annexure B of the *Zimbabwe National Code* which makes similar provisions. In considering the exceptional circumstances, it is recommended that an independent assessment should be done to determine whether there are no relationships or circumstances likely to affect the director's independence and decision making, such as impairment of character and judgment by long service.

²⁰⁴ Para 110 of the *National Code*. See also Otten L *Term Limits for Non-profit Boards* (The Non-profit Center at La Salle University 2009) 1 available at <http://www.nprcenter.org/Boards> (accessed on 16 January 2014).

²⁰⁵ *Ibid.*

However, the *CGF* recommends that at the expiry of the board tenure, efforts should be made to enable continuity and stability to leadership by retaining at least a third of the board and allowing for smooth hand over processes.²⁰⁶ Further to the above, Zimbabwe’s corporate governance framework seeks to minimise political interference in board appointments. The *CGF* provides that a board member’s term of office should not be “affected by the tenure of office of the Responsible Minister” but should be determined by the relevant Act of Parliament or Articles of Association, whichever is applicable.²⁰⁷ Also, the draft *Corporate Governance and Remuneration Policy Framework* provides for exclusion of the relevant ministry’s permanent secretary from board membership.²⁰⁸

The above efforts are an indication of Zimbabwe’s desire to bring about transparency in the board appointment process with a view to ensuring that appropriately qualified and skilled board members are appointed in public entities. What remains is to establish how effective the framework put in place has been in achieving the desired transparency and objectivity in the board selection process. This is considered in chapter 7 below.²⁰⁹

4.2.4 Composition of the Board

Like other jurisdictions, Zimbabwe appears to have also adopted the view that board composition may have a positive or negative influence on the performance of an organisation.²¹⁰ The country’s corporate governance framework considers a right sized and properly composed board to be an important factor in building an effective board.²¹¹ It is therefore, recommended that collective knowledge, skills, experience, the nature of the

²⁰⁶ Paras 3.2.4 and 3.2.6 of the *CGF* and also paras 98 and 5-7 of Annexure B of the *National Code*.

²⁰⁷ Para 3.7.4 of the *CGF*. Section 6 of the ZMDC Act provides that an appointed member shall hold office for a period not exceeding three years. The draft *Corporate Governance and Remuneration Policy Framework* advocates for a four year term, renewable only once.

²⁰⁸ Section 1 of the *Corporate Governance and Remuneration Policy Framework*. However, the *Framework* allows the responsible Minister to appoint ministry representatives to attend board meetings and report back on the deliberations.

²⁰⁹ See Chapter 7, para 7.2.3 below.

²¹⁰ Para 3.2.1 of the *CGF* acknowledges the fact that the performance of a public entity largely depends on the capabilities and performance of its board. Similarly, para 84 of the *National Code* recommends that the board “should be composed of persons with good leadership qualities and core competencies required by the company”. Proper board composition is, therefore, considered a very important ingredient for achieving optimum board effectiveness and good corporate governance.

²¹¹ *Ibid.*

company's business, resources required for conducting the business of the board, the need to have sufficient directors to structure board committees appropriately, potential difficulties of raising a quorum with a small board and the need to comply with regulatory requirements should be considered when determining the number and quality of directors to serve on the board.²¹² The size of the board should also be determined in accordance with section 169 of the Companies Act²¹³ or the statute applicable.²¹⁴

The *Manual*, *CGF* and *National Code* also suggest that the board should be properly composed in terms of independence. To achieve this objective, it is proposed that boards should be composed of both executive and non-executive directors with the majority of board members being non-executive and the roles of chairman and chief executive officer should not be exercised by the same individual.²¹⁵ This is to allow for greater independence and diverse viewpoints and to ensure that power is evenly balanced and exercised in the best interests of the company.²¹⁶ The statutes establishing public entities provide for a board composed of a majority of non-executive directors with the chief executive officer being the only executive director.²¹⁷

In addition, it is recommended that the board should be diverse and well balanced in terms of skills, gender and leadership experience.²¹⁸ The *National Code* also recommends that the board should be composed of persons with core competencies required by the company, such as “accounting or financial expertise, legal skills, business and managerial experience, industry knowledge, strategic planning experience, and customer-based experience and

²¹² Paras 100-101 of *National Code*.

²¹³ Section 169 provides that every company shall have at least two directors, other than alternate directors; preferably there should be at least one non-executive director for every executive director.

²¹⁴ The majority of the establishing Acts provide for a maximum of ten and a minimum of six board members. For example, section 5 of the MMCZ Act provides that the board shall consist of “not fewer than six and not more than ten other members...” See also para 3.8.1 of the *CGF* which provides that the size and composition of boards shall be in accordance with the provisions of the enabling Act or Articles of Association.

²¹⁵ Paras 27-28 of the *Manual* and para 3.8.2 of the *CGF*.

²¹⁶ *Ibid*.

²¹⁷ Section 5 of the ZMDC Act and section 5 of the Railways Act.

²¹⁸ Para 114 of the *Manual*, para 84 of the *National Code* and para 3.2.1 of the *CGF*. Board members are expected to have the ability to translate their knowledge and experience into solutions that can be applied in the interests of the company and all relevant stakeholders (para 115 of the *Manual*). See also Chapter 3, para 3.2.3 above with regard to the promotion of gender equality in the board appointment process.

knowledge”.²¹⁹ Similarly, the *CGF* recommends that the board should consist of competent individuals with a relevant complementary expertise and skills mix to enable it to effectively discharge its duties.²²⁰

To promote gender equality and non-discrimination, the Constitution requires that “the State, all institutions and agencies of government at every level must take practical measures” to promote gender equality.²²¹ The Constitution requires that all persons should have the right to be protected and benefit from the law.²²² It mandates the government to put in place legislative and other measures to promote the achievement of equality and protection of all persons. The Constitution also requires the setting up of a Gender Commission whose main functions are monitoring, investigating, researching, advising institutions and making appropriate recommendations on issues relating to gender equality.²²³

The country has even created a ministry (Ministry of Women Affairs, Gender and Community Development) to specifically focus on promoting the rights and interests of women.²²⁴ The Ministry, in liaison with other gender-focused institutions, spearheaded the enactment of a number of gender-sensitive legislative instruments. In addition to the Constitution,²²⁵ the Sex Discrimination and Removal Act,²²⁶ Indigenisation and Economic

²¹⁹ Para 84 of the *National Code*. Para 85 further sets out in detail the core qualities, membership criteria and qualifications of board members e.g. academic qualifications, emotional and social intelligence, competence in their field of endeavour, among others. Similarly, the establishing Acts provide that board members should be appointed for “their ability and experience in the industry or administration and for their suitability otherwise for appointment as members.” (section 5 of the ZMDC Act).

²²⁰ Para 3.2.1 of the *CGF*.

²²¹ See sections 17 and 56 of the Constitution which deal with gender balance, equality and non-discrimination. The provisions in the Constitution show that it has extensively borrowed from the UN Global Compact *Guiding Principles on Business and Human Rights* (2011) as regard gender equality promotion.

²²² Section 56 of the Constitution.

²²³ Sections 245-246 of the Constitution. The Bill to establish the Gender Commission was gazetted in July 2014 and members of the Gender Commission were appointed in June 2015 (*The Herald* of 30 June 2015 1). See also Makunike R *The Quality of Women’s Employment: An Analysis of the Vertical Representation of Women in Employment in Zimbabwean Parastatals* Unpublished Thesis (Southern and Eastern African Regional Centre for Women’s Law, University of Zimbabwe 2012) 10-12.

²²⁴ Matizha C *A Stumbling Block or Foundation Builder: An Assessment of the Ministry of Women’s Affairs in Promoting Women’s Rights in Zimbabwe* Unpublished Thesis (University of Zimbabwe 2006) 12-13.

²²⁵ Chapter 4 of the Constitution provides for human rights which include the right to be equally treated and not to be discriminated in any way.

²²⁶ Act No. 18 of 1983. The Act was created to enable women to have equal opportunity with men to hold public office and carry out all public functions in terms of national legislation.

Empowerment Act²²⁷ and Labour Relations Act²²⁸ are examples of some of the statutes that promote gender equality.²²⁹ Zimbabwe has also acceded to a number of international conventions and ratified protocols that address issues of gender equality or representation,²³⁰ for example, the *Convention on the Elimination of All Forms of Discrimination against Women* (December 1979),²³¹ the *Beijing Declaration on the Platform for Action* (1995)²³² and the *SADC Protocol on Gender and Development* (August 2008).²³³

The *CGF*, *National Code* and draft *Corporate Governance and Remuneration Policy Framework* embedded the constitutional requirement for gender equality promotion in their recommendations that board composition should take cognisance of the need for gender

²²⁷ Act No. 14 of 2007. The main objectives of the Act are to, *inter alia*, provide for support measures for the indigenisation of the Zimbabwean economy and the economic empowerment of indigenous people. The Act requires the Government to implement the support measures specifically on behalf of women, young persons under a prescribed age and disabled persons as defined in the Disabled Persons Act (No. 5 of 1992).

²²⁸ Act No. 16 of 1985. The Act prohibits employers from discriminating any potential employee on the basis of gender, *inter alia*.

²²⁹ The cited are examples of legislation that relate to employment but there are other statutes over and above this, e.g. the Legal Majority Act (No. 15 of 1982) which granted majority to every Zimbabwean aged 18 years and above and the Matrimonial Causes Act (No. 11 of 1987) which provide for equal distribution of matrimonial property on divorce. See Zvobgo CJM *A History of Zimbabwe, 1890-2000 and Postscript, Zimbabwe, 2001-2008* (Cambridge Scholars Publishing 2009) 292-295.

²³⁰ Matizha C *A Stumbling Block or Foundation Builder: An Assessment of the Ministry of Women's Affairs in Promoting Women's Rights in Zimbabwe* (2006) 12-13. See also the *National Gender Policy (2013-2017)* (Policy developed by Zimbabwe's Ministry of Women Affairs, Gender and Community Development) 2 available at <http://www.women.gov.zw/downloads?download=3:2013-national-gender-policy> (accessed on 17 November 2014). Although international conventions do not automatically become part of national law, ratification is an important step in that it indicates government's commitment to the principles and actions specified.

²³¹ The *Convention on the Elimination of All Forms of Discrimination against Women* was adopted by the United Nations General Assembly on 18 December 1979 and entered into force as an international treaty on 3 September 1981. The Convention positively affirms the principle of gender equality by requiring states parties to take "all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men". Visit <http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm> for more information.

²³² The *Beijing Declaration and Platform for Action* was adopted by the Fourth World Conference on Women in 1995. It reasserts the fundamental principle that the rights of women are an "inalienable, integral and indivisible part of universal human rights." The *Platform for Action* also calls upon governments to implement policies that deal with issues women's rights, among them equal treatment of women. Visit <http://www.stopvaw.org/beijing-declaration-and-platform-for-action> for more information.

²³³ The *Protocol* aims to "provide for the empowerment of women, to eliminate discrimination and achieve gender equality by encouraging and harmonising the development and implementation of gender responsive legislation, policies and programmes and projects" in SADC member states. The *Protocol* is available at <http://www.sadc.int/documents-publications/show/803> (accessed on 17 July 2014).

balance.²³⁴ All public entities are, therefore, required to ensure that their boards are properly composed in terms of expertise, skills, gender and other required attributes.²³⁵

4.2.5 Remuneration of Directors

Board remuneration is one of the critical elements that contribute to public entity boards' effectiveness in Zimbabwe. The Companies Act provides that directors' remuneration should be fixed by the company in a general meeting whilst the articles of some companies authorise directors to determine their own remuneration.²³⁶ The Act prohibits tax-free payments to directors,²³⁷ loans to directors except in certain circumstances²³⁸ and the issue of shares to directors on more favourable terms than are available to members unless approved by the company in a general meeting.²³⁹ To enhance transparency, the Act requires directors' remuneration, pensions and compensation for loss of office to be fully disclosed in "any accounts of a company laid before it in general meeting or in a statement annexed thereto".²⁴⁰ In addition, the statutes establishing public entities require that board remuneration or any allowance to meet any reasonable expenses incurred by a board member in connection with the business of the board or committee should be fixed by the Minister.²⁴¹ It can be concluded that these provisions aim to ensure that board remuneration is determined in a transparent

²³⁴ Para 3.2.2 of the *CGF*, para 99 of the *National Code* and section 1 of the *Corporate Governance and Remuneration Policy Framework*. This is in line with international corporate governance developments which aim to promote gender equality (see Chapter 2, para 2.6.3 above, Part VI of the *OECD Principles of Corporate Governance* and Principle 2.18 of the *King III Report*).

²³⁵ An assessment of the usefulness of the corporate governance measures put in place to enhance the effectiveness of public entity boards through the creation of properly composed boards is made in Chapter 7, para 7.2.4 below.

²³⁶ Table A, Article 5 of the Companies Act. The assumption is that the power to fix directors' remuneration means the "power to fix reasonable remuneration" (*The Master v Thompson's Estate* (1961) (2) SA 20 (FC)).

²³⁷ Section 176 of the Companies Act.

²³⁸ Section 177 of the Companies Act. The exceptional circumstances include: where the loan is meant to meet expenditure incurred or to be incurred by the director for the purposes of the company or for the purpose of enabling him to properly perform his duties as an officer of the company; where the company's ordinary business includes the lending of money or the giving of guarantees in connection with loans made by other persons; the making of the loan is to enable the director to purchase or subscribe for fully paid shares in the company to be held by him or in trust for him or where the loan is issued by a private company, which is not a subsidiary company, with the consent of members holding at least nine-tenths of the issued share capital.

²³⁹ Section 183 of the Companies Act. The objective of these restrictions is to prevent undeclared remuneration which may circumvent the disclosure requirements of section 184 of the Act.

²⁴⁰ Section 184 of the Companies Act.

²⁴¹ Section 13 of the MMCZ Act, section 14 of the Grain Marketing Act and para 13 of the *CGF*.

manner and that there is an independent checking mechanism to minimise abuse of authority by the board as far as its remuneration is concerned.

The principle that the level of directors' remuneration should be adequate to attract and retain appropriately qualified and competent individuals who are able to successfully run the organisation has been widely accepted in Zimbabwe.²⁴² To achieve this objective, the *National Code* recommends that the size and mix of the remuneration package of board members "should attract, retain and motivate persons of high calibre, relevant experience and appropriate skills, but must be affordable to the company."²⁴³ In the same way, the *CGF* recommends that the remuneration for board members should be affordable, sustainable, competitive and reasonable.²⁴⁴ Moreover, the *National Code* recommends that directors' remuneration should be indicative of the level of commitment and time devoted by them to the company's business as well as their responsibilities and experience.²⁴⁵ It is thus accepted that performance related elements of remuneration should constitute a substantial portion of the total remuneration package of directors to promote long term success of the company.²⁴⁶ The corporate governance frameworks also require that the remuneration packages should be transparently determined and fully disclosed.²⁴⁷ The *Manual*, *CGF* and *National Code* provide that the annual report of an entity should sufficiently disclose directors' annual remuneration including beneficial and non-beneficial shareholdings.²⁴⁸

To assist the board in setting up and administering remuneration policies that comply with good corporate governance, the *National Code* and the *Manual* provide for the establishment of a remuneration committee which should be composed of independent non-executive board

²⁴² Paras 2.2.2 and 3.2.4 of the *CGF* support this opinion.

²⁴³ Para 169 of the *National Code*. Similarly, the *National Code* provides that board remuneration should be attractive and fair enough to enhance "commitment and effectiveness, and to promote the creation of value for the company and advance its short and long term interests" (para 167 of the *National Code*). See also para 3.13 of the *CGF*.

²⁴⁴ Para 3.13 of the *CGF*.

²⁴⁵ Para 173 of the *National Code*.

²⁴⁶ Para 168 and 172 of the *National Code*.

²⁴⁷ Para 3.13 of the *CGF* and para 35 of the *Manual*. Disclosure assists in achieving transparency and accountability and has the effect of deterring directors from receiving unscrupulous benefits. In addition, disclosure brings to light any form of misconduct and noncompliance enabling shareholders and other interested people to take appropriate corrective action.

²⁴⁸ Para 36 of the *Manual*, para 3.13 of the *CGF* and para 287 of the *National Code*. To achieve the same objective, section 184 of the Companies Act provides for full declaration of payments made to directors in the financial statements.

members.²⁴⁹ The committee should assist the board in setting up and administering remuneration policies that promote fair remuneration in order to motivate board members and enhance their reliability, commitment and effectiveness in creating value for the company and advancing its interests.²⁵⁰ However, it would appear like this committee might not be so relevant when it comes to public entity board remuneration as this is determined by the Minister.²⁵¹

Chapter 7 analyses whether or not the efforts put in place by Zimbabwe to match international corporate governance standards with regard to directors' remuneration, have yielded positive results.²⁵²

4.2.6 Evaluation of Board Performance

The evaluation of board performance has been acknowledged as a critical aspect in enhancing the effectiveness of boards of public entities in Zimbabwe. To achieve this, the *CGF* and the *National Code* require the board to sign a performance agreement²⁵³ with the responsible Minister and to evaluate itself against agreed performance indicators and targets on an annual basis.²⁵⁴ The Minister is in turn supposed to; using an agreed performance management system and with the assistance of outside experts, if considered necessary, appraise the performance of the board at intervals agreed to by the parties.²⁵⁵ To assist in managing performance, the government has, as part of its “Zim Asset Program”, introduced a results

²⁴⁹ Paras 170 and 171 of the *National Code* and Annexure 3 (para 6) of the *Manual*.

²⁵⁰ Paras 167 and 171 of the *National Code*.

²⁵¹ Section 13 of the MMCZ Act and section 14 of the Grain Marketing Act.

²⁵² See Chapter 7, para 7.2.5 below.

²⁵³ The performance agreement is a kind of contract between the government usually represented by the ministry and the public entity board which defines the broader policy objectives of the entity, the goals and requirements for the entity and sets financial performance targets expected to be achieved by the entity. The success or failure of the board is reflected on the results achieved during the agreed period (Paras 3.4 and 3.5 of the *CGF* and para 11 of Annexure B to the *National Code*).

²⁵⁴ See also paras 4, 11-13 of Annexure B of the *National Code* and para 6.5 of the *CGF*.

²⁵⁵ Paras 3.5.1 and 3.5.2 of the *CGF* and paras 13-14 of Annexure B of the *National Code*.

based management (RBM) system to be implemented by all government departments and state-owned enterprises.²⁵⁶

The *Corporate Governance and Remuneration Policy Framework* provides that the responsible Minister should appoint appropriately qualified and experienced personnel from the Ministry to attend board meetings and report back on the deliberations. All board resolutions should be submitted to the responsible Minister, all public entities should hold annual general meetings which should be attended by different government stakeholders and the chief executive officer should, on a regular basis, report directly to the Permanent Secretary on operational issues and significant board decisions.²⁵⁷ Furthermore, the *Framework* provides for performance related contracts for the board, chief executive officer and senior management that clearly stipulate the minimum performance standards which, if not achieved, can result in termination of service.²⁵⁸ The main objective of these measures is to assist the Minister in monitoring the performance of the board and thus to enable him to evaluate its effectiveness. Where the board does not perform to expectation or in accordance with the mandate of the organisation, the responsible Minister is mandated to change the chairperson and/or the composition of the board.²⁵⁹ Also, the Minister is empowered to discipline or dismiss any directors for non-performance, corrupt conduct or any behaviour which brings the name of the public entity into disrepute.²⁶⁰

As another performance measure, the board is expected to produce a special report on corporate governance which should be attached to the annual report.²⁶¹ The report should

²⁵⁶ *Zim Asset Policy Document* 118-119 and *The Herald* of 4 December 2013 5. The RBM system is a tool that can be used to help policy-makers and decision makers to track progress and demonstrate the impact of a given policy, programme or project (Madhekeni A “Implementing Results-Based Management Systems in Zimbabwe: Context and Implications for the Public Sector” (2012) 2(8) *International Journal of Humanities and Social Science* 122-129).

²⁵⁷ Section 1 of the *Corporate Governance and Remuneration Policy Framework*.

²⁵⁸ *Ibid.*

²⁵⁹ Para 2.2.2 of the *CGF* and section 9 of the *MMCZ, ZMDC and Grain Marketing Acts*.

²⁶⁰ Para 3.7 of the *CGF*. Measures to be taken are determined in accordance with relevant legislation and/or applicable code of conduct. The enabling Acts provide for the suspension or dismissal of board members if they fail to perform according to expectations. For instance, section 9 of the *Grain Marketing Act* empowers the Responsible Minister to suspend or request an appointed member to vacate office if the Minister is satisfied that the member has been guilty of misconduct, has failed to comply with the conditions of his office or is physically incapable of efficiently performing his duties as a member (see section 9 of the *MMCZ, ZMDC and Grain Marketing Acts*).

²⁶¹ Para 6.10 of the *CGF*.

indicate whether or not the public entity is complying with the *CGF*, giving a brief description of how this instrument is being applied, whether or not the entity has been audited and the skills, experience and expertise held by each director in office at the date of the report.²⁶² It should also state those rules or principles of the *CGF* that the public entity deviated from and the reasons for each deviation, among other issues.²⁶³ In addition, the board is expected to prepare financial statements in accordance with generally accepted accounting principles and standards and to present annual audited financial accounts at the annual general meeting in compliance with the requirements of the Companies Act, PFMA and the responsible Minister.²⁶⁴ This enhances transparency and allows the responsible Ministers and other interested stakeholders to assess the performance of the board and public entity, as well as to ask informed questions.

The board evaluation framework set out above clearly has the ability to assist in improving the effectiveness of public entity boards in Zimbabwe. The aim of this research is to find out the extent to which the recommendations and legal provisions have been implemented and whether they have yielded positive results.²⁶⁵

4.2.7 Enforcement of Corporate Governance Compliance

Zimbabwe has, to a large extent, relied on a self-regulatory environment in its approach to corporate governance because the basic requirements of corporate governance have not been given the force of an Act of Parliament.²⁶⁶ However, the continued corporate collapses, as a result of poor corporate governance practices, are a clear indication that the voluntary nature of compliance may not be sophisticated enough to generate an absolute transformation in corporate governance standards and practices in Zimbabwe. The country has thus recognised

²⁶² The Ministry of State Enterprises and Parastatals, in consultation with the responsible ministers, should monitor compliance with corporate governance principles by public entities (para 2.3 of the *CGF* and paras 32 and 40 of the *National Code*).

²⁶³ Para 6.10 of the *CGF*.

²⁶⁴ Para 5.1 of the *CGF*. The PFMA requires public entities to prepare quarterly management accounts, half-yearly unaudited reports and annual audited reports (sections 48 and 49 of the PFMA).

²⁶⁵ See Chapter 7, para 7.2.6 below.

²⁶⁶ See the 'Introduction and Background' to the *National Code* which clearly indicates that the *Code* adopts the "apply or explain" approach which means that all entities are expected by way of explanation to make a positive statement about how the principles have been applied or have not been applied.

that other interventions are necessary to create a climate necessary to ensure adherence to good corporate governance principles.²⁶⁷ As a result, the country has come up with a legislative and regulatory framework.

In terms of legislative instruments, the Companies Act, Public Finance Management Act, statutes enabling the creation of the public entities and the Anti-corruption Commission Act have played a significant role in the enforcement of good corporate governance practices in Zimbabwe's public entities.²⁶⁸ The ZSE *Listing Requirements* have also significantly contributed to the promotion of good corporate governance through its mandatory requirement for listed companies to comply with certain corporate governance standards.²⁶⁹ The Companies Act provides for a number of ways to enable directors to practice good corporate governance²⁷⁰ as well as for measures to deter directors from violating the provisions of the Act.²⁷¹ To enforce compliance the Companies Act imputes liability to directors for various offences committed in violation of the provisions of the Act. As an example, section 147 of Companies Act requires directors to attach to every balance sheet, laid before a company in general meeting, a report with respect to the state of the company's affairs, failure of which they will be guilty of an offence and liable to a fine.²⁷²

The other offences for which directors may be liable include making, circulating and publishing false statements in relation to any property or affair of the company,²⁷³

²⁶⁷ Zhou D "Three Decades of Public Enterprise Restructuring in Zimbabwe a Will-Of-The-Wisp Chase?" (2012) 2(20) *International Journal of Humanities and Social Science* 175-184. See also Mambondiani L, Zhang Y and Arun T *Corporate Governance and Bank Performance: Evidence from Zimbabwe* (Discussion Paper at the Institute of Development Policy and Management (IDPM, University of Manchester 2013) 8-10 available at <http://zimbabweinvestor.com/wp-content/uploads/2013/05/LanceMambondiani.pdf> (accessed on 2 March 2015).

²⁶⁸ Chapter 9:22 (Act 13 of 2004).

²⁶⁹ Section 7.F.5 of ZSE *Listing Requirements* (2002).

²⁷⁰ These range from requiring directors to disclose interests, prohibiting them from accessing tax free payments and loans and allowing members and the public to inspect the company's books to enhance transparency (sections 156-159, 176-177 and 186 of the Companies Act).

²⁷¹ The Companies Act imposes civil and criminal liability for directors who are charged with acts of misconduct (sections 169-186 and 343 of the Zimbabwean Companies Act).

²⁷² However, where, in the opinion of the court dealing with the case, the director committed the offence willfully he shall be sentenced to imprisonment.

²⁷³ Section 343 of the Companies Act. A charged director shall be exonerated from liability if he is able to prove that he conducted reasonable investigation and had "reasonable ground to believe and did believe that the statement, report or account was true and that there was no omission to state any material fact necessary to make the statement as set out not misleading".

falsification of company books (e.g. minute books, registers or accounts)²⁷⁴ and failure to submit company returns to Registrar as required by the Act.²⁷⁵ The Act also allows for the removal of directors from office as one of the penal provisions for failing to properly carry out one's duties.²⁷⁶ Other examples of deterrent measures are disqualification²⁷⁷ and penalties in the form of fines or imprisonment.²⁷⁸

The PFMA provides that every public entity should adhere to and implement the principles of sound corporate governance policies, procedures and practices.²⁷⁹ In the event of failure to comply, the Act provides for disciplinary proceedings to be instituted against any accounting authority of the public entity.²⁸⁰ The Act further provides that where the accounting authority²⁸¹ is a board or other body, every member of the authority is individually liable for any financial misconduct of the accounting authority.²⁸² To enforce the provisions of the Act, the PFMA provides for the establishment of a Treasury whose main mandate is to “determine the manner in which public resources shall be accounted for” and to supervise and give directions on how public resources should be effectively managed.²⁸³

²⁷⁴ Section 345 of the Companies Act. Unless the director proves to the court that he had no intention to defraud or deceive, he shall be guilty of an offence and liable to a fine not or to imprisonment or to both such fine and such imprisonment.

²⁷⁵ Section 346 of the Companies Act. The Registrar may direct the director should make good the default within such time as may be specified in the order. Such order may provide that all costs of and incidental to the application should be borne by the director responsible for the default. The Registrar may also invoke the provisions of any law that provides for the imposition of penalties for failure to submit company returns as required by the Companies Act.

²⁷⁶ The Act provides for the removal of a director before the expiration of his period of office, through a resolution of which special notice has been given, for failure to comply with the terms and conditions of his office (Section 175 of the Companies Act).

²⁷⁷ According to section 173(2), a director is disqualified from continuing to act as such if he “has at any time been or is adjudged or otherwise declared insolvent or bankrupt under a law in force in Zimbabwe or any other country”, is convicted of theft, fraud, forgery or uttering a forged document or perjury and has been sentenced therefor to serve a term of imprisonment without the option of a fine or to a fine exceeding level five or if he is removed by the court from any office of trust on account of misconduct. Any person who directly or indirectly continues to act as a director when he has been disqualified under the Act is considered guilty of an offence and liable to a fine not exceeding level ten or to imprisonment for a period not exceeding two years or to both such fine and such imprisonment (section 173(2) of the Companies Act).

²⁷⁸ See sections 173, 175 and 340-345 of the Companies Act.

²⁷⁹ Section 50 of the PFMA.

²⁸⁰ Section 41 and 87 of the PFMA. An act of financial misconduct occurs if a person wilfully or negligently fails to comply with the provisions of the Act or makes or permits any unauthorised expenditure, irregular expenditure or fruitless and wasteful expenditure (sections 85 and 87 of the PFMA).

²⁸¹ The PFMA defines an accounting authority as a board or other controlling body, the chief executive officer or the person in charge of that public entity (section 41 of the PFMA).

²⁸² Section 86(2) of the PFMA.

²⁸³ Section 6 of the PFMA.

The PFMA also provides for the appointment of auditors and audit committees to conduct independent checks on compliance by public entities with relevant laws and regulations which includes compliance with good corporate governance principles.²⁸⁴ The majority of the public entities are audited by the Office of the Comptroller and Auditor General (OCAG)²⁸⁵ to check their level of compliance.²⁸⁶ To complement the efforts of the OCAG, an Anti-Corruption Commission has been established in Zimbabwe. Its main purpose is to combat corruption by investigating reported cases of alleged corruption and recommending prosecution of defaulters, where considered necessary.²⁸⁷ Similarly, an Office of the Attorney General has been established to assist in enforcing compliance. Its main functions are to, *inter alia*, act as the principal legal advisor to the government, represent the government in legal proceedings and “to promote, protect and uphold the rule of law and to defend the public interest”.²⁸⁸

In addition to the provisions of the PFMA, the Acts that established public entities provide for dismissal of board members on charges of misconduct as a means of instilling discipline and promoting good corporate governance.²⁸⁹ As an example, the ZMDC Act empowers the Minister to request a board member to leave his office on the grounds of improper conduct as a member and failure to comply with the terms and conditions of his appointment.²⁹⁰ Similarly, the *ZSE Listing Requirements* compel companies to include a statement in their listing particulars indicating and explaining the extent to which they comply with the

²⁸⁴ Sections 80-84 of the PFMA.

²⁸⁵ OCAG is a government institution formed to examine, audit and report to Parliament on the management of public resources of Zimbabwe with the aim of improving accountability and good corporate governance. Its mandate is derived from the Constitution of Zimbabwe (section 309) and the PFMA (section 9).

²⁸⁶ To complement this, the *Corporate Governance and Remuneration Policy Framework* requires that all external audit reports should be submitted by the Auditor directly to the board and Responsible Minister to enhance transparency and accountability (section 1 of the *Corporate Governance and Remuneration Policy Framework*).

²⁸⁷ The objects of the Anti-Corruption Commission are stated in the Act as “to promote the investigation of serious cases of corruption and fraud” and “to make proposals for the elimination of corruption in the public and private sectors”, among others (section 11 of the Anti-Corruption Commission Act). The Zimbabwe Anti-Corruption Commission was established in terms of section 254 of the Constitution.

²⁸⁸ Section 114 of the new Constitution. The Attorney General’s Office falls under the Ministry of Justice of Zimbabwe.

²⁸⁹ Section 9 of the ZMDC and MMCZ Acts.

²⁹⁰ *Ibid.*

principles set out in the *Code of Corporate Practice and Conduct* of the *King Report* and *Cadbury Report*.²⁹¹

The voluntary codes that aim to guide entities to observe good corporate governance principles include the *Manual*, *CGF* and *National Code*.²⁹² In the meantime, organisations have also had to rely on other international codes on corporate governance, for example, the *OECD Principles of Corporate Governance*, *CAGG Guidelines*, *King Report* and the UK *Combined Code* to assist them in complying with good corporate governance.²⁹³ Furthermore, Zimbabwe developed a draft *Corporate Governance and Remuneration Policy Framework* in 2014. It is anticipated that this *Framework* will be promulgated as an Act of Parliament that governs the operations of state-owned enterprises and local authorities with regard to remuneration and corporate governance practices.²⁹⁴

The *Framework's* objective is to ensure that public entities boards and management observe good corporate governance. Sanctions can be imposed if the provisions of the *Framework* are not observed. To complement the above initiatives, the government has set up a Corporate Governance and Delivery Agency whose role is to ensure that parastatals comply with the *Manual*, *CGF* and the *National Code*²⁹⁵ through overseeing the selection and appointment of board members, monitoring operations, reviewing directors and senior management remuneration and overseeing audits.²⁹⁶

²⁹¹ Section 7.F.5 of *ZSE Listing Requirements* (2002).

²⁹² See Chapter 3, para 3.2.1 above. The voluntary nature of Zimbabwe's corporate governance framework is confirmed by the fact that it is not obligatory for organisations to apply the provisions of the various instruments but just to explain or give reasons where they fail to do so or where they adopt a different practice, approach or principle ("Introduction" to the *Manual*, para 6.10 of the *CGF* and "Introduction and Background" to the *National Code*).

²⁹³ See Chapter 4, para 4.2.1 above.

²⁹⁴ *The Zimbabwe Mail* of 16 April 2014 13 and *The Herald* of 19 June 2014 1.

²⁹⁵ In line with the *Plan for Economic Growth* outlined by the country's President in the State of the Nation Address delivered to Parliament in August 2015, the "Office of the President is working on proposals to transform the *National Code* into law to enable the government to deal with corruption and other shenanigans in companies" (*The Herald* of 6 October 2015 1). Converting the *National Code* into law will make it mandatory for organisations to comply with the corporate governance principles enshrined in the *Code* otherwise they would risk being subjected to penalties.

²⁹⁶ Section 1 of the *Corporate Governance and Remuneration Policy Framework*. See also Mthombeni D *Public Sector Corporate Governance Bill* (*The Zimbabwe Mail* of 25 June 2014) and *Public Sector Corporate Governance Bill* (*The Herald* of 19 June 2014). The Corporate Governance and Delivery Agency is mandated to "compile and maintain a "Databank (Directory) of all potential Board members on a parastatal by parastatal basis", from which the Ministers should select potential board members for approval by the President (section 1 of the *Corporate Governance and Remuneration Policy Framework*).

Further to the above, Zimbabwe has a judicial system which plays a crucial role in the effective enforcement of the above measures. The country's judicial system is derived from section 176 of the Constitution which vests the judicial authority of Zimbabwe in the Constitutional Court, Supreme Court; High Court, magistrates and such other courts as may be established by or under an Act of Parliament.²⁹⁷ The court system comprises of ordinary courts and special courts.²⁹⁸ The ordinary courts (Supreme Court; High Court, Magistrates Court) possess both criminal and civil jurisdiction. The special courts derive their existence from section 92(4) of the Constitution and have limited and frequently exclusive jurisdiction in one or more specific area of the law as defined by or under an Act of Parliament.²⁹⁹ Examples of special courts are the Labour Court, the Administrative Court, the Special Court for Income Tax Appeals and the Fiscal Appeal Court.³⁰⁰

The Institute of Directors of Zimbabwe (IoDZ) has also been actively involved in the promotion of good corporate governance in Zimbabwe.³⁰¹ The institution played an integral role in the development of the *National Code* and the *CGF*. To enhance good corporate governance practices, it disseminates information on corporate governance trends around the world as well as provides technical training on directorship and board effectiveness. However, the best the IoDZ can do is to encourage compliance but it has no powers to compel any entity to observe good corporate governance principles.³⁰²

²⁹⁷ Madhuku L *An Introduction to Zimbabwean Law* (2010) 61-65. See also Dube B "Roman-Dutch and English Common Law: The Indispensable Law in Zimbabwe" (2014) V(4) 1-18 and Keynote Address by the Honourable Mr Justice Chidyausiku GG, Chief Justice at the Joint Bar-Judiciary End of Term Colloquium Held on 28 November 2014 at Vumba, Zimbabwe available at <http://www.jsc.org.zw/index.php/how-courts-operate> (accessed on 27 April 2015).

²⁹⁸ Ibid. See also Saki O and Chiware T *The Law in Zimbabwe* (Midlands State University, Zimbabwe, Research Paper of February 2007) 14-16 available at www4.msu.ac.zw/.../1211357129The%20Law%20in%20Zimbabwe.doc (accessed on 12 January 2015)).

²⁹⁹ Ibid.

³⁰⁰ Feltoe G *A Guide to Administrative and Local Government Law in Zimbabwe* (University of Zimbabwe 2012) 13-14.

³⁰¹ To show the high level of commitment to promoting good corporate governance, the IoDZ is one of the twelve Institutes of Directors that founded the African Corporate Governance Network (ACGN).

³⁰² Research has shown that, despite IoDZ's efforts, entities across different sectors do not fully comply with good corporate governance standards (Zvavahera P "Corporate Governance and Ethical Behaviour: The Case of the Zimbabwe Broadcasting Corporation" (2014) 9 *Journal of Academic and Business Ethics* 1-8, Moyo G *The State of Corporate Governance in Zimbabwe's State Enterprises: Can the Situation be Rescued?* (2012) and Chidoko C and Mashavira A "An Analysis of Corporate Governance in the Banking Sector of Zimbabwe" (2014) 2(3) *Humanities and Social Sciences Letters* 174-180).

The challenge remains to ascertain how effective these enforcement mechanisms have been in promoting good corporate governance and enhancing the effectiveness of public entities boards so that the entities do not continue to be a drain to the fiscus but instead promote economic and social development.³⁰³

4.3 PRELIMINARY CONCLUSIONS

This chapter examined the corporate governance framework in Zimbabwe with particular emphasis on the framework that has been put in place to enhance the effectiveness of boards of public entities.

In Zimbabwe, like in most jurisdictions, the issue of good corporate governance has come up mainly in the wake of corporate collapses, the need to attract foreign investment and the necessity to sustain long term company growth. Compliance with good corporate governance has been largely voluntary. The country has tried to conform to internationally recognised corporate governance principles by coming up with localised corporate governance instruments, namely the *CGF, Manual* and *National Code*. The instruments have recommended that, among others, boards should be fully aware of their roles, the board members should be transparently appointed based on merit and relevant experience, the composition of the board should be properly balanced in terms of skills, independence and gender, directors' remuneration should be adequate and performance related and the performance of the board should be regularly and objectively evaluated to assess its effectiveness.

However, due to the prevalence of corporate collapses, Zimbabwe has taken steps to complement the existing self-regulatory corporate governance regime with legislative and regulatory instruments. In this regard, the Constitution, Public Finance Management Act, Acts establishing public entities, Companies Act, Anti-Corruption Commission Act, *Corporate Governance and Remuneration Policy Framework* and the *ZSE Listings Requirements* require the boards of public entities to observe good corporate governance at all times. To assist in enforcing the corporate governance principles, the country has set up

³⁰³ See Chapter 7, para 7.2.7 below.

institutions like Office of the Comptroller and Auditor General, Corporate Governance and Delivery Agency and the Zimbabwe Anti-Corruption Commission.³⁰⁴

In addition to these measures, Zimbabwe's entities are also guided by internationally recognised codes on corporate governance like the OECD *Principles of Corporate Governance* and the CAGG *Guidelines* and national codes like the *King Reports*, Malawi's *Code of Best Practice for Corporate Governance* and UK *Combined Code* in their practice of good corporate governance.³⁰⁵ A number of institutions have supported efforts to promote good corporate governance in Zimbabwe, for example, the Institute of Directors, African Management Services Company, World Bank, Centre for Corporate Governance and African Development Bank.³⁰⁶

Having considered the corporate governance framework from Zimbabwe's perspective, chapters 4 and 5 compare and contrast the Zimbabwean framework to those of South Africa and Australia, respectively.³⁰⁷ The objective is to establish how well Zimbabwe's corporate governance standards compare to those of other jurisdictions.

³⁰⁴ See para 4.2.7 above.

³⁰⁵ See para 4.2.1 above.

³⁰⁶ Ibid.

³⁰⁷ See Chapter 1, para 1.2 above for the reasons why South Africa and Australia were chosen for the comparison.

CHAPTER 5

COMPARISON OF SOUTH AFRICA AND ZIMBABWE'S CORPORATE GOVERNANCE FRAMEWORKS

5.1 INTRODUCTION

Corporate governance law is continuously reformed to keep abreast of developments in the world and the changing business environment.¹ It is thus imperative that, whenever a country decides to enact legislation or put in place regulatory systems, they are compatible with international best practice.²

As the King Committee on Corporate Governance observed, companies are governed within the framework of the laws and regulations of the country in which they operate.³ There can therefore, be no single generally applicable corporate governance model especially in view of the fact that countries differ in culture, regulation, law and generally the way business is conducted.⁴ But, considering the fact that a significant number of investors now invest all over the world, there are certain international standards⁵ that every country is required to

¹ “Preamble” to the OECD *Principles of Corporate Governance* and “Preface” to the CAGG *Guidelines*.

² Ibid.

³ “Introduction and Background” to the *King II Report*.

⁴ Corporate governance practices and their efficiency are largely determined by the corporate governance system of a country because practices that may appear appropriate and efficient for one country may not necessarily be appropriate for another country due to contextual differences of countries. Differences in each country’s political, legal, social and cultural systems thus need to be taken into account when transferring a set of corporate governance systems from one context to another (OECD *Principles of Corporate Governance* (2004) 13). See also Claessens S and Yurtoglu B *Corporate Governance and Development - An Update* (Global Corporate Governance Forum Focus (10) 2012) 11-12 available at http://www.ifc.org/wps/wcm/connect/.../Focus10_CG%26Development.pdf? (accessed on 15 May 2015).

⁵ International guidelines have been developed by, *inter alia*, the OECD, ICGN and CACG to guide member and nonmember countries in developing legal, institutional and regulatory frameworks for corporate governance in their countries which match their individual developmental experiences. Four pillars have been considered essential to all international guidelines of corporate governance namely; fairness, accountability, responsibility and transparency (OECD *Principles of Corporate Governance* (2004) 17-23).

comply with to attract and retain investors.⁶ It is thus, desirable that Zimbabwe should harmonise its legal and regulatory framework of corporate governance with other jurisdictions to reduce the cost of conducting business and increase certainty both for international companies and investors and for the benefit of local companies involved in international trade and investment.

In this chapter, a comparative analysis between Zimbabwe and South Africa's corporate governance frameworks is conducted to establish the extent to which Zimbabwe has tried to harmonise its systems with other neighbouring and regional players.⁷ The main objective is to establish how Zimbabwe has performed, in comparison with other countries in the region, in so far as empowering boards to promote good corporate governance in public entities is concerned.

5.2 COMPARISON OF SOUTH AFRICA AND ZIMBABWE'S CORPORATE GOVERNANCE FRAMEWORKS

Zimbabwe relies on its neighbours and other regional countries as models for reform and recognises the fact that complementary regulations will immensely benefit the neighbouring countries. Due to geographical proximity, Zimbabwe's economy "relies heavily on South Africa with which it has close political, economic and cultural ties".⁸ South African statutory instruments have been influential in the establishment of Zimbabwean statutory instruments and courts have referred to South African case law/precedents in passing court judgements.⁹ This is because the legal system governing business entities in Zimbabwe "originated from that which was operating in the Cape Province of South Africa in 1891, which was in itself

⁶ It has been established that raising foreign finance and maintaining liquidity is easier if investors have confidence in the country and particular company's corporate governance procedures and standards (Huy DTN, Hung NV and Hien DTN *Modern International Corporate Governance Principles and Models After Global Economic Crisis* (Partridge, India 2014) 430 and Abdioglu N, Khurshed A and Stathopoulos K "Foreign Institutional Investment: Is Governance Quality At Home Important?" (2013) 32 *Journal of International Money and Finance* 916-940).

⁷ Chapter 4 of this thesis concentrated on analysing the Zimbabwean corporate governance framework. In this chapter the South African framework is discussed in greater detail and compared to the Zimbabwean framework.

⁸ Besada H and Werner K *The Environment and Corporate Governance in Zimbabwe* (The Centre for International Governance Innovation Policy Brief No. 19 of July 2010 available at <http://www.cigionline.org> (accessed on 5 August 2014).

⁹ Saki O and Chiware T *The Law in Zimbabwe* (Midlands State University, Zimbabwe 2014) 13-15. See also Dzvimbo RS *Should the Zimbabwean Companies Act Move Away From Judicial Management and Adopt Business Rescue?* Unpublished Thesis (University of Cape Town 2013) 5-6.

based on Roman-Dutch law”.¹⁰ South African textbooks on law have also been persuasive authority upon which Zimbabwean courts have relied in making judicial decisions.¹¹ In addition, the drafters of the *Manual*, *CGF* and *National Code*¹² confirm that precedents set in the *King Reports on Governance for South Africa* were persuasive in the development these codes.¹³

In view of the close linkages between the two countries, this section compares and contrasts the Zimbabwean corporate governance framework to that of South Africa with special reference to selected corporate governance aspects. The selected aspects are the board’s role, selection and appointment, composition, remuneration and performance evaluation as well as enforcement of compliance with good corporate governance standards.

5.2.1 Overview of South African Corporate Governance Framework

During the period of apartheid in South Africa, the level of corporate governance was compromised because the economic and trade sanctions imposed by the United Nations resulted in the country facing difficulties in interacting with the global economy.¹⁴ This resulted in the country’s “corporate practices, laws and regulation” not conforming to international standards and businesses and regulators disrespecting good corporate management and professional ethics.¹⁵ After a democratic government was elected, the country had to undertake a number of corporate governance reforms to manage demands from international investors, meet the requirements for external financial support and

¹⁰ Owusu-Ansah S “The Impact of Corporate Attributes on the Extent of Mandatory Disclosure and Reporting by Listed Companies in Zimbabwe” (1998) 33(5) *The International Journal of Accounting* 605-631. See also Dube B “Roman-Dutch and English Common Law: The Indispensable Law in Zimbabwe” (2014) 1-18.

¹¹ Ibid. See also Madhuku L *An Introduction to Zimbabwean Law* (2010) 15-17.

¹² See Chapter 4, para 4.2.1 for details on these Zimbabwean corporate governance codes.

¹³ “Foreword” to the *Manual*, “Introduction and Background” to the *Zimbabwe National Code* and “Introduction” to the *CGF*.

¹⁴ Afolabi AA “Examining Corporate Governance Practices in Nigerian and South African Firms” (2015) 3(1) *European Journal of Accounting, Auditing and Finance Research* 10-29 available <http://www.eajournals.org/> (accessed on 15 April 2015). See also Mallin CA *Handbook on International Corporate Governance: Country Analyses* (Edward Elgar Publishing 2006) 210.

¹⁵ Afolabi AA “Examining Corporate Governance Practices in Nigerian and South African Firms” (2015) 10-29.

encourage the highest standard of corporate governance in the country.¹⁶ South Africa has thus, acknowledged good corporate governance as a fundamental instrument for the efficient utilisation and management of private and state-owned assets as well as a tool to restore investor confidence and enhance corporate transparency and accountability.¹⁷

Historically, the South African corporate governance framework has emulated that of the United Kingdom in that it has two systems namely; the legal sources (which include legislation and case law)¹⁸ and non-binding codes of best practice to guide corporate behaviour.¹⁹ The country acknowledges that effective corporate governance requires a balance between allowing directors to run the company in the way they consider best for the stakeholders, while providing stakeholders with some protection against a board that ignores its responsibilities and is not held properly accountable.²⁰ The Institute of Directors of South Africa (IoDSA) was one of the first bodies to be actively involved in the promotion of good corporate governance in South Africa mostly through its integral role in the development of the *King Report on Corporate Governance (King Reports I-III)*²¹ which forms the basis of the

¹⁶ Ibid. See also Mallin CA *Corporate Governance* 4th ed. (Oxford University Press 2013) 340.

¹⁷ Okeahalam CC and Akinboade OA *A Review of Corporate Governance in Africa: Literature, Issues and Challenges* (2003) 3-5. See also Hendricks E *Towards Good Corporate Governance in South Africa: Private Enforcement versus Public Enforcement* Unpublished Thesis (University of Cape Town 2010) 13.

¹⁸ South African law is a combination of different legal systems, with its origin in Europe and Great Britain. Its foundation lies in Roman-Dutch law, which is itself a blend of indigenous Dutch customary law and Roman law (Van der Merwe CG and Du Plessis JE *Introduction to the Law of South Africa* (The Hague: Kluwer Law International 2004) 2-12). See also Kitchin SB "The Judicial System of South Africa" (1914) 62(6) *University of Pennsylvania Law Review and American Law Register* 441-449 available at <http://www.jstor.org/stable/3313881?seq> (accessed on 27 March 2015) and Schreiner OD *The Contribution of English Law to South African Law; And the Rule of Law in South Africa* (Juta & Company Limited 1967) 5-9.

¹⁹ This is mostly because the corporate governance regime is characterised by a unitary board system, a reliance on capital markets to raise finance, a strong legal framework to protect shareholder rights and a set of self-regulatory measures designed to shape management and board behaviour (West A "Theorising South Africa's Corporate Governance" (2006) 68(4) *Journal of Business Ethics* 433 – 448). See also Croucher R and Miles L "Corporate Governance and Employees in South Africa" (2010) 10 (2) *Journal of Corporate Law Studies* 367-389.

²⁰ Muswaka L "Corporate Governance under the South African Companies Act: A Critique" (2013) 3(3) *World Journal of Social Sciences* 11-19. See also Mallette P "State Anti-corporate Takeover Laws: Issues and Arguments" (1995) 7 *Journal on Managerial Issues* 142-160.

²¹ The *King Reports* have been developed, in line with global developments, from *King I* in 1994, *King II* in 2002 and subsequently *King III* in 2009 (Naidoo R *Corporate Governance: An Essential Guide for South African Companies* (2009) 32-35). It is also worth noting that efforts are underway to review the *King III Report* and produce *King IV Report*. It has been reported that the set-up phase on the project plan, which includes governance structures and project plan, has been completed. The initial research consisting stakeholder consultations and a comparative analysis of *King III* with the major international governance codes has also been completed. Currently the project team has published the draft document for public comment. This thesis does not discuss the *King IV Report* in detail since it is still in draft form. For more information on the draft *Report*, visit http://c.ygcdn.com/sites/www.iodsa.co.za/resource/resmgr/King_IV/King_IV_Progress_update.

debate on corporate governance in South Africa.²² To enhance its efforts, in 2001, the IoDSA established the Centre for Directorship and Corporate Governance, which disseminates information on corporate governance developments around the globe in addition to providing technical training on directorship and board effectiveness.²³

The main sources of corporate governance in South Africa are the Constitution of the Republic of South Africa (Act 108 of 1996), Acts of Parliament,²⁴ particularly the Public Finance Management Act (PFMA) 1 of 1999 and Companies Act 71 of 2008, the Johannesburg Stock Exchange (JSE) *Listings Requirements*²⁵ and common law²⁶ with rich and extensive case law pertaining to corporate governance.²⁷ Examples of other Acts²⁸ which impose, although indirectly, corporate governance obligations on companies and its directors include (as amended), the Labour Relations Act 66 of 1995,²⁹ the Basic Conditions of

²² Koma SB “Conceptualisation and Contextualisation of Corporate Governance in the South African Public Sector: Issues, Trends and Prospects” (2009) 44(3) *Journal of Public Administration* 451-459. However, “the government, regulatory agencies, the accountants’ profession and the stock exchange have also been forces for change, motivated largely by the desire to apply international standards in South Africa” (Oman CP *Corporate Governance in Development: The Experiences of Brazil, Chile, India, and South Africa* (OECD Publishing, 2003) 163). See also Luo Y and Tung RL “International Expansion of Emerging Market Enterprises: A Springboard Perspective” (2007) 38 *Journal of International Business Studies* 481-498.

²³ The Institute of Directors (IoDSA) *Governance Assessment Instrument, Information 2012* (IoDSA 2012) 9-10 available at http://www.iodsa-gai.co.za/documents/iodsa_gai_handout_2012.pdf. (accessed on 29 September 2015). For more information on the Center for Directorship and Corporate Governance, visit <http://www.iodsa.co.za/>.

²⁴ Included among the key statutes are the Public Audit Act (No. 25 of 2004), Acts that enabled the formation of the public entities (e.g. the South African Civil Aviation Authority Act 40 of 1998 and Eskom Conversion Act 13 of 2001) and sector legislation (e.g. Electricity Regulation Act 4 of 2006 and Electronic Communications Act 36 of 2005).

²⁵ The Johannesburg Securities Exchange *Listings Requirements* make it mandatory for companies and directors to observe certain corporate governance principles as enshrined in the *King Report* (section 3.84 of the *JSE Listings Requirements*). The *JSE Listings Requirements* are available at <https://www.jse.co.za/.../JSEEducationItems/Service%20Issue%2017.pdf> (accessed on 10 October 2014).

²⁶ Although the new Companies Act incorporates numerous provisions of common law, the Act does not replace the common law but rather endorses it (section 77 of the Companies Act). See also Naidoo R *Corporate Governance: An Essential Guide for South African Companies* (2009) 31.

²⁷ Moloi STM *Assessment of Corporate Governance Reporting in the Annual Reports of South African Listed Companies* (2008) 46. See also Naidoo R *Corporate Governance: An Essential Guide for South African Companies* (2009) 30-32. It is important to note that this study mostly focuses on corporate governance instruments that are applicable to public entities.

²⁸ It is beyond the scope of this study to analyse these other Acts in detail as the major focus is on the main Acts, i.e. the Constitution, Companies Act, Public Finance Management Act and Acts establishing public entities.

²⁹ The Labour Relations Act was effective from December 1995. Its main purpose is to “advance economic development, social justice, labour peace and the democratisation of the workplace”. The Act was enacted to, among other things, give effect to section 23 of the Constitution, regulate the organisational rights of trade unions and to give effect to the public international law obligations of the Republic of South Africa relating to labour relations (section 1 of the Labour Relations Act). The Labour Relations Act is relevant in promoting good corporate governance because employees are one of the stakeholders directors need to take cognisance of in undertaking their duties in the modern society.

Employment Act 75 of 1997,³⁰ the Employment Equity Act 55 of 1998,³¹ the National Environmental Management Act 107 of 1998,³² Broad-Based Black Economic Empowerment Act 53 of 2003³³ and the Securities Services Act 36 of 2004.³⁴ In addition to these statutory instruments, the *King Report on Corporate Governance* and the *Protocol on Corporate Governance in the Public Sector* have sought to promote good corporate governance practices in South Africa.³⁵

5.2.1.1 Constitution of the Republic of South Africa, 1996

The South African Constitution was approved by the Constitutional Court on 4 December 1996 and became effective on 4 February 1997. The Constitution acknowledges the importance of good governance.³⁶ It is founded on; *inter alia*, “the achievement of equality

³⁰ The Basic Conditions of Employment Act was promulgated in 1997. Its purpose is to “advance economic development and social justice” through giving effect to and regulating the right to fair labour practices conferred by section 23(1) of the Constitution and giving effect to “obligations incurred by the Republic as a member state of the International Labour Organisation”. The Act establishes and enforces basic conditions of employment by regulating the variation of basic conditions of employment (section 2 of the Basic Conditions of Employment Act).

³¹ The Act was promulgated in October 1998. Its purpose is to promote the constitutional right of equality and the exercise of true democracy, promote equity in the workplace through the elimination of unfair discrimination and “implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups” (section 2 of Employment Equity Act).

³² The National Environmental Management Act commenced on 29 January 1999. Its purpose is to “provide for co-operative environmental governance by establishing principles for decision-making on matters affecting the environment, institutions that will promote cooperative governance and procedures for coordinating environmental functions exercised by organs of state; to provide for certain aspects of the administration and enforcement of other environmental management laws” (“Preamble” to the National Environmental Management Act). In the modern world, directors have an obligation to preserve the environment in which they operate by preventing pollution and ecological degradation and promoting conservation. The Act is therefore relevant to directors in undertaking their duties.

³³ The Broad-Based Black Economic Empowerment (BEE) Act was promulgated in January 2004. It seeks to “promote the achievement of the constitutional right to equality, increase broad-based and effective participation of black people in the economy and promote a higher growth rate, increased employment and more equitable income distribution; and establish a national policy on broad-based black economic empowerment so as to promote the economic unity of the nation, protect the common market, and promote equal opportunity and equal access to government services” (“Preamble” and section 2 of the Act). The Act was passed to set up a legal framework for the promotion of black economic empowerment so that black people have sufficient influence over strategic direction and core management of businesses (Southall R “The ANC and Black Capitalism in South Africa” (2004) 100 *Review of African Political Economy* 313-328). The Act provides for, *inter alia*, issuance of codes of good practice and transformation charters (section 9 and 12 of the BEE Act).

³⁴ The Securities Services Act was gazetted in January 2005. It seeks to increase confidence in the South African financial markets by requiring that securities services be “provided in a fair, efficient and transparent manner” and through promoting the international competitiveness of securities services in the country (section 2 of the Securities Services Act). See Naidoo R *Corporate Governance: An Essential Guide for South African Companies* (2009) 34-36.

³⁵ Although there are other self-regulatory instruments in South Africa, this thesis mainly focuses on the *King Report* and *Protocol*.

³⁶ Nevondwe L, Odeku KO and Tshoose CI “Promoting the Application of Corporate Governance in the South African Public Sector” (2014) 40(2) *Journal of Social Sciences* 261-275.

and the advancement of human rights and freedoms” and “a multi-party system of democratic government, to ensure accountability, responsiveness and openness”. The Constitution is the supreme law of the country and binds all legislative, executive and judicial organs of state at all levels of government. Chapter 2 of the Constitution, containing the Bill of Rights, enshrines the rights of all people in South Africa and “affirms the democratic values of human dignity, equality and freedom”. The Constitution forbids unfair discrimination directly or indirectly against anyone on one or more grounds, “including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth”.³⁷ In addition, Chapter 10 of the Constitution aims to promote good corporate governance by providing for; *inter alia*, economic and effective use of resources, high standard of professional ethics, transparency, fairness and accountability in the administration of all organs of state and public entities.

5.2.1.2 Companies Act

The Companies Act 71 of 2008 was promulgated on 9 April 2009 and became effective on 1 May 2011. The Act, *inter alia*, repealed the Companies Act 61 of 1973 and made certain amendments to the Close Corporations Act 69 of 1984.³⁸ The Companies Act applies to every company incorporated in terms of this Act.³⁹ The Act is not a complete codification of the company law applicable to companies regulated by it and common law principles have been referred to where necessary.⁴⁰ In this respect, English law has played a significant role in South Africa given the fact that the country’s legal system originated from and was modelled after its English counterpart.⁴¹ As a result, many of the English company law rules have been readily accepted in South African law especially in respect of directors’ fiduciary duties.⁴²

³⁷ Section 9 of the Constitution.

³⁸ “Preamble” and section 7 of the Companies Act.

³⁹ Sections 7-10 of the Companies Act.

⁴⁰ Kanamugire JC and Chimuka TC “The Directors’ Duty to Exercise Care and Skill in Contemporary South African Company Law and the Business Judgment Rule” (2014) 20(5) *Mediterranean Journal of Social Sciences* 70-78 available at <http://www.mcser.org/journal/index.php/mjss/article/viewFile/3710/3635> (accessed on 4 November 2015). See also Delpont P *The New Companies Act Manual* (LexisNexis 2009) 58-59.

⁴¹ Du Plessis JJ, Saenger I and Foster R “Board Diversity or Gender Diversity? Perspectives from Europe, Australia and South Africa” (2012) 207-249.

⁴² *Ibid.*

Nonetheless, English company law has been merely persuasive and not binding authority in South African law because where English principles conflict with South African law, the courts have disregarded them.⁴³

The objectives of the Companies Act are to, *inter alia*, provide for the incorporation, registration, organisation and management of companies and to define the relationships between companies and their respective shareholders or members and directors.⁴⁴ In the purpose clause, the Companies Act specifically provides that one of its purposes is to promote the development of the South African economy by “encouraging transparency and high standards of corporate governance as appropriate, given the significant role of enterprises within the social and economic life of the nation”.⁴⁵ The Act governs how companies should be administered and imposes a number of statutory duties on directors which should result in good corporate governance, if properly observed.⁴⁶ The Companies Act further provides for a partial codification of directors’ duties with the objective of, *inter alia*, providing clarity to directors concerning their duties and enlightening all stakeholders on the rules that govern directors’ conduct.⁴⁷ The Companies Act also applies to state owned enterprises.⁴⁸ The Act specifically states that any provision of the Act “that applies to a public company applies also to a state-owned company, except to the extent that the Minister has granted an exemption in terms of subsection (3)”.⁴⁹

⁴³ See *Roodepoort United Main Reef GM Co Ltd (in Liquidation) and Another v Du Toit NO* where Solomon CJ warned that “Although, therefore, there is force in the argument that as our Companies Act is taken over from the English Act, we should be guided in our interpretation of it by decisions of English courts on identical sections, the argument cannot be pressed too far, and does not justify us in adopting any English decision which is based upon legal principles which are foreign to our system of law” (at 71-72) (*Roodepoort United Main Reef GM Co Ltd (in Liquidation) and Another v Du Toit NO* 1928 AD 66).

⁴⁴ *Ibid.*

⁴⁵ Section 7(b) of the Companies Act.

⁴⁶ Muswaka L “Corporate Governance under the South African Companies Act: A Critique” (2013) 11-19.

⁴⁷ Sections 75-78 of the Companies Act. See also Esser I *Recognition of Various Stakeholder Interests in Company Management* (2008) 286-287.

⁴⁸ A “state owned company” is defined as an enterprise that is registered in terms of the Companies Act as a company and either is listed as a public entity in Schedule 2 or 3 of the Public Finance Management Act or is owned by a municipality, as contemplated in the Local Government: Municipal Systems Act 32 of 2000 (Chapter 1, Part A of the Companies Act).

⁴⁹ Section 9(1) of the Companies Act. The exemption can only be granted where the provisions of the Companies Act overlap or duplicate an applicable regulatory scheme established in terms of any other national legislation.

5.2.1.3 Public Finance Management Act 1 of 1999

The PFMA was promulgated on 2 March 1999 and became effective on 1 April 2000. It repealed the Reporting by Public Entities Act 93 of 1992. The PFMA aims “to secure transparency, accountability, and sound management of the revenue, expenditure, assets and liabilities” of departments, public entities, constitutional institutions and provincial legislatures.⁵⁰ The Act gives managerial and operational autonomy to the public entities and it adopted several principles in the *King Reports* to promote the effectiveness of public entity boards.⁵¹ The PFMA plays an important role in regulating good corporate governance practices and presents more comprehensive standards for reporting and accountability through embracing an approach to financial management in public entities that requires performance in service delivery and economic and efficient deployment of state assets and resources.⁵² It is mandatory for entities to comply with the provisions of the PFMA and the Act imposes sanctions for noncompliance.⁵³

5.2.1.4 Acts Establishing Public Entities

The majority of South African public entities are established through an Act of Parliament.⁵⁴ The Act specifies the main objective of establishing the respective public entity, how it should be governed and stipulates the functions, powers and duties of the entity.⁵⁵ For example, the South African Civil Aviation Authority Act provides that the Authority must

⁵⁰ Preamble, sections 2 and 3 of the PFMA. The PFMA defines a public entity as a national government business enterprise; “or a board, commission, company, corporation, fund or other entity (other than a national government business enterprise) which is—

(i) established in terms of national legislation;
(ii) fully or substantially funded either from the National Revenue Fund, or by way of a tax, levy or other money imposed in terms of national legislation; and
(iii) accountable to Parliament” (See Chapter 1 of the PFMA).

⁵¹ Sections 46 through 86 of the PFMA are of particular importance for financial governance issues.

⁵² Madue SM “Public Finance Management Act, 1 of 1999 – A Compliance Strategy” (2007) 26(3) *Politeia: South African Journal for Political Science and Public Administration* 306-318 available at <http://uir.unisa.ac.za/bitstream/handle/10500/2902/madue1.pdf?sequence=1> (accessed on 23 October 2015). See also Nevondwe L, Odeku KO and Tshoose CI “Promoting the Application of Corporate Governance in the South African Public Sector” (2014) 261-275.

⁵³ See para 5.2.7 below.

⁵⁴ Examples are the South African Civil Aviation Authority Act 40 of 1998, South African National Roads Agency Limited Act 7 of 1998 and Eskom Conversion Act 13 of 2001.

⁵⁵ See “Preamble” and sections 2 and 25 of the South African National Roads Agency Limited Act. The Act thus seeks to ensure that the public entity is properly governed.

perform its functions in a manner consistent with the obligations of the Republic under any international agreement and customary international law binding on the Republic in terms of the Constitution of the Republic of South Africa.⁵⁶ The Authority is also obliged to perform its functions without unreasonably discriminating” against or among various participants or categories of participants in civil aviation safety and security”.⁵⁷ The Authority should be governed by a board that is appointed by the Minister of Transport in the national sphere of government.⁵⁸

5.2.1.5 King Reports on Corporate Governance

The notion of corporate governance was formally introduced in South Africa in March 1992, with the formation of the King Committee on Corporate Governance.⁵⁹ The Committee came up with recommendations which resulted in the adoption of the *King I Report on Corporate Governance* (hereinafter referred to as *King I Report*) in November 1994. The *King I Report* aimed to encourage the highest standard of corporate governance in South Africa and served as “a reference point for policy makers in the examination and development of legal and regulatory frameworks for corporate governance”.⁶⁰ In 2002, following the adoption of a new Constitution and economic developments locally and internationally, the *King I Report* was revised, and *King II Report on Corporate Governance* (hereinafter referred to as *King II Report*) was published.⁶¹

The *King II Report* focused more on the qualitative rather than quantitative aspects of good corporate governance in that it extended beyond the existing legal and regulatory framework,

⁵⁶ Section 4 of the South African Civil Aviation Authority Act.

⁵⁷ Ibid.

⁵⁸ Section 8 of the South African Civil Aviation Authority Act. See also section of 12 of the South African National Roads Agency Limited Act.

⁵⁹ Scholtz H and Smit AR “Factors Influencing Corporate Governance Disclosure of Companies Listed on the Alternative Exchange (AltX) in South Africa” (2015) 29(1) *South African Journal of Accounting Research* 29-50 available at <http://www.tandfonline.com/doi/pdf/0.1080/10291954.2015.999471> (accessed on 9 November 2015).

⁶⁰ 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) 20 *South African Mercantile Law Journal* 95–116. According to Bekink, the key challenge for the drafters of the *King I Report* was to seek principles striking an appropriate balance between the freedom to manage, accountability and the interest of stakeholders.

⁶¹ Mallin CA *Handbook on International Corporate Governance: Country Analyses* (Edward Elgar Publishing 2006) 218-219.

and sought to identify key areas of good corporate governance practice which would be voluntarily and effectively applied by companies and directors.⁶² The *King II Report* was applicable to all companies listed on the JSE Limited, banks, financial and insurance entities, public sector enterprises falling under the Public Finance Management Act and the Local Government: Municipal Finance Management Act 56 of 2003, including any state department acting in terms of the Constitution or legislation.⁶³ All other entities were, however, also expected to take into account the provisions of the *King II Report* where applicable.⁶⁴

The then anticipated new Companies Act and changes in international corporate governance trends since the release of the *King II Report* necessitated the issuance of the *King III Report* (hereinafter referred to as *King III Report*) in September 2009.⁶⁵ The *King III Report* became effective from March 2010 and applies to all entities regardless of their nature, size or form of incorporation or establishment.⁶⁶ In contrast to the previous *Reports*, the *King III* moves from a “comply or explain” approach to a principles-based “apply or explain” approach.⁶⁷ This means that all entities are not necessarily obliged to comply with all aspects of the *King III Report* but are expected, by way of explanation, to make a positive statement about how

⁶² Ibid. The *King II Report* identifies seven fundamental characteristics of good corporate governance namely discipline, transparency, independence, accountability, responsibility, fairness and social responsibility (“Introduction and Background” to the *King II Report*).

⁶³ Nevondwe L, Odeku KO and Tshoose CI “Promoting the Application of Corporate Governance in the South African Public Sector” (2014) 261-275. According to Mallin, the main reason for the “selective application was to target companies and institutions that fall within a structured and more readily regulated environment in which the corporate governance standards could be more easily identified and measured” (Mallin CA *Handbook on International Corporate Governance: Country Analyses* (2006) 218-219).

⁶⁴ Koma SB “Conceptualisation and Contextualisation of Corporate Governance in the South African Public Sector: Issues, Trends and Prospects” (2009) 451-459. See also Mallin CA *Handbook on International Corporate Governance: Country Analyses* (2006) 218-219.

⁶⁵ “Introduction and Background” to the *King III Report* and Moloi T and Barac K “Assessment of Corporate Governance Reporting in the Annual Report of South African Listed Companies” (2010) 10(1) *Southern African Journal of Accountability and Auditing Research* 19-31. See also De Beer F and du Toit DH “Human Resources Managers as Custodians of the King III Code” (2015) 18(2) *South African Journal of Economic and Management Sciences* 206-217 available at <http://sajems.org/index.php/sajems/article/viewFile/769/539> (accessed on 29 October 2015).

⁶⁶ Muswaka L “Corporate Governance Best Practices Vital for Good Corporate Citizenship: Guidance from King III” (2013) 3(4) *World Journal of Social Sciences* 25-35. See also Hendricks PSA and Wyngaard RG “South Africa’s King III: A Commercial Governance Code Determining Standards of Conduct for Civil Society Organizations” (2010) 12(2) *The International Journal of Not-for-Profit Law* 1-109 available at http://www.icnl.org/research/journal/vol12iss2/art_1.htm (accessed on 25 October 2015).

⁶⁷ Ibid. The “apply or explain” approach means that where entities have applied the best practice recommendations in the *Report*, a positive statement should be made to the stakeholders to this effect and where the entities have not complied with any principle or recommendation they should fully explain the reasons to the stakeholders (Scholtz H and Smit AR “Factors Influencing Corporate Governance Disclosure of Companies Listed on the Alternative Exchange (AltX) in South Africa” (2015) 29-50).

the principles have been applied or have not been applied.⁶⁸ The framework recommended by the *King III Report* is principles-based and recognises that there is no “one size fits all” solution to good corporate governance.⁶⁹

In addition, the *King III Report* takes an integrated approach to corporate governance which “recognizes that stakeholders such as the community in which the company operates, its customers, its employees and its suppliers, need to be developed when developing the strategy of the company”.⁷⁰ The *King III Report* thus advocates for a balance in corporate governance between allowing directors to run the company in the way they consider as best for the stakeholders, while providing stakeholders with some protection against a board that disregards its responsibilities and is not held accountable.⁷¹

Since the *King III Report* was issued in 2009, important corporate governance and regulatory developments have taken place both locally and internationally. As a result, the Institute of Directors in Southern Africa (IoDSA) has spearheaded the development of the *King IV Report*. Another consideration in the development of the *King IV Report* is that whilst listed companies are generally applying *King III Report*,⁷² other entities like non-profit organisations, private companies and public sector organisations have experienced challenges in interpreting and adapting *King III Report* to their particular circumstances.⁷³ The *King IV*

⁶⁸ Hendricks PSA and Wyngaard RG “South Africa’s King III: A Commercial Governance Code Determining Standards of Conduct for Civil Society Organizations” (2010) 1-109. It has been proposed that the term “apply or explain” is preferred to the term “comply or explain”, so as to avoid the impression that failure to comply equals non-compliance, that is rule-breaking. Commenting on the effectiveness of the *Combined Code*, Sir Derek Higgs says “apply or explain” is better than “comply or explain,” because “comply” connotes some regulatory compliance or rule where there is none (FRC *The Review on Effectiveness of the Combined Code* (Financial Reporting Council (FRC) 2009) 6-7 available at www.frc.org.uk/documents/.../Cable%20&%20Wireless.pdf (accessed on 17 September 2015).

⁶⁹ Entities are therefore encouraged to adapt the principles of the *King III Report* as appropriate to the size, nature and complexity of their organisation (Hendricks PSA and Wyngaard RG “South Africa’s King III: A Commercial Governance Code Determining Standards of Conduct for Civil Society Organizations” (2010) 1-109). See also BPeSA *Corporate Governance Handbook* (Business Process enabling South Africa (BPeSA) Western Cape 2011) 12-14 available at http://www.bpesa.org.za/wp-content/uploads/2011/11/BPeSA-WC-CG-Manual_Sep-2011_V2.0.pdf (accessed on 17 September 2015).

⁷⁰ “Introduction and Background” to the *King III Report*. See also Hamann R *South Africa: The Role of History, Government, and Local Context* (Springer Berlin Heidelberg 2009) 435-439, for a similar line of argument.

⁷¹ Moyo NJ *South African Principles of Corporate Governance: Legal and Regulatory Restraints on Powers and Remuneration of Executive Directors* (2010) 85.

⁷² This is mostly because it is mandatory for listed companies to comply with the *King Report* in terms of section 3.84 of the *JSE Listings Requirements*.

⁷³ See www.iodsa.co.za/?page=KingIV and Paper titled “Changes in Corporate Governance – An Introduction to King IV” presented by Parratt J at the Institute of Chartered Secretaries Administrators (ICSA) Annual Conference 2016 available at <http://www.slideshare.net/ICSAevents/icsa-annual-conference-day-1-1530> (accessed on 15 March 2016).

Report, thus, aims to, *inter alia*, “broaden the acceptance of corporate governance by making it accessible and fit for application by organisations of a variety of sizes, resources and complexity of strategic objectives and operations”.⁷⁴ The *King IV Report* “does not represent a significant departure from the philosophy underpinning King III” but just redefines some concepts.⁷⁵

To ensure compliance with the recommendations of the *King Reports*, South African courts have found that companies and their boards are required to measure up to the principles set out in the *King Report*.⁷⁶ An example is the case of *South African Broadcasting Corporation (SABC) Ltd & Another V Mpofo*, where the court observed that the board and its directors are ultimately accountable and responsible for the performance and affairs of the company as required by the King Report on Corporate Governance for South Africa 2002.⁷⁷

5.2.1.6 Protocol on Corporate Governance in the Public Sector

In 1994, the new South African Government observed that the control and governance of public entities was “not based on any standardized principles or rules”.⁷⁸ As a result, the South African Department of Public Enterprises published the *Protocol on Corporate Governance in the Public Sector* (hereinafter referred to as the *Protocol*) in 1997 with a view to inculcate the principles of good corporate governance in public entities.⁷⁹ The *Protocol* was reviewed in 2002 based on the *King II Report* and international developments.⁸⁰ In contrast to the *King Reports*, “which cover a wide spectrum of entities in both private and public sectors, the *Protocol* aims to provide guidance specifically to the public sector, taking

⁷⁴ “Part 1: Introduction and Foundational Concepts” to the draft *King IV Report on Corporate Governance, 2016*.

⁷⁵ *Ibid*.

⁷⁶ See para 29-30 of *South African Broadcasting Corporation (SABC) Ltd & Another V Mpofo* (2009) 4 All SA 169 and *Minister of Water Affairs and Forestry V Stilfontein Gold Mining Co Ltd and Others* (2006) (5) SA 333 (W). See also Nevondwe L, Odeku KO and Tshoose CI “Promoting the Application of Corporate Governance in the South African Public Sector” (2014) 261-275.

⁷⁷ *South African Broadcasting Corporation (SABC) Ltd & Another V Mpofo* (2009) 4 All SA 169.

⁷⁸ “Historical Background” to the *Protocol*.

⁷⁹ The *Protocol* governs how public entities are directed, managed and held accountable (para 2.3 of the *Protocol*).

⁸⁰ Para 2.2 of the *Protocol*.

into account the unique mandate” of public entities.⁸¹ It therefore, applies to all public entities listed in Schedules 2 and 3 (B) and (D) to the PFMA and any unlisted public entities that are subsidiaries of a public entity, whether listed or not.⁸²

5.2.1.7 Johannesburg Securities Exchange (JSE) Listings Requirements

The JSE was established “to provide facilities for the listing of securities (including securities issued by companies, domestic or foreign), to provide the JSE’s users with an orderly market place for trading in such securities and to regulate the market accordingly”.⁸³ To achieve its objectives, the JSE produced the *Listings Requirements* which have been regularly amended to align them with domestic laws and international best practice.⁸⁴ The *Listings Requirements* aim to ensure that the “business of the JSE is carried on with due regard to the public interest” and to increase investor confidence in the South African equities market.⁸⁵ The *Listings Requirements* apply to “companies seeking a listing for the first time, presently listed companies, all other securities that applicants may wish to list and those presently listed and, where applicable, to directors (as defined in each relevant section) of applicant issuers and to sponsors”.⁸⁶

The *Listings Requirements* comprise “rules and procedures governing new applications, all corporate actions and continuing obligations applicable to issuers and issuers of specialist securities”.⁸⁷ They accommodate certain provisions of the *King Report on Corporate*

⁸¹ However, it should be noted that the principles of the *Protocol* only seek to augment and “not supersede (or conflict with) those contained in the King Code and should, in fact, be read in conjunction with the King Code” (para 2. 2 of the *Protocol*). See also Koma SB “Conceptualisation and Contextualisation of Corporate Governance in the South African Public Sector: Issues, Trends and Prospects” (2009) 451-459.

⁸² Para 4.4 of the *Protocol*.

⁸³ “Introduction” to the JSE *Listings Requirements*. See also Naidoo R *Corporate Governance: An Essential Guide for South African Companies* (2009) 28.

⁸⁴ Scholtz HE “Share Options as Part of Executive Remuneration: Aligning the Interests of Stakeholders” (2009) 13(2) *Southern African Business Review* 58-87.

⁸⁵ Ibid.

⁸⁶ “Introduction” to the JSE *Listings Requirements*.

⁸⁷ Ibid.

Governance and apply equally to companies listed on the JSE.⁸⁸ All listed companies are required to disclose in the annual report the extent of the company's compliance with the principles set out in the *King Report on Corporate Governance* and to proffer explanations where the principles were not complied with.⁸⁹

Organisations in South Africa have also been extensively guided by other international corporate governance codes like the OECD *Principles of Corporate Governance*, CAGG *Guidelines* and ICGN *Principles*.⁹⁰ Like a number of African countries, South Africa has benefited from corporate governance initiatives such as New Partnership for Africa's Development (NEPAD),⁹¹ African Peer Review Mechanism (APRM),⁹² Africa Governance Forum (AGF) and Africa Governance Inventory (AGI).⁹³ The country is also one of the founder members of the African Corporate Governance Network (ACGN) which was established to enhance the corporate governance standards of African nations through information and experiences sharing.⁹⁴

The next section considers how the various instruments have assisted the enhancement of the effectiveness of boards of public entities. In this chapter, the research highlights the recommendations and regulatory provisions put in place by the two countries. A comparative

⁸⁸ Section 3.84 of the *JSE Listings Requirements* provides that, in addition to complying with section 8.63(a) of the *JSE Listings Requirements*, listed companies must also comply with a number of specifically itemised corporate governance requirements and must disclose their compliance therewith in their annual report. For example, every listed company is required to have a policy detailing the procedures for appointments of board members and "a clear balance of power and authority at board of directors' level".

⁸⁹ Section 3.84 of the *JSE Listings Requirements*.

⁹⁰ "Introduction and Background" to the *King III Report*. See also Ncube B *Corporate Governance? Future Perspective in Light of the 2008/09 Global Economic Meltdown* Unpublished Thesis (University of Stellenbosch 2010) 8-9. These initiatives are discussed under Chapter 2, para 2.5 above.

⁹¹ See Chapter 3, para 3.5 above for more details on the New Partnership for Africa's Development.

⁹² South Africa conducted its first African Peer Review Mechanism Country Review Report (CRR) in 2007 where it identified numerous governance challenges. As a result of the identified challenges, the country introduced and is in the process of implementing a National Programme of Action. In 2013, South Africa presented its third progress report on the implementation of the APRM Program Action to the Committee of Heads of State and Government of participating countries of the African Peer Review Mechanism (Turianskyi Y *South Africa's Implementation of the APRM: Making a Difference or Going Through the Motions?* (South African Institute of International Affairs Policy Briefing 99 of July 2014) 1-2 available at http://www.saiia.org.za/doc_download/550 (accessed on 13 March 2015)).

⁹³ Carmody P "Another BRIC in the Wall? South Africa's Developmental Impact and Contradictory Rise in Africa and Beyond" (2012) 24 *European Journal of Development Research* 223-241 available at <http://www.palgrave-journals.com/ejdr/journal/v24/n2/full/ejdr20128a.html> (accessed on 15 March 2015). See para 2.5 for a discussion of these initiatives.

⁹⁴ See Chapter 3, para 3.5 above.

assessment of the effectiveness of the guidelines and regulatory instruments in enhancing the effectiveness of boards of public entities and promoting corporate governance is carried out in chapter 7.

5.2.2 Role of the Board

Historically, South African company law focused on the shareholder wealth maximisation approach and obliged directors to employ their powers for the benefit of the company.⁹⁵ But, the country has progressively developed the idea of an inclusive approach to corporate governance to ensure that directors act in the interests of all relevant stakeholders.⁹⁶ In carrying out their various duties, the directors are guided by common law, several statutes (e.g. the Companies Act),⁹⁷ the company's Memorandum of Incorporation and corporate governance instruments like the *King Reports* and the *Protocol*.⁹⁸ Although directors' duties in South Africa have traditionally been largely regulated by the common law, in a change of approach, the Companies Act has partially codified these duties by specifically setting a standard of directors' conduct.⁹⁹ For clarity, the Act provides that the provisions of the Act

⁹⁵ Principle 8 of the *King III Report*. See also Muswaka L "Shareholder Value versus Stakeholders' Interests– A Critical Analysis of Corporate Governance from a South African Perspective" (2015) 43(3) *Journal of Social Sciences* 217-225, Miles L and Jones M "The Prospects for Corporate Governance Operating as a Vehicle for Social Change in South Africa" (2009) 14(1) *Deakin Law Review* 53–77 and Esser I *Recognition of Various Stakeholder Interests in Company Management* (2008) 211-213. For information on the shareholder wealth maximisation approach as well as explanations on what "the benefit of the company" entails, see Chapter 3, para 3.6.1 above.

⁹⁶ The Companies Act acknowledges the importance of considering the interests of other stakeholders, for example, when it states that one of its purposes is to "provide for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders" (section 7(k) of the Companies Act). For more information on the inclusive approach to corporate governance, see Chapter 3, para 3.6.1 above, Croucher R and Miles L "Corporate Governance and Employees in South Africa" (2010) 367-389, Muswaka L "Corporate Governance under the South African Companies Act: A Critique" (2013) 3(3) *World Journal of Social Sciences* 11-19, "Introduction and Background" & section 4 of the *King II Report* and Principle 8 of the *King III Report*.

⁹⁷ The Companies Act is the main Act (for example sections 75-77 of Companies Act 71 of 2008) with other legislation also providing for directors' duties, for example, the PFMA, Labour Relations Act and the Income Tax Act (No. 28 of 1997).

⁹⁸ See Bouwman N "An Appraisal of the Modification of the Director's Duty of Care and Skill" (2009) 21 *South African Mercantile Law Journal* 509-534 and Esser I and Coetzee J "Codification of Directors' Duties" (2004) 12(1) *Juta's Business Law* 26-31.

⁹⁹ Partial codification, unlike complete codification, involves adopting the general principles of law but allows some room for the development of the common law. This means that the Companies Act does not replace the common law duties of directors that are not expressly amended or are not in conflict with the Act (Delpont P *The New Companies Act Manual* (2009) 58-59). See also Kanamugire JC and Chimuka TC "The Directors' Duty to Exercise Care and Skill in Contemporary South African Company Law and the Business Judgment Rule" (2014) 70-78.

are in addition to, and not in substitution of, any duties of the director¹⁰⁰ of a company under the common law.¹⁰¹ This means that directors are still obliged to comply with their common law duties unless the duties have specifically been amended by section 76 or are in conflict with that section.¹⁰²

Concerns were raised by some commentators as to whether it was necessary to partially codify directors' duties as a way of encouraging a higher standard of conduct by directors. In response to the concerns, those in favour of codification said that the move was necessary as a starting point to promote professional and ethical conduct by directors as it enables "directors to identify the scope of their duties clearly".¹⁰³ Their line of argument was that the existing standards were insufficient, archaic and spread in decided cases which may not be easily available to both directors and stakeholders of the company.¹⁰⁴ Havenga¹⁰⁵ argues that partial codification is the most suitable for South Africa as it helps in making the law understandable and easily accessible, whilst retaining some flexibility.¹⁰⁶ She further argues that codification of directors' duties does not only make the law accessible and assist directors to be clear about their obligations, but enlightens investors on the rules that govern the behaviour of directors and the associated liabilities or remedies where the rules are not observed.¹⁰⁷ Other analysts also contend that codification has the potential to induce directors

¹⁰⁰ The Act defines a director as "a member of the board of a company, as contemplated in section 66, or an alternate director of a company and includes any person occupying the position of a director or alternate director, by whatever name designated".

¹⁰¹ Section 76(6) of the Companies Act. The fact that section 76 does not substitute the common law duty of the director to exercise care and skill means that a director can be held liable in terms of the common law principles (section 77(2) of the Companies Act) of delict for any loss, damages or costs incurred by the company which resulted from the director's breach of his statutory duty of care and skill (Cassim FHI *et al Contemporary Company Law* 2nd ed. (Juta, Cape Town 2012) 558-560 and Bouwman N "An Appraisal of the Modification of the Director's Duty of Care and Skill" (2009) 509-534).

¹⁰² Delpont P *The New Companies Act Manual* (LexisNexis 2009) 58-59.

¹⁰³ Esser I and Coetzee J "Codification of Directors' Duties" (2004) 26-31.

¹⁰⁴ Grové AP *Company Directors: Fiduciary Duties and the Duty of Care and Skill* Unpublished Thesis (University of Pretoria 2012) 39-43.

¹⁰⁵ Havenga M "Regulating Conflicts of Interest and South African Company Law Reform" (2005) 26(3) *Obiter* 609-621.

¹⁰⁶ Directors need to know what their duties are, and directors must be aware of what is expected of them, because the standards of director's conduct can influence the profitability of a company, determine the extent of foreign and domestic investments and ultimately determine the success of a company (Kiggundu J and Havenga M "The Regulation of Directors' Self-Serving Conduct: Perspectives from Botswana and South Africa" (2004) 37(3) *Comparative and International Law Journal of Southern Africa* 312-326).

¹⁰⁷ Havenga M "Regulating Conflicts of Interest and South African Company Law Reform" (2005) 609-621.

to act in accordance with professional standards of care and to make proper and sound business decisions.¹⁰⁸

On the other hand, those opposed to codification of directors' duties argue that the common law adequately outlines and deals with directors' duties and liabilities such that it was unnecessary to codify those duties as codification may be inadequate to address the dynamics of duties of directors'.¹⁰⁹ They argue that it may not be possible to standardise directors' duties due to the differences in the type of decisions directors have to make and also differences in the nature of business conducted by the companies.¹¹⁰ It would be difficult to comprehensively codify directors' fiduciary duties and their obligations of care and skill as there are simply too many matters to be taken care of.¹¹¹ The analysts are also of the view that codification may create rigidity and conciseness which may cause directors to; for example, assume that the omission of certain requirements from legislation implies that the omitted requirements are less important and to disregard some duties and obligations which may be contained in other legislation and regulations.¹¹² They further contend that directors might not be motivated to take the necessary risks and to fully engage their entrepreneurial abilities for the economic growth of their companies' but might just focus on observing rules and regulations.¹¹³

Arguments have also been presented to the fact that, unlike the traditional position which gave shareholders powers to oversee the management of a company, the new Companies Act empowers the board to manage the business and affairs of a company, subject to the Act or the company's Memorandum of Incorporation.¹¹⁴ The Act specifically states that a board has

¹⁰⁸ 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) 95-116.

¹⁰⁹ Ibid. See also Havenga M "Regulating Conflicts of Interest and South African Company Law Reform" (2005) 609-621.

¹¹⁰ Ibid.

¹¹¹ Ibid.

¹¹² Ibid. See also Esser I *Recognition of Various Stakeholder Interests in Company Management* (2008) 291-292.

¹¹³ 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) 95-116. See also Havenga M "Regulating Conflicts of Interest and South African Company Law Reform" (2005) 609-621.

¹¹⁴ Section 66(1) of the Companies Act provides that "the business and affairs of a company must be managed by or under the direction of its board". Even though directors are required to act collectively as a board, the board cannot owe a fiduciary duty because it is not an independent legal persona and is not incorporated as a legal entity. Therefore, liability for failure to

the “authority to exercise all of the powers and perform any of the functions of the company, except to the extent that the Act or the company’s Memorandum of Incorporation provides otherwise”.¹¹⁵ According to Delpont, the new Companies Act changed the original doctrine which provided that “the division of powers is regulated by the agreement between the shareholders and the board of directors”.¹¹⁶ The powers of directors are now derived from statute and do not originate from the agreement between the shareholders and directors.¹¹⁷ This makes the board of directors the highest authority in the company.¹¹⁸

The Companies Act provides for various directors’ duties which encourage integrity, transparency and accountability thus enhance good corporate governance practices.¹¹⁹ For example, directors are obliged to act in good faith¹²⁰ and for a proper incumbent purpose,¹²¹

properly carry out the fiduciary duties devolves on the directors as individuals not as a board (Naidoo R *Corporate Governance: An Essential Guide for South African Companies* (2009) 160).

¹¹⁵ Section 66(1) of the Companies Act. However, according to Delpont, it is not clear whether the “except to the extent that the Act or the company’s Memorandum of Incorporation provides otherwise” extend to the management of the business and affairs of the company too and whether it only qualifies the authority to “exercise all of the powers and perform any of the functions of the company” (Delpont PA “The Division of Powers in a Company” in Visser C and Pretorius JT *Essays in Honour of Frans Malan* (2014) 90-92).

¹¹⁶ Delpont PA “The Division of Powers in a Company” in Visser C and Pretorius JT *Essays in Honour of Frans Malan* (2014) 90-92.

¹¹⁷ Ibid.

¹¹⁸ Ibid.

¹¹⁹ Section 76 of the Companies Act. In addition to their statutory duties, directors owe fiduciary duties to the company and common law duties to take reasonable care in the running of a company’s affairs (*Du Plessis NO v Phelps* 1995 (4) SA 165 (C) at 170). Since the Companies Act only partially codifies directors’ duties and the common law is not specifically excluded, the rules contained in the common law remain relevant and of utmost importance. See also Nevondwe L, Odeku KO and Tshoose CI “Promoting the Application of Corporate Governance in the South African Public Sector” (2014) 261-275.

¹²⁰ Directors have a fiduciary duty to exercise their powers and perform their functions in good faith and in the best interests of the company. In *Cyberscene Ltd and Others v i-Kiosk Internet and Information (Pty) Ltd* 2000 (3) SA 806 (C) it was confirmed that a director stands in the fiduciary relationship to the company of which he or she is a director, even if he or she is a non-executive director. The court held that a director acts in breach of his fiduciary duty to the company where he disadvantages the company of its contractual opportunities for his own benefit, or where he uses confidential information, obtained as a director, to advance the interests of a rival business entity or his own business at the expense of his company’s interests. Section 76(2) prohibits a director from using information gained by virtue of his office for personal gain. According to Cassim, section 76(2) is applicable when certain requirements are met, namely; the defendant must be a director within the definition of a director, the information or advantage must have come to the director, the director must have used his/her position as or information gained as a result of being a director to gain an advantage or knowingly cause harm to the company or wholly owned subsidiary and such advantage must have been obtained for the director or some other person other than the company or its wholly owned subsidiary (Cassim FHI *et al Contemporary Company Law* (2012) 552-554).

¹²¹ Section 76(3)(a) of the Companies Act. According to Delpont *et al*, “in good faith and for a proper purpose” entails that a director must act honestly and may not exceed the limitations of his own authority and must not exceed the capacity or authority of the company. The fact that the directors honestly believed that it was in the best interest of the company to act outside their proper purpose duties is irrelevant and they may still be rendered personally liable (Delpont PA *et al Henochsberg on the Company Act 71 of 2008* (LexisNexis 2012) 1(2) 296). Directors must, therefore, use their powers for

in the interests of the company¹²² and with the necessary degree of skill and care expected of a reasonable person.¹²³ They are also expected to ensure that all company profits are detailed and accounted for, thereby ensuring accountability¹²⁴ and to disclose any interests they may have in a contract with a company, thereby encouraging transparency.¹²⁵

the benefit of the company and not to their own advantage. Directors are liable if they act beyond their authority and their powers exercised for an improper purpose may be set aside even if they have acted honestly. In *Punt v Symons & Co Ltd* (1903) 2 Ch 506 it was held that it is improper for directors to use their powers to issue shares in order to rob the existing majority shareholders of their voting control. A similar decision was made in *Hogg v Cramphorn Ltd* (1967) Ch 254. Cassim states that the appropriate test to determine whether the duty to act “in good faith and for a proper purpose” has been complied with is found in *Extrasure Travel Insurances Ltd v Scattergood* (2003) 1 BCLC (ChD) 619. In this case four steps were said to be essential namely; identification of the particular power being challenged, identification of the proper purpose for which the power was given, identification of the substantial purpose for which the power was in fact exercised and deciding whether the purpose was proper (Cassim FHI *et al Contemporary Company Law* (2012) 527-528).

¹²² Section 76(3)(b) of the Companies Act. A director’s fundamental duty is to act in the best interests of the company. Henochsberg suggests that section 76(2) places a duty upon the director to account for secret profits which means that should a director gain such a corporate opportunity for himself, the law will treat the acquisition as being made on behalf of the company. It is further contended that a director’s liability to account is linked to the fact that profit has been made and not to the presence of any form of fraud or the absence of *bona fides* (Delpont PA *et al Henochsberg on the Company Act 71 of 2008* (2012) 289-291). Cassim suggests that the test found in *Charterbridge Corporation Ltd v Lloyd’s Bank* (1970) Ch 62 should be used in order to determine whether a director has fulfilled his duty to act in the best interests of the company. The test seeks to establish whether or not an intelligent and honest person acting in the position of the director could in the prevailing circumstances have reasonably believed that he or she was acting in the interest of the company (Cassim FHI *et al Contemporary Company Law* (2012) 525).

¹²³ Section 76(3)(c) of the Companies Act. See *Re Brazilian Rubber Plantations and Estates Ltd* (1911) 1 Ch 425 at 437 where it was held that, when performing their duties, directors must attend carefully to the affairs of the company and must exhibit the “reasonable care” which any ordinary person might be expected to take under the same circumstances. To be considered reasonable the director’s actions must have been in the interests of the company, the director must have taken diligent steps to understand the subject matter and he must not have a personal financial interest in the subject matter. It is also important that he must have exercised his judgment in the belief that the decision was in the best interests of the company and in a way any reasonable man in similar circumstances would have done. A similar ruling was made in *Re City Equitable Fire Insurance Co* (1925) Ch 407 at 427-429 where the Court of Appeal found that a director need not show a greater degree of skill when performing his duties than may be reasonably expected of a person of his knowledge or experience. According to Cassim *et al*, the new Companies Act upgrades the director’s duty of care and skill, and it imposes a less subjective and more demanding standard for directors than the common law. The introduction of this statutory duty reflects the modern commercial fact and contemporary attitude towards the management of companies as well as corporate governance best practices. The standard of care, skill and diligence is now partly objective and partly subjective. It is objective in that the director should exercise the degree of care, skill and diligence that may reasonably be expected of a person carrying out the same functions as the director. It is partly subjective to the extent that the knowledge, skill and experience of the particular director are also taken into account. The more experienced, knowledgeable and skilled the director is, the higher the level of care, skill and diligence that he must exercise (Cassim FHI *et al Contemporary Company Law* (2012) 560 and 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) 95–116).

¹²⁴ Section 30 of the Companies Act. A director will be accountable for any profit made using a corporate asset through holding the office of director. In *Regal (Hastings) Ltd v Gulliver* (1942) 1 All ER 378 (HL), the House of Lords held that the directors were liable for the profits in respect of the sold subsidiary company’s shares. The court disregarded the fact that the directors had acted in good faith and tried to assist the company in acquiring the corporate opportunity. The court found that the directors had acquired the profits only by reason of their holding the office of directors. To enhance accountability, section 214 of the Companies Act provides that if any company’s financial statement is false or misleading, any person who is “a party” (as defined) to the preparation, approval or publication of that statement is guilty of an offence.

¹²⁵ Section 75 of the Companies Act. Directors are required not to put themselves in a position where there is, or may be, a conflict between their personal interests and their duties to the company. In *Robinson v Randfontein Estates Gold Mining Co Ltd* 1921 AD 168, it was held that a director will not be allowed to retain a benefit or profit obtained through a breach of his fiduciary duties to the company. In this case, a director of the plaintiff company had purchased property in circumstances under which it was his duty to acquire the property for the company and not for himself. See also Sher H “Company Directors’ Duties and Responsibilities” (2005) 13(3) *Juta’s Business Law* 129-131.

The Act also provides for the mandatory appointment of a company secretary who is accountable to the company's board.¹²⁶ The secretary assists the board and individual directors in executing their duties through provision of guidance as to their duties, responsibilities and powers.¹²⁷ The secretary ensures that, *inter alia*, minutes of all shareholders, board and board committee meetings are properly recorded in accordance with the Act and that the company complies with all the applicable legislation.¹²⁸ The Companies Act further provides for the establishment of board committees to assist the board to effectively carry out its obligations.¹²⁹ In terms of the Act, the audit committee¹³⁰ and social ethics committee¹³¹ are mandatory for certain companies. The board or board committees are empowered to engage the services of legal counsel, accountants, or other professional persons retained by the company on matters involving skills or expertise within the particular person's professional or expert competence.¹³²

¹²⁶ Section 86 of the Companies Act.

¹²⁷ Section 88 of the Companies Act.

¹²⁸ *Ibid.*

¹²⁹ Section 72 of the Companies Act. Research has found that board committees are necessary to assist the board to effectively manage its workload, thereby strengthening the board's governance role. The committees focus on specific areas allowing the board to concentrate on broader and strategic issues and directions (Donaghey B "Board Committees: An Overview of Their Role" (2008) 13 *AISSA School Board Governance Journal* 1-3 available at <http://www.ais.sa.edu.au/files/f/2113/...Board%20Committees...pdf/> (accessed on 25 February 2016)).

¹³⁰ An audit committee is a requirement for every public company, state-owned company or other company that is so required only by its Memorandum of Incorporation. The audit committee must comprise of a minimum of three non-executive persons with adequate relevant knowledge and experience to perform the committee's functions. The main functions of the committee are to, *inter alia*, nominate, for appointment, independent external auditor, determine the fees and terms of engagement for the external auditor, prepare a report, to be included in the annual financial statements for that financial year describing how the audit committee carried out its functions and to make submissions to the board on any matter concerning the company's accounting policies, financial control, records and reporting (Section 94 of the Companies Act). Generally, audit committees have assisted companies to improve the quality of their accounting and internal controls, strengthen the objectivity and credibility of their financial reporting, strengthen the independence of their internal and external auditors and to create a climate of discipline and control that minimises fraudulent activities (Marx B "An Analysis of Audit Committee Responsibilities and Disclosure Practices at Large Listed Companies in South Africa" (2009) 23(1) *SA Journal of Accounting Research (SAJAR)* 31-44 and Van der Nest DP, Thornhill C and de Jager J "Audit Committees and Accountability in the South African Public Sector" (2008) 43(4) *Journal of Public Administration* 545-558)).

¹³¹ The new Companies Act introduced a requirement that state-owned companies and listed public companies, among others, must establish a social and ethics committee (section 72 of the Companies Act). The committee is expected to advance corporate social responsibility, sound ethical leadership and human rights imperatives. The Regulations state the committee's functions as, to monitor the company's activities in certain spheres, having regard to relevant legislation, legal requirements or prevailing codes of best practice (Regulation 43(5)(a)). The committee reports to the board and to shareholders at the company's annual general meeting on the matters within its mandate (Regulations 43(5)(b)-43(5)(c)). In addition, the committee is required to monitor the non-financial aspects of management activity, including ethical conduct, social and environmental responsibility, and health and safety to the extent that these aspects are not dealt with by committees specifically appointed for that purpose. It is believed that this committee may enhance the company's reputation and improve its management of risk, legal compliance, social and ethics performance (Havenga M "The Social and Ethics Committee in South African Company Law" (2015) 78 *Journal of Contemporary Roman-Dutch Law (THRHR)* 285-292).

¹³² Section 76 of the Companies Act.

Comparable the Companies Act, the PFMA and the statutes that established the public entities prescribe how directors should carry out their duties. The PFMA provides that directors should “exercise the duty of utmost care to ensure reasonable protection of the assets and records of the public entity”.¹³³ To achieve this, the directors are expected to “act with fidelity, honesty, integrity and in the best interests of the public entity in managing the financial affairs of the public entity”.¹³⁴ They are also expected to disclose all material facts about the operations of the public entity which may influence the decisions or actions of the relevant authorities to prevent any financial prejudice to the entity.¹³⁵ For example, directors are required to disclose any “direct or indirect personal or private business interest” that he, his immediate relative or business partner may have in any matter relating to the public entity.¹³⁶ In addition, the board is required to ensure that the public entity’s activities are conducted in an effective, efficient and transparent manner and in compliance with all the relevant legislation.¹³⁷

Similarly, the various Acts of Parliament which established the public entities detail the roles of each of their boards which are derived from the functions and the powers of respective the entities.¹³⁸ The boards of public entities are therefore guided by the provisions of their respective Acts in carrying out their duties. For example, the Acts require the board and responsible Minister to sign a performance agreement which clearly states the government’s “requirements in respect of the Authority’s scope of business, efficiency and financial performance, and achievement of objectives” as well as the “principles to be followed by the Authority for purposes of business planning”.¹³⁹ To promote transparency and objectivity, directors of public entities are required to declare any direct or indirect financial interest they or their close relative or business partner may have in a matter relating to the business of the

¹³³ Section 50 of the PFMA.

¹³⁴ Ibid.

¹³⁵ Section 50 of the PFMA.

¹³⁶ Ibid.

¹³⁷ Section 51 of the PFMA.

¹³⁸ Sections 3-4 and of the South African Civil Aviation Authority Act 40 of 1998 and sections 25-26 of the South African National Roads Agency Limited and National Roads Act 7 of 1998.

¹³⁹ Section 5 of the South African Civil Aviation Authority Act.

public entity.¹⁴⁰ The Acts also provide for the establishment of board committees to assist the board in the performance of its functions.¹⁴¹

To complement the Acts, the *Protocol* and the *King Reports* detail the roles of the board and recommend how directors should operate to achieve good corporate governance. According to the *Protocol*, the role of the board of a public entity is to oversee the performance of the entity, be fully accountable to the shareholder for such performance, give strategic direction, appoint the chief executive officer, monitor management closely in implementing board plans and corporate strategies and to ensure that the entity is fully aware of and complies with applicable laws, regulations, government policies and codes of business practice.¹⁴² The *Protocol* emphasises the need for the board to act in good faith, with diligence, skill and care and in the best interests of the public entity and all stakeholders, independent of management.¹⁴³

Similarly, the *King III Report* also recommends that the board and its directors should act as the focal point for and custodian of corporate governance and in the best interest of the company and all relevant stakeholders.¹⁴⁴ To ensure that the board is empowered to direct the operations of the entity, the *King III Report* recommends that it should be in “effective control of the company” which basically means it must have the ability to make critical decisions for the benefit of the entity with minimal interference from the shareholders.¹⁴⁵ The *Protocol* and *King III Report* recommend that directors should have adequate knowledge on what is expected of them in so far as performing their duties is concerned.¹⁴⁶ They propose

¹⁴⁰ Section 8 of the South African Civil Aviation Authority Act and section 9 of the South African Construction Industry Development Board Act 38 of 2000.

¹⁴¹ Section 5 of the South African Construction Industry Development Board Act and section 16 South African National Roads Agency Limited and National Roads Act.

¹⁴² Para 5.1.1 of the *Protocol*. See para 3.3 of the CGF, paras 57-60 of the *National Code* and paras 17-19 of the *Manual* in respect of Zimbabwe.

¹⁴³ Para 5.1.12.8 of the *Protocol*. Para 21 of the *Manual*, paras 22 & 28 of the *National Code* and para 3.3.5 of the CGF make similar provisions.

¹⁴⁴ Chapter 1 of the *King III Report* and para 5.1.1 of the *Protocol*.

¹⁴⁵ Principle 2.1 of the *King III Report*. In support of the need to empower the board, the *Protocol* recommends that the board “must retain full and effective control over the SOE and monitor management closely in implementing board plans and strategies” (para 5.1.1 of the *Protocol*). See also section 66 of the Companies Act for similar provisions.

¹⁴⁶ Chapter 1 of the *King III Report* and para 5.1.1 of the *Protocol*. Principle 6.2 of the *King III Report* requires the board and each individual director to have a working understanding of the effect of the applicable laws, rules, codes and standards on the company and its business.

that the shareholder should, in a written charter or performance agreement, describe in as much detail as is reasonably possible the role and responsibilities of the board as a whole and of individual directors.¹⁴⁷ The charter should establish the correct balance between complying with governance constraints and performing in an entrepreneurial manner.¹⁴⁸ The charter or performance agreement should be disclosed in the annual report and must be available for public inspection at the public entity's head office during business hours to enhance transparency.¹⁴⁹

As a second measure, the *King III Report* and the *Protocol* recommend that the board members should be properly inducted, educated and trained so that they are adequately informed and reminded of their responsibilities.¹⁵⁰ To support this cause, the IoDSA has spearheaded the education, training and induction of board members on their roles and responsibilities and updating the boards and other relevant stakeholders on current international corporate governance developments.¹⁵¹ The third recommendation, which is aimed at ensuring that the board maintains its independence and makes informed decisions, is that the board should have unrestricted access to accurate, relevant and timely information of the entity and establish an agreed procedure in terms of which a director may, if necessary, solicit independent professional advice at the expense of the public entity.¹⁵²

In the fourth instance, the *King III Report* and *Protocol*, like the Companies Act, PFMA and the Acts in terms of which public entities are established, recognise the need to have a small group working on issues to achieve efficiency. Thus, they recommend that the board should delegate certain functions to well-structured committees but without renouncing its own responsibilities.¹⁵³ Certain committees have been considered as crucial if the board is to be

¹⁴⁷ Principle 2.1 of the *King III Report* and para 5.1.13.1 of the *Protocol*. The *Protocol* further provides that in case of doubt, the board should seek clarity from the shareholder or from external professional advisors where the issue cannot be objectively resolved internally.

¹⁴⁸ Ibid.

¹⁴⁹ Section 5(4) of the South African Civil Aviation Authority Act and para 5.2.13 of the *Protocol*.

¹⁵⁰ Principle 2.2 of the *King III Report* and para 5.1.1.12 of the *Protocol*.

¹⁵¹ See <http://www.iodsa.co.za> for more information.

¹⁵² Para 5.1.3 - 5.1.1.4 of the *Protocol* and Principles 2.14 and 2.23 of the *King III Report*.

¹⁵³ Board committees constitute an important element of the governance process and should be established with clearly agreed written terms of reference and reporting procedures. The committees should also be appropriately constituted, considering any relevant legislation and the objectives of the company (Principle 2.23 of *King III Report*, section 72 of the

effective in discharging its duties, for example, the audit, social and ethics and remuneration committees.¹⁵⁴ The *Protocol* and *King Report* also recommend that the board should monitor and manage potential conflicts of interest of management, board members and the shareholder to enable effective discharge of its duties.¹⁵⁵ Lastly, the *King Report* and *Protocol* provide for the appointment of a “competent, suitably qualified and experienced” company secretary to assist the board in carrying out its obligations.¹⁵⁶ The duties of the company secretary include, *inter alia*, advising the board, organising shareholders, board and board committee meetings, writing minutes, maintaining statutory records and ensuring that the company complies with all relevant laws and regulations.¹⁵⁷

The above analysis shows that Zimbabwe and South Africa have developed similar frameworks that seek to enlighten the boards on their fiduciary duties and responsibilities, empower them to undertake their roles effectively and to remain accountable for the achievement of the entity’s objectives. As in South Africa, in Zimbabwe the way directors of public entities operate is governed by legislation (e.g. Companies Act, PFMA and the Acts that established the entities), common law, non-binding corporate governance codes (e.g. the *Manual*, *National Code* and *CGF*) and Stock Exchange *Listing Requirements*.¹⁵⁸ Both countries have tried to move away from the shareholder wealth maximisation approach towards an inclusive approach.¹⁵⁹ However, South Africa has overhauled its Companies Act and has partially codified directors’ duties which Zimbabwe has not done. To further enhance

Companies Act, section 16 of the South African National Roads Agency Limited Act and paras 5.1.1.1 and 5.1.2.2.6 of the *Protocol*).

¹⁵⁴ The audit and social and ethics committees are statutory committees for certain companies (sections 72 and 94 of the Companies Act and section 77 of the PFMA). Some of the committees recommended by the *King Report* are the risk, remuneration and nomination, social and ethics, governance, IT steering and sustainability committees (Principle 2.23 of the *King III Report*). See also paras 5.1.1.1 and 5.1.2.2.6 of the *Protocol*.

¹⁵⁵ Principle 2.14 of the *King III Report* and para 5.1.1.7 of the *Protocol*.

¹⁵⁶ Principle 2.21 of *King III Report* and para 5.1.4 of the *Protocol*.

¹⁵⁷ *Ibid.* See also Naidoo R *Corporate Governance: An Essential Guide for South African Companies* (2009) 202-204 and Havenga MK and Locke N *Corporations and Partnerships in South Africa* (Kluwer Law International 2010) 79-80.

¹⁵⁸ See Chapter 4, para 4.2.2 above.

¹⁵⁹ Para 21 of the *Manual*, paras 22 & 28 of the *National Code* and Principle 8 of the *King III Report*. See Chapter 3, para 3.2.2 for the discussion on Zimbabwe’s position.

transparency and accountability, South Africa, unlike Zimbabwe, also introduced a social and ethics committee as a mandatory committee in some of its companies.¹⁶⁰

5.2.3 Selection and Appointment of Board Members

South Africa has acknowledged the importance of appointing directors in a transparent and objective way. The Companies Act provides that a company may appoint a person who satisfies the requirements for election as a director to serve as a director of the company.¹⁶¹ To minimise the risks of corporate failure as a result of unethical conduct and mismanagement by directors, the Companies Act disqualifies certain persons from appointment as a director.¹⁶² Examples of disqualified persons are a person who, has been prohibited by a court to be a director, has been declared delinquent in terms of section 162¹⁶³ or in terms of section 47 of the Close Corporations Act (No. 69 of 1984), is an unrehabilitated insolvent, has been removed from an office of trust on the grounds of misconduct involving dishonesty or has been convicted, in South Africa or elsewhere, for theft, fraud, forgery or perjury.¹⁶⁴

¹⁶⁰ The social and ethics committee established by South Africa, if properly utilised, is likely to enhance the governance of South African public entities thus promote good corporate governance. The committee may enable South Africa to score higher than Zimbabwe in terms of advancing sound ethical leadership and corporate social responsibility as well as enhancing transparency in the operations of public entities.

¹⁶¹ Section 66 of the Companies Act. The Act and the Memorandum of Incorporation of a company set the requirements for one to qualify for appointment as a director. The directors must be elected by persons entitled to exercise voting rights in such an election. However, strictly speaking there are no specific legal “qualifications required for a person to hold the position of director and there is no legal limit to the number of directorships an individual may have” (Naidoo R *Corporate Governance: An Essential Guide for South African Companies* (2009) 110).

¹⁶² Section 69 of the Companies Act. The Act actually nullifies the election or appointment of a person as a director if, at the time of the election or appointment, that person was ineligible or disqualified in terms of the Act. See Carciumaru LM *An Assessment of the Impact of Corporate Governance Codes and Legislation on Directors and Officers Liability Insurance in South Africa* Unpublished Thesis (University of the Witwatersrand 2009) 145-147.

¹⁶³ To understand the circumstances under which a director may be declared delinquent, see *Kukama v Lobelo and Others* (38587/2011) (2012) ZAGPJHC 60. In this case the director in question had, among other things, permitted some R2.2 million intended for the company to be paid into an alternative account to the disadvantage of the company, had failed to detect a fraud on SARS amounting to R39 million and had further failed to inform his co-director and co-shareholder of such fraudulent dealings. The Presiding Judge ruled that the director concerned had contravened section 76 (standards of directors conduct) and section 22 (reckless trading) of the Companies Act. The court found that the director’s conduct did “not measure up to the standard required and expected of a director” and as a result found that he was in breach of his fiduciary duties to the company. The court further found that the director’s conduct was grossly negligent, constituted wilful misconduct, a breach of trust and a gross abuse of his position as a director. Consequently, the court ruled that the director should be declared delinquent in terms of section 162 of the Act.

¹⁶⁴ Carciumaru LM *An Assessment of the Impact of Corporate Governance Codes and Legislation on Directors and Officers Liability Insurance in South Africa* (2009) 145-147. See also Van der Merwe JG and Du Plessis JE *Introduction to the Law of South Africa* (Kluwer Law International 2004) 385-386. Examples of circumstances where a director can be disqualified are in the case of *Secretary of State for Trade and Industry v Swan & Others*. In this case, the Secretary of State for Trade and Industry sought disqualification orders against X and Y alleging that they were aware of the process of cheque kiting

The Acts that established public entities also seek to ensure that board members are appointed transparently and based on merit. Examples are the South African Civil Aviation Authority Act and the Construction Industry Development Board Act. Both Acts require the responsible Minister to, specifying the required criteria,¹⁶⁵ invite persons interested in board appointment by notice in the Gazette and widely accessed media.¹⁶⁶ In the appointment of the members of the board, the Minister must aim to achieve a reasonable balance of expertise and knowledge of the relevant industry, “whilst broadly reflecting the race, gender and geographic composition of the Republic”.¹⁶⁷ The Minister is then required to submit a list of the names of at least fifteen suitable candidates or of all potential candidates, if less than fifteen candidates apply, to the relevant committees of Parliament.¹⁶⁸ The committees consider the applications and shortlist at least ten candidates to the Minister.¹⁶⁹ Only after this process has been completed, can the board be appointed by the Minister.¹⁷⁰

which, it was argued, allowed the group to trade in breach of its banking agreements. The Secretary further alleged that X was directly responsible for an inaccurate statement in a circular sent to shareholders which inaccurately stated the group’s cash balances and Y had failed to investigate the financial irregularity allegations concerning the company. The Court held that X, as director and CEO, had failed to act diligently as he should have been knowledgeable of practices of cheque kiting. Furthermore, the Court held that X had failed to make appropriate enquiries into the issue of several large cheques which resulted in a serious negligence of his duty as director. X was disqualified for 4 years. The Court also held that Y had failed to exercise due care and diligence in that he failed to pursue an enquiry into the financial irregularities as robustly as he should have done and that his behavior was really below the conduct expected of someone with his experience and in his position. Y was disqualified for 3 years (*Secretary of State for Trade and Industry v Swan & Others* (2005) EWHC 603 (CH)).

¹⁶⁵ The South African Civil Aviation Authority Act and the Construction Industry Development Board Act require that a potential candidate must be a citizen of and ordinarily resident in South Africa, may not be an unrehabilitated insolvent, may not be a person who has been removed from an office of trust on account of misconduct and may not be a person who has been convicted of an offence and was sentenced to imprisonment without an option of a fine in South Africa or in a foreign country (section 8 of the South African Civil Aviation Authority Act and section 6 of the Construction Industry Development Board Act). The Acts further provide that any person who is disqualified from being appointed as a director of a company in terms of the Companies Act may not be appointed as a board member of a public entity (section 12 of the South African National Roads Agency Limited Act and section 8(4) of the South African Civil Aviation Authority Act).

¹⁶⁶ Section 8 of the South African Civil Aviation Authority Act and section 6 of the Construction Industry Development Board Act.

¹⁶⁷ Section 6 of the Construction Industry Development Board Act and section 12 of the South African National Roads Agency Limited Act.

¹⁶⁸ Section 8 of the South African Civil Aviation Authority Act. In terms of the Construction Industry Development Board Act (section 6), “the Minister must, within 60 days from the expiry 30 date specified in the invitation, appoint” the members of the board.

¹⁶⁹ The Parliamentary committees consider whether or not a potential director is not disqualified in terms of the Act when shortlisting the candidates (sections 8(6) and 9(3) of the South African Civil Aviation Authority Act).

¹⁷⁰ Ibid.

After appointing the board, the Minister is further required to, as soon as possible, publish in the Gazette the names of every person appointed as a member, the date from which the appointment takes effect and the period of the appointment.¹⁷¹ To minimise political interference in the operations of the public entity, if a person, who is a political office bearer, accepts an appointment in terms of the Act, he or she must vacate the political office before the appointment takes effect.¹⁷² In addition, the majority of the members of the board “must not be in the full-time service of the State”.¹⁷³ The period of appointment as a board member differs with each public entity. For example, the South African Civil Aviation Authority Act stipulates that a director should hold office for a period not exceeding five years whilst the Construction Industry Development Board Act states that a board member should hold office for a period not exceeding three years.¹⁷⁴ To achieve continuity, it is provided that a third of the board members or a number as near to a third of the members as possible must be reappointed at the expiry of a board’s term of office.¹⁷⁵

To achieve the same objectives as above, the *King Report* and the *Protocol* recommend that there should be a formal,¹⁷⁶ rigorous and transparent procedure for the appointment of new directors to the board which should include background and reference checks.¹⁷⁷ It is further provided that appointments to the board should, preferably, be through a nomination committee and based on merit and against objective criteria.¹⁷⁸ Furthermore, the *King Report*

¹⁷¹ Section 6(10) of the Construction Industry Development Board Act.

¹⁷² Section 6 of the Construction Industry Development Board Act.

¹⁷³ Section 8(4) of the South African Civil Aviation Authority Act.

¹⁷⁴ However, a member may be reappointed for one more term or for more terms if the Minister finds it “necessary to reappoint a member to ensure continuity or on the grounds of the specific expertise of that member” (section 9 of the South African Civil Aviation Authority Act and section 7 of the Construction Industry Development Board Act). See also section 13 of the South African National Roads Agency Limited Act which limits the director’s term of office to three years and also states that a director’s term of office can be extended subject to fulfilment of certain conditions prescribed in the Act.

¹⁷⁵ Section 7(3) of the Construction Industry Development Board Act.

¹⁷⁶ The appointment of a director should be formalised in an agreement between the company and the director. The agreement should include a director’s code of conduct to be complied with and the contribution that is expected from the specific individual (Principle 2.19 of *King III Report*).

¹⁷⁷ Principle 2.19 of the *King III Report* and para 5.1.6.1 of the *Protocol*. The *King Report* recommends that, prior to their appointment, the directors’ backgrounds should be investigated along the lines of the approach required for listed companies by the *JSE Listing Requirements*. The board should also “make full disclosure regarding individual directors to enable shareholders to make their own assessment of directors”.

¹⁷⁸ The nomination committee should constitute only non-executive directors, of whom the majority must be independent and should be chaired by the board chairman (Principle 2.18 of the *King III Report*). The nominating committees provide a list of suitable candidates to the Executive Authority that oversees the state owned enterprise, which has the final power of

and *Protocol* recommend that public entity board members should be appointed based on their integrity and accountability, competence, relevant and complementary skills and expertise.¹⁷⁹

In view of the time and dedication required to fulfill the directors' duties properly, it is also recommended that potential directors should not hold more directorships than is reasonable for them to be able to exercise due care, skill and diligence.¹⁸⁰ The board should, therefore, examine the number of directorships held by an individual as part of the due diligence process to ensure that the appointed directors are able to effectively discharge their fiduciary obligations.¹⁸¹ To enable new perspectives and ideas, the *Protocol* and *King III Report* recommend that board members should serve for a certain period.¹⁸² Furthermore, to enhance continuity and stability for the success of an entity, the *Protocol* and *King III Report* recommend that, whenever a new board is put in place, some members from the dissolved board should be included and their selection must be based on good performance.¹⁸³

To complement the above efforts regarding the appointment of public entity boards, a *Handbook for the Appointment of Persons to Boards of State and State Controlled Institutions* was published.¹⁸⁴ The *Handbook's* main purpose is "to provide best practice

appointment (Robinett D *The Challenge of SOE Corporate Governance for Emerging Markets* (2006) 24-28). However, the relevancy of the nomination committee is questionable since, in the majority of public entities, the board is appointed by the Minister, in accordance with statutory requirements (Section 12(2) of the South African National Roads Agency Limited Act and section 8(2) of the South African Civil Aviation Authority Act). It is therefore assumed that, in appointing board members, the line Minister/Executive Authority should take into account the qualities recommended by the *King Report* and the *Protocol*.

¹⁷⁹ Principle 2.18 of the *King III Report* and para 5.1.6.1 of the *Protocol*. It is also recommended that board appointments should take into account the need for gender balance (Principle 2.18 of the *King III Report* and para 5.1.6.1 of the *Protocol*).

¹⁸⁰ Principle 2.19 of the *King Report* and para 5.1.6.1 of the *Protocol*. For more details with regard to the challenges associated with multiple directorships, see Kiel GC and Nicholson GJ "Multiple Directorships and Corporate Performance in Australian Listed Companies" (2006) 14(6) *Corporate Governance: An International Review* 530-546 and Hassim HA and Rahman MSA "Multiple Board Appointments: Are Directors Effective?" (2005) 2(7) *International Journal of Business and Social Science* 137-143.

¹⁸¹ Ibid.

¹⁸² Para 5.1.6.2 of the *Protocol* and Principle 2.18 of the *King III Report*. The *Protocol* proposes three years which can be extended for a second term of three years subject to the directors' performance and their skills continuing to be relevant to the entity. The *King III Report* recommends that at least one third of the non-executive directors should rotate every year and any "independent non-executive directors serving more than 9 years should be subjected to a rigorous review of his independence and performance by the board".

¹⁸³ Paras 5.1.6 and 5.1.7 of the *Protocol* and Principle 2.18 of the *King III Report*.

¹⁸⁴ The *Handbook* was approved by Cabinet on 17 September 2008 and issued by the Department of Public Service and Administration in 2009 (PwC, IoDSA and DBSA *State Owned Enterprises: Governance Responsibility and Accountability* (PricewaterhouseCoopers (PwC), South Africa, the Institute of Directors in Southern Africa (IoDSA) and the Development

guidelines to promote uniformity in the appointment of persons to boards of state and state controlled institutions”.¹⁸⁵ It recommends that the board appointment process¹⁸⁶ should be merit-based,¹⁸⁷ transparent,¹⁸⁸ representative¹⁸⁹ and consistent.¹⁹⁰ It also prescribes qualifying criteria for board membership.¹⁹¹ For example, the *Handbook* recommends that a member of the National Assembly or a member of a provincial legislature, a special adviser to an Executive Authority or head of department¹⁹² may not serve on the board of any state or state controlled institution.¹⁹³

The *Handbook* limits multiple memberships of boards by recommending that a person may not serve on more than three boards, whether private or public, be chairperson of more than one board at any time and may not “be serving on the board of a regulatory entity may not simultaneously serve on the board of a government enterprise that is regulated by the

Bank of Southern Africa (DBSA) Public Sector Working Group, 2011 Position Paper 3) 13 available at www.iodsa.co.za/.../PSWG_Position_Paper_3_Governance_in_SOEs.pdf (accessed on 18 May 2014)).

¹⁸⁵ The *Handbook* “builds on the good governance principles and practices provided for in the PFMA” to promote transparency, accountability, sound administration and good governance practices in all organs of state (RSA DPSA *Handbook for the Appointment of Persons to Boards of State and State Controlled Institutions* (South African Department of Public Service and Administration (RSA DPSA) 2009) 1-2 available at <http://www.dpsa.gov.za/dpsa2g/documents.asp> (accessed on 18 May 2014)).

¹⁸⁶ According to the *Handbook*, the appointment process should include, *inter alia*, advertising board vacancies, shortlisting and interviewing candidates, recommendations of suitable candidates and approval by the relevant authorities (RSA DPSA *Handbook for the Appointment of Persons to Boards of State and State Controlled Institutions* (2009) 44).

¹⁸⁷ Board members should be appointed based on their competencies (skills, expertise, experience, and knowledge) and qualifications and on the needs of the entity (RSA DPSA *Handbook for the Appointment of Persons to Boards of State and State Controlled Institutions* (2009) 30).

¹⁸⁸ The appointment process and phases should be standardised, objective, clear, understandable transparent and in compliance with applicable legislation ((RSA DPSA *Handbook for the Appointment of Persons to Boards of State and State Controlled Institutions* (2009) 26, 30-31).

¹⁸⁹ It is proposed that the appointment process should take into consideration employment equity legislation and policies to achieve broad representation of the South African population according to race, gender, and disability (RSA DPSA *Handbook for the Appointment of Persons to Boards of State and State Controlled Institutions* (2009) 26, 30-31).

¹⁹⁰ The appointment process should be applied consistently in all cases (RSA DPSA *Handbook for the Appointment of Persons to Boards of State and State Controlled Institutions* (2009) 26).

¹⁹¹ RSA DPSA *Handbook for the Appointment of Persons to Boards of State and State Controlled Institutions* (2009) 30.

¹⁹² A head of department “may not serve on the board of a state or state controlled institution for which his/her department is the parent department and in respect of which his/her Executive Authority has an oversight responsibility” except in exceptional cases for a specific period, to promote a government objective (RSA DPSA *Handbook for the Appointment of Persons to Boards of State and State Controlled Institutions* (2009) 13).

¹⁹³ RSA DPSA *Handbook for the Appointment of Persons to Boards of State and State Controlled Institutions* (2009) 26) 10-15.

particular regulatory entity”.¹⁹⁴ If a retiree, the person may not serve on more than five boards.¹⁹⁵ It is provided that a selection committee should be established to assess “the capacity, availability and competencies of candidates to meaningfully contribute their time to the affairs of the board, particularly where candidates serve on a number of boards”.¹⁹⁶

Similar to the above instruments, *the JSE Listing Requirements* provide that there must be a policy detailing the procedures for appointments to the board and such appointments must be formal and transparent.¹⁹⁷ Where appropriate, the board should be assisted by a nomination committee composed of only nonexecutive directors, of whom the majority must be independent.¹⁹⁸ The *Listing Requirements* require that directors of an applicant “must collectively have appropriate expertise and experience for the governance and management of the applicant and the group’s business”.¹⁹⁹

The Zimbabwe corporate governance system with regard to board appointment is not very different from that of South Africa. The Zimbabwean framework, like that of South Africa, provides for a formal, robust and transparent board selection and appointment process which should be based on merit.²⁰⁰ The Zimbabwean instruments also prescribe the minimum requirements for directorship, limit the period of directorship, discourage multiple directorships to boards and encourage board continuity and stability.²⁰¹ Despite the similarities, Zimbabwe and South Africa have differed in a number of aspects. South Africa, unlike Zimbabwe, has developed and adopted a *Handbook for the Appointment of Persons to*

¹⁹⁴ According to the *Handbook*, the main reason for limiting multiple board membership is “to ensure that members are able to pay proper attention to the affairs of the institutions on whose boards they serve, to broaden participation in public sector governance, to avoid tokenism, to minimise opportunities for corruption and to minimise conflicts of interest” (RSA DPSA *Handbook for the Appointment of Persons to Boards of State and State Controlled Institutions* (2009) 17).

¹⁹⁵ *Ibid.* However, the *Handbook* states that the proposals can be varied if there are justifiable reasons for exceeding the limit for multiple memberships.

¹⁹⁶ RSA DPSA *Handbook for the Appointment of Persons to Boards of State and State Controlled Institutions* (2009) 17.

¹⁹⁷ Section 3.84 of the *JSE Listing Requirements*.

¹⁹⁸ *Ibid.*

¹⁹⁹ Section 4.8 of the *JSE Listing Requirements*.

²⁰⁰ See Chapter 4, para 4.2.2 for a discussion on the board appointment process in Zimbabwe.

²⁰¹ *Ibid.*

Boards of State and State Controlled Institutions to enhance the board appointment process in public entities whereas Zimbabwe does not have such a guiding document.²⁰²

South Africa has also specifically detailed how the board members should be appointed to promote transparency, for example, the requirement for advertising of board vacancies, shortlisting and interviewing of candidates and notifying the public of board appointments in the Gazette. Zimbabwe's framework just indicates that the appointment process should be formal and transparent but does not give specific details on how this can be achieved as is the case in South Africa.²⁰³ The lack of a standardised framework in Zimbabwe may make it difficult to achieve uniformity and objectivity in public entities' board appointment process.

5.2.4 Composition of Board

Universally, it has been accepted that, for a board to be effective, it should be properly balanced in terms of power, skills, independence and diversity.²⁰⁴ The Companies Act and the company's Memorandum of Incorporation set the minimum qualifications to be satisfied by directors.²⁰⁵ However, as indicated above,²⁰⁶ the Act does not prescribe any specific professional or academic qualifications as a requirement for a person to be appointed as a director.²⁰⁷ The Acts that established public entities require that the boards of the respective entities should be composed of directors with relevant qualifications and experience.²⁰⁸ It is

²⁰² However, the *Corporate Governance and Remuneration Policy Framework*, if enacted into law, may save a similar purpose.

²⁰³ See Chapter 4, para 4.2.3 above.

²⁰⁴ Roberts J, McNulty T and Stiles P "Beyond Agency Conceptions of the Work of the Non-Executive Director: Creating Accountability in the Boardroom" (2005) 16 *British Journal of Management* S5-S26. See also Principle 2.18 of the *King III Report* and Part 2 (IV) of the *OECD Principles of Corporate Governance*.

²⁰⁵ Sections 68-69 of the Companies Act.

²⁰⁶ Para 5.2.3 above.

²⁰⁷ Naidoo R *Corporate Governance: An Essential Guide for South African Companies* (2009) 110.

²⁰⁸ The Acts prescribe that the prospective board members should have special knowledge of or experience in matters relating to the functions of the entity (section 8(2) of the South African Civil Aviation Authority Act and section 6(3) of the Construction Industry Development Board Act).

also a requirement that the majority of the directors should be non-executive members with the chief executive officer being the only executive director by virtue of his office.²⁰⁹

To complement the statutes, the *King III Report* and the *Protocol* recommend that the board should be composed of properly qualified and experienced people, the majority of which should be competent non-executive directors, with a sufficient number of the non-executive directors being independent.²¹⁰ The *King III Report* also recommends that at least one third of the non-executive directors should rotate every year and any independent non-executive director serving more than nine years should be subjected to a rigorous review of his independence and performance by the board.²¹¹ The board should “include a statement in the integrated report regarding the assessment of the independence of the independent non-executive directors”.²¹² In the same way, the *JSE Listing Requirements* provide that there must be a policy evidencing a clear balance of power and authority at board level, to ensure that no one director has unfettered powers of decision-making.²¹³

²⁰⁹ Section 12(2) of the South African National Roads Agency Limited Act and section 8(2) of the South African Civil Aviation Authority Act. However, the *King III Report* recommends a minimum of two executive directors which should include the CEO and Financial Director so that “there is more than one point of contact between the board and the management” (Principle 2.18 of the *King III Report*).

²¹⁰ Independence was emphasised after inquiries following recent corporate scandals and failures revealed that the board of directors was often not sufficiently independent from management, and as a result, did not inquire meticulously about questionable practices proposed and undertaken by executive management. The main idea behind the recommendation is thus to have a board balanced in terms of power and authority to avoid one member or a few directors dominating the board’s decision-making, reduce the possibility of conflicts of interest and promote objectivity (Petrick JA and Scherer RF “The Enron Scandal and the Neglect of Management Integrity Capacity” (2003) 18(1) *American Journal of Business* 37-50). See also para 5.1.6.1 of the *Protocol* and Principle 2.18 of the *King III Report*.

²¹¹ Principle 2.18 of the *King III Report*. There have been conflicting views on whether or not the issue of a director’s “independence” is necessary to promote good corporate governance in companies. Some commentators have argued that independent directors are necessary to achieve good corporate governance as they provide an oversight role on management, solve inefficiencies in the company and protect shareholders’ interest (Brickley JA, Coles JL and Terry RL “Outside Directors and the Adoption of Poison Pills” (1994) 35 *Journal of Financial Economics* 371-390 and Cotter J, Shivdasani A and Zenner M “Do Outside Directors Enhance Target Shareholder Wealth During Tender Offer Contests?” (1997) 43 *Journal of Financial Economics* 195-218). On the other hand, other commentators have been unable to establish a direct link between independent directors and company performance. Instead, the later commentators found that independent directors are an inefficient monitoring device because they lack the ability, knowledge and experience to drive the company appropriately as a result of the fact that they may possess inadequate knowledge about the company, its business and its industry. Accordingly, they may end up relying on management to provide them with the necessary information to undertake their functions (Bhagat S and Black B “The Uncertain Relationship between Board Composition and Firm Performance” (1999) 54(3) *Business Lawyer* 921-963 and Hermalin BE and Weisbach MS “The Effects of Board Composition and Direct Incentives on Firm Performance” (1991) 20(4) *Financial Management* 101-112).

²¹² Ibid.

²¹³ Para 3.84 of the *JSE Listing Requirements*.

Further to the requirement for a balance in terms of power, skills and independence, the size of the board has also been considered an essential element of board composition. The Companies Act and the company's Memorandum of Incorporation set the minimum number of directors for companies to at least one director for a private company and at least three directors in respect of public companies and non-profit companies.²¹⁴ The Acts that established public entities prescribe either the minimum or maximum number of directors. For example, the South African Civil Aviation Authority Act and The South African National Roads Agency Limited Act provide that the board should consist of not more than seven members whereas the South African Construction Industry Development Board Act provides that the board must consist of not fewer than nine, but not more than thirteen members.²¹⁵

Unlike the statutes, the *King III Report* and the *Protocol* do not specify the size of the board but acknowledge that the nature of the company business, the board's collective knowledge, skills and experience and the need to comply with regulatory requirements should be considered when determining the number of directors to serve on the board.²¹⁶ In addition, the *King III Report* recommends that diversity should be considered in coming up with a properly composed board.²¹⁷ Thus, when composing a board, cognisance must be taken of the need to reflect the race, gender and geographic composition of South Africa.²¹⁸

To achieve this objective, South Africa has developed policies and promulgated a number of statutes, for example, the Constitution,²¹⁹ the Black Economic Empowerment (BEE)

²¹⁴ Section 66-69 of the Companies Act. The minimum number is "in addition to the minimum number of directors that the company must have to satisfy any requirement, whether in terms of this Act or its Memorandum of Incorporation, to appoint an audit committee, or a social and ethics committee". See also Naidoo R *Corporate Governance: An Essential Guide for South African Companies* (2009) 105.

²¹⁵ Section 8 of the South African Civil Aviation Authority Act, section 12 of the South African National Roads Agency Limited Act and section 6 of the South African Construction Industry Development Board Act.

²¹⁶ Principle 2.18 of the *King III Report* and para 5.1.6 of the *Protocol*. The *King III Report* recommends that, in determining an appropriate board number, it is crucial to consider the nature of business and requisite skills, the need to achieve an appropriate mix of executive and independent non-executive directors, the need to have sufficient directors to structure board committees appropriately and establish a quorum and statutory requirements, among others.

²¹⁷ Diversity has been defined to include academic qualifications, technical expertise, relevant industry knowledge, experience, nationality, age, race and gender (Principle 2.18 of *King III Report*).

²¹⁸ Section 6(3) of the South African Construction Industry Development Board Act.

²¹⁹ The Bill of Rights (Chapter 2 of the Constitution) prohibits discrimination on the grounds of marital status, sexual orientation, gender, sex, among others.

policies,²²⁰ the Employment Equity Act,²²¹ the Basic Conditions of Employment Act²²² and the Labour Relations Act.²²³ Commentators have said the Black Economic Empowerment policies and legislation have encouraged racial diversity and have indirectly raised the profile of women on the board.²²⁴ Also, the other mentioned Acts, *inter alia*, consist of provisions that seek to address inequalities in the workplace and emphasise the need for gender consideration when recruiting employees or appointing board members.²²⁵

The South African Constitution also provides for the establishment of a Commission for Gender Equality to promote gender equality.²²⁶ The Commission draws its mandate from the Commission for Gender Equality Act (No. 39 of 1996). It was created to “advance, promote and protect gender equality in South Africa through undertaking research, public education, policy development, legislative initiatives, effective monitoring and litigation”.²²⁷ The

²²⁰ The BEE policies were introduced by the current ANC government with the aim of abolishing the economic legacy of apartheid and widening involvement in the economy by everyone, especially by those perceived to have been previously deprived of such participation (underprivileged black people). The policies resulted in the promulgation of the Broad Based Black Economic Empowerment (B-BBEE) Act (No. 53 of 2003) whose main objective is to empower the previously underprivileged black people (section 2 of the B-BBEE Act). The Act was promulgated on the basis of the equality clause (section 9) of the Constitution, which provides that everyone is equal before the law and has the right to equal protection and benefit of the law. In addition to the Act, the South African Department of Trade and Industry published Codes of Good Practice “which contain the detail on BBBEE measures and provide the framework for measuring the progress made on the implementation and execution of BBBEE measures” (Esser I and Dekker A “The Dynamics of Corporate Governance in South Africa: Broad Based Black Economic Empowerment and the Enhancement of Good Corporate Governance Principles” (2008) 3(3) *Journal of International Commercial Law and Technology* 157-169)).

²²¹ Act No. 55 of 1998. The Employment Equity Act was created to “promote the constitutional right of equality and the exercise of true democracy” and “eliminate unfair discrimination in employment” (‘Preamble’ to the Employment Equity Act). South Africa has also enacted the Women Empowerment and Gender Equality Bill (No. 50 of 2013) which is still to be gazetted as an Act of Parliament. The Bill seeks to empower women and encourage their appointment and representation in decision-making positions and structures (section 3 of the Women Empowerment and Gender Equality Bill).

²²² Act No. 11 of 2002. The main objective of the Act is to “give effect to and regulate the right to fair labour practices conferred by section 23(1) of the Constitution”.

²²³ Act No. 127 of 1998. The Act was enacted to “advance economic development, social justice, labour peace and the democratisation of the workplace” by giving effect to and regulating the basic rights bestowed by section 27 of the Constitution and “give effect to obligations incurred by the Republic as a member state of the International Labour Organisation”, among others.

²²⁴ Kruger LP “The Impact of Black Economic Empowerment (BEE) on South African Businesses: Focusing on Ten Dimensions of Business Performance” (2011) 15(3) *Southern African Business Review* 207-233. See also Curtis M, Schmid C and Struber M *Gender Diversity and Corporate Performance* (Credit Suisse Research Institute Paper of August 2012) 18-19 available at https://www.credit-suisse.com/newsletter/doc/gender_diversity.pdf (accessed on 17 July 2015).

²²⁵ See sections 5-6 of the Employment Equity Act, sections 2 and 4 of the Basic Conditions of Employment Act and sections 4-5 of the Labour Relations Act.

²²⁶ Section 187 of the Constitution.

²²⁷ Section 11 of the Commission for Gender Equality Act. See also DU Plessis JJ, Saenger I and Foster R “Board Diversity or Gender Diversity? Perspectives from Europe, Australia and South Africa” (2012) 17(2) *Deakin Law Review* 207-249 available at <http://www.austlii.edu.au/au/journals/DeakinLRev/2012/10.pdf> (accessed on 13 November 2014).

Department for Women, Children and Persons with Disabilities (DWCPD) was also established to drive the “government’s goal of achieving equality, empowerment and access to development opportunities by vulnerable and historically disadvantaged groups” within South African society.²²⁸ In addition, South Africa has ratified a number of international agreements that deal with gender promotion issues, for example, the *Convention on the Elimination of All Forms of Discrimination Against Women* (December 1979) and the *SADC Protocol on Gender and Development* (August 2008).²²⁹

Similar to the provisions of the South African instruments, the Zimbabwean instruments have greatly sought to increase board effectiveness by providing for the establishment of properly composed boards in terms power, expertise, size and diversity (e.g. race, age, gender).²³⁰ To promote gender equality, as in South Africa, Zimbabwe has enacted legislation, set up of a Gender Commission, created a particular Ministry and ratified a number of international agreements that seek to promote gender equality.²³¹ Nonetheless, Zimbabwe appears to be lagging behind South Africa in so far as promoting gender equality is concerned because it is still to put appropriate structures and enact laws to enforce this aspect.²³²

5.2.5 Remuneration of the Board

The need to appropriately reward directors to enable them to effectively discharge their duties has been acknowledged in South Africa and other countries.²³³ At the same time, there is growing concern that company directors and executives are abusing their position in the company to pursue their personal objectives instead of focusing on what is best for the

²²⁸ The department was established in May 2009. Its main objective is to create “an enabling environment that translates constitutional obligations, policies and legislative frameworks into the realisation of gender, disability and children’s rights”. Visit <http://www.wcpd.gov.za/> for more information. See also Storbeck C and Moodley S “ECD Policies in South Africa – What About Children with Disabilities?” (2011) 3(1) *Journal of African Studies and Development* 1-8.

²²⁹ *A Framework for Transforming Gender Relations in South Africa* (Paper presented by the Commission on Gender Equality 2000) 52-53 available at http://www.gov.za/sites/www.gov.za/files/transformation_0.pdf (accessed on 12 September 2014). See also section 3 of the Women Empowerment and Gender Equality Bill.

²³⁰ See Chapter 4, para 4.2.4 above, for a detailed discussion on Zimbabwe’s position with regard to board composition.

²³¹ See Chapter 4, para 4.2.4 above.

²³² Ibid.

²³³ Principle 2.25 of the *King III* and para 5.1.10.3 of the *Protocol*.

company and its shareholders.²³⁴ In response to these concerns, various corporate governance reforms have been advocated.²³⁵

To achieve objectivity and enhance transparency, the Companies Act prescribes that the remuneration of directors must be approved by a prior special resolution of shareholders in general meeting passed not more than two years before.²³⁶ Also a company's annual financial statements should include particulars showing the remuneration and benefits (e.g. bonuses, pensions, compensation for loss of office and securities) received by each director, or individual holding any prescribed office in the company.²³⁷ The Companies Act further prohibits direct or indirect financial assistance to directors unless the assistance is permitted in terms of the Memorandum of Incorporation of the company, is made in accordance with an employee share scheme and is approved by a special resolution of the shareholders.²³⁸ The board also has to be satisfied that, immediately after providing the financial assistance, the company would remain solvent and liquid and that the terms and conditions of the financial assistance are fair and reasonable to the company.²³⁹ In the same spirit as the Companies Act, the Acts that established public entities in South Africa prescribe that the remuneration and allowances of a board or committee member should be determined and approved by the relevant Minister, in consultation with the Minister of Finance and other relevant stakeholders.²⁴⁰

The *King III Report* and the *Protocol* recommend that the level of directors' remuneration should be adequate to attract, incentivise and retain high quality skills, experience and

²³⁴ Scholtz HE and Smit A "Executive Remuneration and Company Performance for South African Companies Listed on the Alternative Exchange (AltX)" (2012) 16(1) *Southern African Business Review* 22-38.

²³⁵ Scholtz and Engelbrecht found that corporate governance reforms "relating to institutional ownership, the number of non-executive directors on the remuneration committee, shareholder voting on the remuneration policy and the number of remuneration committee meetings act as an effective governance tool to protect shareholders' interests with regard to some of the elements of executive directors' remuneration" (Scholtz HE and Engelbrecht WA "The Effect of Remuneration Committees, Directors' Shareholding and Institutional Ownership on the Remuneration of Directors in the Top 100 Companies in South Africa" (2015) 19(2) *Southern African Business Review* 22-51).

²³⁶ Section 66 (8-9) of the Companies Act.

²³⁷ Section 30 of the Companies Act.

²³⁸ Section 45 of the Companies Act.

²³⁹ Ibid.

²⁴⁰ Section 10 of the South African Civil Aviation Authority Act (No. 40 of 1998), section 13(3) of the South African National Roads Agency Limited Act) and section 9 of the South African Construction Industry Development Board Act.

expertise as well as loyalty and commitment to the public entity.²⁴¹ To assist the entities in developing an appropriate remuneration system, it is recommended that a remuneration committee, chaired by independent non-executive directors, should be established.²⁴² The committee should develop a remuneration policy which should be aligned with the strategy of the company, linked to a director's level of skill, experience and expertise and his contribution to the performance and success of the entity.²⁴³ In addition, the remuneration policy should be subjected to shareholder approval before its implementation.²⁴⁴ But, it is questionable whether the remuneration committee is relevant to public entities since the statutes do not make any reference to the committee but provide for ministerial approval of board remuneration.²⁴⁵

The *King Report* and the *Protocol* also recommend that the company's annual financial statements should include detailed disclosure of all forms of remuneration paid to individual directors to enhance transparency and accountability.²⁴⁶ Likewise, the *JSE Listings Requirements* substantially add to the disclosure requirements in an attempt to make the information disclosed in companies' records, for example the prospectus and annual accounts, more meaningful and to enhance transparency.²⁴⁷ To preserve director independence, the *King III Report* recommends that the "chairman and non-executive

²⁴¹ Principle 2.25 of the *King III* and para 5.1.10.3 of the *Protocol*.

²⁴² Principle 2.25 of the *King III* and paras 5.1.9.1 and 5.1.10.2 & 5.1.12.2 of the *Protocol*. The committee is responsible for making recommendations to the board on remuneration issues and assists it in setting and monitoring remuneration policies.

²⁴³ Principle 2.25 of the *King III* and para 5.1.10.2 of the *Protocol*. It has been found that linking remuneration policies to performance can increase stakeholder value over the long term. The *King III Report's* requirement for disclosure between salary and performance-related elements as well as an explanation of the basis on which remuneration is measured, make it increasingly difficult for companies to determine directors' remuneration without considering their performance (Scholtz HE and Smit A "Executive Remuneration and Company Performance for South African Companies Listed on the Alternative Exchange (AltX)" (2012) 22-38.

²⁴⁴ Principle 2.25 of the *King III Report* and para 5.1.10.1 of the *Protocol*. The proposal by the *King III Report* that shareholders approve the remuneration policy of a company will increase the accountability of executive directors to shareholders.

²⁴⁵ Section 10 of the South African Civil Aviation Authority Act (No. 40 of 1998), section 13(3) of the South African National Roads Agency Limited Act) and section 9 of the South African Construction Industry Development Board Act.

²⁴⁶ Principle 2.26 of the *King III Report* and para 5.1.9.4 of the *Protocol*. As part of disclosure, listed companies should disclose emoluments, for example fees, basic salaries, bonuses, share options and performance-related payments made to directors during the last financial period in their annual financial statements (Principle 2.26 of the *King III Report*).

²⁴⁷ Section 3 of *JSE Listings Requirements*. In line with the international trend of moving from disclosure on an aggregate basis to individualized disclosure of remuneration, the JSE now requires listed companies to disclose directors' compensation, as required by the Companies Act, on an individualised basis (Section 7 (para 7.B.7) of *JSE Listings Requirements*). See also Moloi STM *Assessment of Corporate Governance Reporting in the Annual Reports of South African Listed Companies* (2008) 72-75.

directors should not receive incentive awards that may impair their ability to provide impartial oversight and advice”.²⁴⁸ The *Report* discourages payment share or incentive based remuneration and further suggests that non-executive directors should aim to limit their shareholding to the company to a “level which will not impair their independence”.²⁴⁹

To complement the statutes, *King Report* and the *Protocol*, the Department of Public Enterprises has published *State-owned Enterprises Remuneration Guidelines*.²⁵⁰ The remuneration model was developed based on market data which categorises state-owned enterprises according to their asset base and revenue.²⁵¹ The *Guidelines* suggest that packages for chairpersons and non-executive directors should be linked to the size of the public entity and determined by asset base and revenue.²⁵² The board is, thus, expected to determine the sizing of its entity according to the categorisation model prepared by the Department of Public Enterprises.²⁵³

Chairpersons and non-executive directors should be paid annual retainer fees which must be determined according to the remuneration model and should not exceed the median amount of the retainer fee developed by the department.²⁵⁴ The *Guidelines* further recommend that board remuneration should be calculated based on the number of board meetings attended, business travelling and accommodation expenses, director’s skill level or scarcity of skill, achievement of set performance targets as well as subjected to justification and shareholder

²⁴⁸ Principle 2.26 of the *King III Report*.

²⁴⁹ *Ibid*.

²⁵⁰ The *Guidelines* were published in August 2007 and are available at www.pmg.org.za/files/docs/100319guidelines1.pdf. Similar to the *King III Report* and the *Protocol*, the *Guidelines* provide for the establishment of a remuneration committee and detail its responsibilities. Boards and remuneration committees are expected to apply these *Guidelines* in determining remuneration levels of board members and in formulating remuneration policies (section 9 and Annexure A to the *SOE Remuneration Guidelines*).

²⁵¹ Section 2 of the *State Owned Enterprises Remuneration Guidelines*. The Department of Public Enterprises categorised public entities into four categories, namely small (A), medium (B), large (C) and very large (D). The assets and revenue for small companies should be less than R143.5 million and R22.8 million and those for very large companies should be above R16.3 billion and R2.54 billion, respectively.

²⁵² *Ibid*.

²⁵³ Sections 4.2-4.6 of the *State Owned Enterprises Remuneration Guidelines*.

²⁵⁴ *Ibid*.

approval.²⁵⁵ Similar to the *King III Report*, the *Guidelines* discourage the disbursement of incentive payments to directors to protect their independence.²⁵⁶

The above indicates that Zimbabwe and South Africa have developed similar corporate governance instruments that seek to motivate directors to effectively discharge their duties through fair, adequate and performance related remuneration.²⁵⁷ Both jurisdictions have tried to promote transparency and accountability through providing for shareholder approval and advocating for disclosure of board remuneration to allow for public scrutiny. The only main difference is that South Africa has developed and publicised *State-owned Enterprises Remuneration Guidelines* aimed at specifically addressing challenges of determining board remuneration in public entities whereas Zimbabwe still has a draft *Corporate Governance and Remuneration Policy Framework*. What remains to be established is how effectively the measures have been implemented and whether they have assisted boards of public entities to achieve set targets.²⁵⁸

5.2.6 Evaluation of the Board

South Africa has joined the rest of the world in valuing the importance of assessing the effectiveness of the board of directors for the success of any organisation. As a result, measures have been put in place to enable the board to effectively discharge its duties and at the same time to promote the assessment of its effectiveness.²⁵⁹ Having established measures

²⁵⁵ Sections 4.7-4.13 of the *State Owned Enterprises Remuneration Guidelines*. In determining the rate at which to pay board or committee fees, an entity is expected to “refer to a remuneration strategy and/or policy document approved by the Minister for guidance” (sections 7 of the *State Owned Enterprises Remuneration Guidelines*).

²⁵⁶ The Guidelines state that non-executive directors should neither receive incentive payments nor participate in schemes designed for the remuneration of executives (section 4.17 of the *State Owned Enterprises Remuneration Guidelines*).

²⁵⁷ See Chapter 4, para 4.2.5 above for comparable measures in Zimbabwe.

²⁵⁸ See Chapter 7, para 7.2.5 below.

²⁵⁹ See Chapter 4, paras 4.2.2-4.2.5 and Chapter 5, paras 5.2.2-5.2.5 above. To enable the board to be effective in performing its role, both countries have put measures to ensure that the roles of boards are clearly and comprehensively expressed, directors are appointed based on merit and in a transparent manner, the composition of the board is balanced in terms of independence, skills and relevant experience, the board is fully empowered to discharge its duties, and board members are adequately remunerated.

to empower the directors, South Africa aims to assess how effectively the board performed during a particular period.²⁶⁰

South Africa has provided for board performance evaluation in the Acts that established public entities to make the process legally enforceable.²⁶¹ To enable the responsible Minister to assess whether or not a public entity board has performed to expectations, the Acts that constituted public entities prescribe that the Minister and the entity (represented by the board) should enter into a written performance agreement.²⁶² The agreement details the entity's "scope of business, efficiency and financial performance, and achievement of objectives", the principles to be followed by the entity in carrying out its mandate and any other matter relating to the performance of the entity's functions.²⁶³ The agreement must be published in the Gazette and any amendment thereto must be so published at least 30 days prior to that amendment coming into operation. It is also a requirement that a copy of the performance agreement must be open to public inspection during business hours at the head office of the entity.²⁶⁴ The performance of the board is then evaluated against the set and agreed performance targets.

The *King III Report and Protocol* recommend that an evaluation of the board, its committees and the individual directors should be performed every year.²⁶⁵ According to the *King III Report and Protocol*, the main objectives of annual performance appraisals of individual directors, the board and board committees should be to provide a basis for evaluating board performance towards the achievement of the set performance objectives and targets of the entity, identifying future training needs and, where necessary, explain why a re-appointment

²⁶⁰ However, the framework has not provided a template or specific performance measurement tools leaving that to individual public entities and their boards to determine.

²⁶¹ For example, see section 5 of the South African Civil Aviation Authority Act and section 5 of the South African Construction Industry Development Board Act.

²⁶² Section 5 of the South African Civil Aviation Authority Act. Section 5 of the South African Construction Industry Development Board Act states that the board, in consultation with the Minister, may develop and publish targets and performance indicators related to best practice standards and guidelines and establish mechanisms to monitor their implementation and evaluate their impact.

²⁶³ Ibid.

²⁶⁴ Ibid.

²⁶⁵ Principle 2.2 of *King III Report* and para 5.1.7.2 of the *Protocol*.

may or may not be appropriate.²⁶⁶ In addition, the performance appraisal may lead shareholders to review the mandate of the board if considered necessary, change the composition of the board or to discipline any directors for non-performance.²⁶⁷

In South Africa, the public entity board should agree with the shareholder²⁶⁸ on performance objectives and targets which include shareholder objectives using key performance indicators developed for this purpose.²⁶⁹ Secondly, the board is expected to regularly keep the Executive Authority²⁷⁰ informed of the operations of the entity and its subsidiaries and to give the Authority such information in relation to those operations as the Authority may require occasionally.²⁷¹ Thereafter, a performance appraisal should be carried out to measure the extent of achievement by the board as whole and individual members of the set performance objectives and targets.²⁷² The board is also expected to produce an integrated report stating whether the appraisals of the board, its committees and individual directors have been conducted.²⁷³ The report should provide an overview of the results of the performance

²⁶⁶ Ibid.

²⁶⁷ Paras 5.1.6.3, 5.1.8, 5.1.11 and 5.1.13.7 of the *Protocol*.

²⁶⁸ The shareholder of public entities is usually the government represented by the responsible Minister (Bulbuena SS *State-owned Enterprises in Southern Africa: A Stocktaking of Reforms and Challenges* (OECD Corporate Governance Working Papers, No. 13 (2014) 41-42).

²⁶⁹ Principle 2.2 of *King III Report* and para 5.1.7.2 of the *Protocol*. The performance objectives and targets should be detailed in a shareholder compact as provided in paras 5.1.13 and 5.1.14 of the *Protocol*. Similarly, the *King Report* recommends that the board charter and the board committees' terms of reference should be comprehensive enough to state the key deliverables expected of the board and its committees to enable the objective assessment of their performance against the targets set (Principle 2.2 of *King III Report*). See also Naidoo R *Corporate Governance: An Essential Guide for South African Companies* (2009) 151-152).

²⁷⁰ Executive Authority means the Cabinet member who is accountable to Parliament for the state owned enterprise or in whose portfolio it falls and/or the member of the provincial Executive Council who is accountable to the provincial legislature for the state owned enterprise or in whose portfolio it falls (para 3.3 of the *Protocol*).

²⁷¹ Para 5.1.15 of the *Protocol*. This is expected to follow a disclosure principle which is similar to the continuous disclosure requirements of the *JSE Listing Requirements*.

²⁷² The board has the prerogative to determine whether the evaluation of performance should be done in-house or conducted professionally by independent service providers, subject to legislative requirements. With regard to in-house evaluations, it is recommended that the chairman, through the nominations committee, may lead the overall performance evaluation of the board, board committees and individual directors with the assistance of a competent, suitably qualified and experienced company secretary (Principle 2.2 of *King III Report* and para 5.1.7.2 of the *Protocol*).

²⁷³ Principle 2.2 of *King III Report* and para 5.1.16 of the *Protocol*. The following aspects regarding directors should be disclosed in the integrated report: the composition of the board and board committees, the manner in which the board and its committees have discharged their duties, the education, qualifications and experience of the directors, the length of service and age of the directors, other significant directorships of each board member, the reasons for the removal, resignation or retirement of a director and any other relevant information.

assessment and the action plans to be implemented, if any.²⁷⁴ In addition to this report, the *King Report* and *Protocol* recommend the production of a corporate governance report which indicates whether or not the entity is complying with the recommended governance principles, giving a brief description of how this is being applied and areas of deviation, citing the reasons for each deviation.²⁷⁵

Zimbabwe, like South Africa, has put in place measures to enable the assessment of board effectiveness.²⁷⁶ Although the two countries have put in place similar board performance evaluation systems, they have differed in that Zimbabwe has provided for government representatives, who are not board members, to regularly attend board meetings and give feedback to the Minister. South Africa has left the issue to be dealt with through informative reports and feedback from the chairman of the board, presumably to avoid excessive interference in the entity's operations.²⁷⁷ South African measures also specifically prohibit a person who is or becomes a political office bearer from being a public entity board member which Zimbabwe does not do.²⁷⁸ In addition, South Africa has legislated for board performance evaluations yet Zimbabwe has left this matter to voluntary codes of corporate governance.²⁷⁹

5.2.7 Enforcement Mechanisms

South Africa has, to a large extent, relied on a self-regulatory environment in its approach to corporate governance.²⁸⁰ However, following the prevalence of poor corporate governance

²⁷⁴ Principle 2.2 of *King III Report* and para 5.2.5 of the *Protocol*. As indicated in para 5.2.2 above, the performance results should be disclosed in the annual report and must be available for public inspection (Section 5(4) of the South African Civil Aviation Authority Act and para 5.2.13 of the *Protocol*).

²⁷⁵ Principle 2.2 of *King III Report* and para 5.2.13 of the *Protocol*.

²⁷⁶ The comparable measures established by Zimbabwe are discussed in Chapter 4, para 4.2.5 above.

²⁷⁷ Paras 5.1.14 and 5.1.15 of the *Protocol*.

²⁷⁸ For example, see section 9(3) of the South African National Roads Agency Limited Act and section 7(4) of the South African Construction Industry Development Board Act. The South African Construction Industry Development Board Act actually states that the board "must perform its functions free from undue influence" (section 3).

²⁷⁹ See section 5 of the South African Civil Aviation Authority Act and section 5 of the South African Construction Industry Development Board Act. See Chapter 4, para 4.2.5 in respect of Zimbabwe's position.

²⁸⁰ Naidoo R *Corporate Governance: An Essential Guide for South African Companies* (2009) 28-37. The self-regulatory position is confirmed in the *King Reports* which the courts have referred to in determining whether or not directors have breached their duties. See *Minister of Water Affairs and Forestry V Stilfontein Gold Mining Co Ltd and Others* (2006) (5)

practices, the country developed a number of legal and regulatory instruments as a way of creating an appropriate climate for adherence to the corporate governance guidelines “without unnecessarily imposing restrictive requirements that would inhibit commercial and entrepreneurial enterprise”.²⁸¹ For example, South Africa has relied on its legislation (e.g. Companies Act,²⁸² PFMA and Acts establishing public entities),²⁸³ case law (judicial precedent)²⁸⁴ and JSE *Listing Requirements*²⁸⁵ to enforce corporate governance compliance.

SA 333 (W) where the directors were fined for violating their environmental obligations. In this case the Court found that the directors of a company, who all resigned simultaneously, in order to avoid taking certain action, acted in bad faith to the company and were liable for the consequences of not discharging their duties. It appeared from the evidence that all directors had resigned from their positions on legal advice to the effect that if they continued in office the mine’s non-compliance with the court order might render them party to reckless trading. In passing judgment the court considered that the code of conduct of the second *King Report* was almost uniformly endorsed by the corporate community in South Africa and that the conduct of the respondent directors was part of their responsibilities in terms of the *King Code of Conduct*, which they were obliged to implement by virtue of the fact that the respondent was a listed company and consequently had to adhere to the *Listing Requirements* of the JSE Securities Exchange. The court held all the respondents guilty of contempt of court. It is therefore, important to note that, although the *King Report* is self-regulatory, the court referred extensively to the *King II Report* to determine if the directors had breached their duties.

²⁸¹ Given the voluntary nature of the *King Reports*, South Africa recognised that other interventions would be necessary to enhance the effectiveness of boards and promote good corporate governance practices. In response, the country formulated legislation intended to introduce “rigorous provisions relating to delinquent directors and for the introduction of provisions that will give legal backing to accounting standards in South Africa” (Armstrong P *Corporate Governance in South Africa – a Perspective from an Emerging Market* (Paper presented at the 5th Meeting of the Eurasian Corporate Governance Roundtable organised by World Bank, OECD and GCGF 2004) 22 available at <http://www.oecd.org/corporate/ca/corporategovernanceprinciples/31919378.pdf> (accessed on 8 April 2014)). See Chapter 4, para 4.2.7 for Zimbabwe’s comparative enforcement initiatives.

²⁸² From a reading of the Companies Act, it is apparent that corporate governance issues are not just regulated in codes of best practice but are also dealt with in legislation. In the Act, a number of sections deal with corporate governance issues, for example, section 7 clearly states that one of purposes of the Act is to encourage “transparency and high standards of corporate governance as appropriate”, Chapter 2, Part C deals with general transparency and accountability requirements and Chapter 2, Part 7 concentrates on general governance of companies wherein directors’ duties are, for instance, partially codified in sections 75 and 76. Where a director breaches certain provisions of the Companies Act, he may incur civil and/or criminal liability or be disqualified to serve as a director (sections 162-163). Furthermore, the Companies Act provides that any provision of the Act “that applies to a public company applies also to a state-owned company, except to the extent that the Minister has granted an exemption...” This means that all penal provisions targeted at directors in private and public companies equally apply to state owned enterprises directors (Section 9 of the South African Companies Act).

²⁸³ Various elements of the recommendations in the *King Reports* have also been incorporated into legislation and regulations to ensure that directors practice good corporate governance (Gstraunthaler T “Corporate Governance in South Africa: The Introduction of King III and Reporting Practices at the JSE ALT-X” (2010) 7(3) *Corporate Ownership & Control* 146-154 available at <http://www.virtusinterpress.org/IMG/pdf/Paper26.pdf> (accessed on 29 May 2015)). See also Hendricks PSA and Wyngaard RG “South Africa’s King III: A Commercial Governance Code Determining Standards of Conduct for Civil Society Organizations” (2010) 1-109 and Institute of International Finance (IIF) *Corporate Governance in South Africa-An Investor Perspective* (IIF Paper of September 2007) available at <http://www.iif.com/download.php?id=0N6SZ+azhm0> (accessed on 27 August 2014).

²⁸⁴ Judicial precedent is a body of court judgements which establishes a particular legal principle which, in addition to statutory provisions, should be considered in passing future judgements in cases with similar facts. Once established, judicial precedent forms part of common law (Naidoo R *Corporate Governance: An Essential Guide for South African Companies* (2009) 31, 162).

²⁸⁵ The *JSE Listing Requirements* have been regularly and comprehensively updated to incorporate certain elements of the *King Reports* as mandatory requirements for quoted companies. The JSE thus continues to enforce its existing requirement for companies to “comply or explain” their adoption of the *King Report* guidelines. In terms of section 1 of the *JSE Listings Requirements*, the JSE has the power, subject to the *Listings Requirements*, to grant, review, suspend or terminate a listing of securities or impose a fine on a listed company. Therefore, in the event that a listed company does not comply with such specifically itemised corporate governance requirements, the JSE would have the power to suspend or terminate such

The Companies Act clearly provides that that a person is not, solely by reason of being a director of a company, liable for any liabilities or obligations of the company, unless where the Companies Act or the company's Memorandum of Incorporation provides otherwise.²⁸⁶ Thus, directors may only incur criminal liability and civil liability in specific instances in terms of the Act.²⁸⁷ A director may be held personally liable, in accordance with the principles of the common law relating to breach of a fiduciary duty,²⁸⁸ for any loss, damages or costs encountered by the company as a result of any breach by him of a duty expected in the standard of directors conduct,²⁸⁹ failure to disclose a personal financial interest in a particular matter,²⁹⁰ failure to avoid a conflict of interest²⁹¹ or any breach of a provision of the Companies Act or the company's memorandum of incorporation.²⁹²

Furthermore, the Act penalises and imposes personal liability on a director for any loss, damage or costs arising as a direct or indirect consequence of his actions.²⁹³ For example, a director is held accountable if he acts on behalf of the company despite knowing that he lacks authority to do so, consents to carrying on of the company's business despite knowing that it amounts to reckless trading in terms of section 22, agrees to being a party to an act or omission despite knowing that the act or omission was calculated to defraud a creditor, employee or shareholder of the company and signed, consented to, or authorised the

company's listing of its securities if it is in the public interest to do so or impose a fine on such listed company (section 1 of the *JSE Listing Requirements*).

²⁸⁶ Delpont P *The New Companies Act Manual* (2009) 38-39.

²⁸⁷ See, for example, section 216(5) of the South African Companies Act, which makes it a criminal offence for a director to fail to notify the company of a change in personal particulars. See also Mammatt J, Du Plessis D and Everingham G *The Company Director's Handbook* (Cape Town: Siber Ink 2004) 100-112, for a list of all the criminal offences in the Companies Act.

²⁸⁸ Section 77(2) of the Companies Act provides that the section applies in addition to any rule of common law that is consistent with the section.

²⁸⁹ Section 77(2) of the Companies Act. For example, a director is liable for failing to act in good faith and for a proper purpose or in the best interest of the company (section 76(3) of the Companies Act). See also Kanamugire JC and Chimuka TC "The Directors' Duty to Exercise Care and Skill in Contemporary South African Company Law and the Business Judgment Rule" (2014) 70-78.

²⁹⁰ Section 75 of the Companies Act.

²⁹¹ Section 76(2) of the Companies Act. See also Kanamugire JC "The Impact of the Companies Act 71 of 2008 on the Traditional Director's Duty to Avoid Conflict of Interest" (2014) 5(9) *Mediterranean Journal of Social Sciences* 75-88.

²⁹² Section 76(2) and 214 of the Companies Act. See also Delpont P, *The New Companies Act Manual*, (2009) 38-39.

²⁹³ Section 77(3) of the Companies Act.

publication of any financial statements that were materially false or misleading or a prospectus that contained false or misleading information.²⁹⁴

To ensure that unsuitable individuals are not allowed to continue managing the company's affairs, the Companies Act provides for the removal of a director before the expiration of his period of office if he fails to perform his duties as expected.²⁹⁵ The circumstances under which a director may be removed are when he becomes ineligible or disqualified or incapacitated to the extent that he is unable to execute the functions of a director or neglected or has been negligent in the performance of his duties.²⁹⁶ A director may also be declared "delinquent" if he, *inter alia*, grossly abuses the position of director or acts in a manner that amounts to gross negligence, wilful misconduct or breach of trust in relation to the performance of the director's functions.²⁹⁷ In an effort to further deter directors from not complying with statutory requirements, the Companies Act provides for the disqualification of directors and for a register of disqualified directors to be maintained.²⁹⁸ A disqualified person under the Act includes a person who has been declared by a court to be a delinquent director, placed under probation by a court, is prohibited in terms of any public regulation to be a director of the company or has been removed from an office of trust on the grounds of misconduct involving dishonesty.²⁹⁹

²⁹⁴ Section 77(3) of the Companies Act. The section further states that the liability of a person in terms of the said section is jointly and severally with any other person who is or may be held liable for the same act. This means that a single director can be held liable for the totality of damages suffered by a third party as a result of the breach of fiduciary duties. See also Grové AP *Company Directors: Fiduciary Duties and the Duty of Care and Skill* Unpublished Thesis (University of Pretoria 2012) 41-42.

²⁹⁵ Section 71 of the Companies Act. Certain requirements have to be met to remove a director, for example, an ordinary resolution must be adopted at a shareholders meeting by a majority of persons entitled to exercise voting rights in an election of that director, prior to such resolution being passed. In addition, the director concerned must be given adequate notice of the meeting and the resolution and afforded reasonable opportunity to make a presentation, in person or through a representative, to the shareholders meeting, before such resolution is put to a vote. See also *Swerdlow v Cohen* 1977 (1) SA 178 (W) at 182E-G.

²⁹⁶ *Ibid.* See also Grové AP *Company Directors: Fiduciary Duties and the Duty of Care and Skill* (2012) 42-43.

²⁹⁷ Section 162 of the Companies Act.

²⁹⁸ Sections 69 and 162 of the Companies Act. Section 69 prohibits a person who has been disqualified from acting as director. The register for disqualified directors should be maintained by the Companies and Intellectual Property Commission. Some commentators have argued that disqualifying and declaring directors delinquent may be viewed as blacklisting the individuals thus discourage people from accepting directorship. However, others have argued that the probability for disqualification is likely to act as a checking mechanism and encourage directors to effectively and ethically discharge their duties (Tumuheki J *Towards Good Corporate Governance: An Analysis of Corporate Governance Reforms in Uganda* (2008) 64).

²⁹⁹ Section 69 of the Companies Act.

Any director found guilty of an offence in terms of this Act, is liable (in the case of a contravention of section 213(1) or 214(1)) to a fine or to imprisonment for a period not exceeding 10 years, or to both a fine and imprisonment. In any other case, the director is liable to a fine or to imprisonment for a period not exceeding 12 months, or to both a fine and imprisonment.³⁰⁰ However, in any proceedings against a director, other than for wilful misconduct or wilful breach of trust, the court may, in terms of the business judgment rule,³⁰¹ discharge the director, either wholly or in part, from any liability set out in the Act, or on any terms the court considers just, if it appears to the court that the director acted honestly and reasonably, or having regard to all the circumstances of the case, including those connected with the appointment of the director, it would be fair to excuse the director.³⁰² In addition, a director is specifically entitled by the business judgment rule to rely on the discharge of functions, and information presented by, persons such as employees and professional advisers who that director reasonably believes to be reliable and competent.³⁰³

To add to the above, the Companies Act makes provision for a new institutional framework consisting of a Companies and Intellectual Property Commission aimed at ensuring proper administration, compliance with and enforcement of the provisions of the Companies Act.³⁰⁴ The Commission must receive and promptly investigate complaints concerning violations of the provisions of the Act, encourage the use of Alternative Dispute Resolution by companies for resolving internal disputes and issue and enforce compliance notices.³⁰⁵ The Act also provides for the protection of whistleblowers which should go a long way in encouraging people to disclose information regarding breach of duty by the directors or other officers of

³⁰⁰ Section 216 of the Companies Act.

³⁰¹ See section 77(9) of the Companies Act 71 of 2008. The excuse is granted if the director took reasonably diligent steps to become informed about the matter, has no material financial interest in the matter or had properly disclosed such interest, and made a decision rationally in the belief that it was in the best interests of the company. (Havenga M “The Business Judgment Rule – Should We Follow The Australian Example?” (2000) 12 *South African Mercantile Law Journal* 25).

³⁰² Section 77(9) of the Companies Act. The main aim of the provisions is to protect directors who, in carrying on the business of the company, acted honestly and reasonably with the aim of furthering the company's interests.

³⁰³ Davis D *et al Companies and Other Business Structures in South Africa* (2009) 108-109. Apart from exempting directors from liability, it is argued that the business judgment rule serves to motivate capable persons to undertake the directorship positions and encourages the directors to engage safely in risk taking activities.

³⁰⁴ Sections 185-188 of the Companies Act.

³⁰⁵ Section 187(2) of the Companies Act.

the company without fear of liability for such disclosure.³⁰⁶ All these provisions in the Companies Act are aimed at ensuring that directors of all companies, including public entities, perform their duties and exercise their powers effectively and within the confines of the relevant legal and regulatory provisions.

The Public Finance Management Act (PFMA) is another Act that South Africa has relied on to enhance board effectiveness and accountability as well as to regulate corporate governance practices in public entities. Sections 50 and 51 of the Act clearly outline the fiduciary duties and general responsibilities of the board as an accounting authority such that the board should have no excuse for failing to effectively discharge its duties as expected of it. To enforce compliance, the Act imposes criminal liability on accounting officers and authorities who willfully or grossly negligently fail to comply with certain provisions of the Act or properly perform their duties.³⁰⁷ Also, the PFMA provides for the disciplining of accounting officers and authorities where they would have committed acts of financial misconduct.³⁰⁸ A person found guilty of an act of financial misconduct is individually and severally liable for the financial misconduct of the accounting authority and may be dismissed or suspended.³⁰⁹

The PFMA further provides for appointment of auditors and audit committees to conduct independent checks on compliance by public entities with the legal and regulatory systems.³¹⁰ Lastly, the PFMA has provided for the setting up of a National Treasury which plays a supervisory function in the management of public entities through promoting accountability, transparency and effective risk management.³¹¹ The National Treasury is mandated to assist departments, public entities and constitutional institutions in building their capacity for

³⁰⁶ Section 159 of the Companies Act. A whistleblower, who makes a disclosure contemplated in terms of section 159 has qualified privilege in respect of the disclosure and is immune from any civil, criminal or administrative liability for that disclosure. See also section 2 of the Protected Disclosure Act (No. 26 of 2000).

³⁰⁷ Section 86 of the PFMA.

³⁰⁸ Sections 81-85 of the PFMA. An act of financial arises when an accounting authority wilfully or negligently fails to comply with a requirement of sections 50-55 or makes or permits an unauthorised expenditure, an irregular expenditure or a wasteful expenditure (Section 81 of the South African PFMA).

³⁰⁹ Section 83 of the South African PFMA.

³¹⁰ See section 77 of the PFMA.

³¹¹ The National Treasury was established in terms of section 5 of the South African PFMA. Its mandate is to encourage good corporate governance in the public entities by promoting corporate governance standards (sections 5 and 6 of the South African PFMA). See also Nevondwe L, Odeku KO and Tshoose CI "Promoting the Application of Corporate Governance in the South African Public Sector" (2014) 261-275.

efficient, effective and transparent financial management and to examine their systems of financial management and internal control.³¹²

Further to the PFMA, the Acts that established public entities provide for disciplinary action against board members who fail to comply with the terms and conditions of their appointment. In South Africa, the Acts provide for dismissal of board members on charges of misconduct, failing to substantially comply with an order issued by the Minister in terms of the Act or failure to perform their functions diligently and effectively, among other issues.³¹³ For example, the responsible Minister is expected to, in writing, immediately dismiss any board member of his duties if that member has failed to vacate his office in terms of section 7(4),³¹⁴ failed to attend two consecutive meetings of the board without leave of the board or failed to uphold and advance the objects of the board.³¹⁵

To further enforce compliance, South Africa has established regulatory bodies tasked to ensure that companies and their directors comply with corporate governance requirements as well as other laws and regulations. The first body to be actively involved in the promotion of corporate governance in South Africa was the Institute of Directors (IoDSA). Although it has no legal powers to enforce compliance, the Institute of Directors has played an integral role in providing technical training to directors and in the development of corporate governance codes and dissemination of information on corporate governance trends around the world.³¹⁶ Secondly, the JSE, through its *Listing Requirements*, has also played a significant role in ensuring that all companies listed with the Stock Exchange are obliged to comply with

³¹² Section 6 of the PFMA.

³¹³ Section 9 of the South African Civil Aviation authority Act and section 14 of the South African National Roads Agency Limited Act.

³¹⁴ Section 7(4) of the South African Construction Industry Development Board Act requires a member to immediately vacate office if he is convicted, whether in South Africa or elsewhere, of theft, fraud, forgery or uttering a forged document, perjury or any offence involving dishonesty or of any offence in terms of the Corruption Act 94 of 1992, the Companies Act or of contravening the PFMA. He also has to vacate office if he becomes a political office bearer or an insolvent whose insolvency was caused by his negligence or incompetence, has been removed from an office of trust on account of misconduct or if he discloses or improperly acts on information gained as a result of his board membership without authorisation. See also section 9 of the South African Civil Aviation authority Act and section 14 of the South African National Roads Agency Limited Act.

³¹⁵ Section 7(5) of the South African Construction Industry Development Board Act.

³¹⁶ Koma SB “Conceptualisation and Contextualisation of Corporate Governance in the South African Public Sector: Issues, Trends and Prospects” (2009) 451-459 and Oman CP *Corporate Governance in Development: The Experiences of Brazil, Chile, India, and South Africa* (2003) 163.

relevant corporate governance principles as enshrined in the *King III Report* and to justify areas of non-compliance.³¹⁷ Failure to adhere to the *JSE Listings Requirements* is an offence which attracts stiff penalties and may result in suspension or termination of a listing and personal liability of directors.³¹⁸

South Africa has also set up supervisory and regulatory bodies to assist in the enforcement of good corporate governance practices. Examples of the regulatory, supervisory and advisory bodies include the Department of Public Enterprises,³¹⁹ Companies and Intellectual Property Commission,³²⁰ the Accounting Standards Board (ASB),³²¹ the Auditor-General of South Africa (AGSA),³²² Public Protector³²³ and Anti-Corruption Commission.³²⁴ Recently, the

³¹⁷ Despite the non-binding nature of the *King Reports*, the JSE requires, as a condition of listing, that companies and directors observe certain corporate governance principles as enshrined in the *King Report* which positively impacts on the way directors conduct company business, thus promoting good corporate governance (section 7 (para 7.F.5 and 7.F.6) of the *JSE Listing Requirements*).

³¹⁸ Section 1.20 of the *JSE Listings Requirements*.

³¹⁹ The Department of Public Enterprises (DPE) is the shareholder representative of the South African Government with oversight responsibility for State Owned Companies (SOC) in key sectors, including: Defence, Energy, Forestry, ICT, Mining and Transport. Visit <http://www.dpe.gov.za/> for more information.

³²⁰ The Companies and Intellectual Property Commission was established in terms of section 185 of the Companies Act. Its overall functions are to monitor and enforce proper compliance with the Companies Act and any other applicable legislation and refer alleged offences in terms of the Acts to the National Prosecuting Authority (section 187 of the Companies Act).

³²¹ The Accounting Standards Board (ASB) was established in terms of section 87 of the PFMA. It is responsible for approving South African accounting standards; it sets standards and guidelines for financial statements as mandated by the Constitution and makes recommendations to the Minister of Finance. For more information about the ASB, visit www.asb.co.za/.

³²² The Auditor-General of South Africa (AGSA) was established in terms of section 181 of the Constitution of South Africa. The AGSA annually produces audit reports on all government departments, public entities, municipalities and public institutions. The AGSA's findings are publicised once the audit reports have been tabled in parliament. This "public disclosure of audit findings serves as another deterrent to committing economic crime" (Fakie S *The Role of the Office of the Auditor-General in South Africa* (Paper presented at the 9th International Anti-Corruption Conference, Durban, South Africa in October 1999) 4 available at http://9iacc.org/papers/day4/ws2/dnld/d4ws2_sfakie.pdf (accessed on 7 July 2014)).

³²³ The Public Protector was established in terms of section 181(a) of the Constitution. It empowered to investigate any conduct in state affairs or in the public administration in any sphere of government that is alleged or suspected to be improper or to result in any impropriety or prejudice. The Public Protector protects the public "against matters such as maladministration in connection with the affairs of government, improper conduct by a person performing a public function, improper acts with respect to public money, improper or unlawful enrichment of a person performing a public function..." ("Preamble to the Public Protector Act 23 of 1994 as amended by Act 22 of 2003). See also Ntlama N "The Brewing Tug-of-War between South Africa's Chapter 9 Institutions: The Public Protector vs the Independent Electoral Commission" (2015) 10(1) *Journal of International Commercial Law and Technology* 13-21.

³²⁴ The Commission was established in terms of section 181 of the Constitution. The Anti-Corruption Commission is mandated to enforce the Prevention and Combating of Corrupt Activities Act 12 of 2004. Its main mandate is to, without fear, favour or prejudice, coordinate the investigation, prevention, education and fighting of corruption in South Africa (section 2 of the Anti-Corruption Act).

South African President set up a Presidential State-owned Enterprises Review Committee.³²⁵ The Committee's main purpose is to strengthen the role of public entities to ensure that they respond to a clearly defined public mandate and support the "developmental State" aspirations of government.³²⁶ The Committee was mandated to, *inter alia*, propose appropriate strategic and legislative frameworks or policies that will enable collaboration between government ministries and public entities as well as enhance strategic management and operational effectiveness with due regard to the developmental state context.³²⁷ It was also tasked to come up with sustainable business and governance models that create a balance between commercial, developmental and shareholder objectives and review the public entity's contribution to human capital development.³²⁸

Parent ministries in South Africa have also been tasked with most of the oversight responsibilities of monitoring the operations of and promoting good corporate governance in public entities.³²⁹ In addition to parent ministries, the Department of Public Enterprises³³⁰ was established to develop policies and processes for the governance of public entities and directly supervise eight major enterprises.³³¹ Moreover, the country has a Department of Trade and Industry (DTI) which is responsible for the supervision of compliance by organisations with company law, commercial policy and industrial policy as well as promotion of economic development, promotion and regulation of international trade and

³²⁵ *National Development Plan and the Medium-Term Strategic Framework for 2009-2014 of the Ruling (ANC) Party* available at <http://www.southafrica.info/business/economy/policies/ndp-140613.htm> (accessed on 17 December 2014).

³²⁶ Gumede W *South African State-Owned Enterprises: Boards, Executives and Recruitment* (Graduate School of Public and Development Management Research Paper of June 2012) 4 available at http://www.thepresidency.gov.za/electronicreport/downloads/volume_3/governance_and_ownership/ (accessed on 17 December 2014).

³²⁷ *Ibid.* See also *Report on State-Owned Enterprises: Briefing by Presidential Review Committee* of 9 October 2013 available at <http://www.pmg.org.za/report/20131009-report-> (accessed on 12 December 2014).

³²⁸ *Ibid.*

³²⁹ Para 4 of the *Protocol* and paras 2.2, 2.3 and 6.1 of the *CGF*. In Zimbabwe, the Ministry of State Enterprises and Parastatals was responsible, in conjunction with parent ministries, for supervising all public entities before it was dissolved in 2013 when a new government came into place.

³³⁰ The Department of Public Enterprises (DPE) is the shareholder representative for government with oversight responsibility for eight major state owned enterprises namely, Alexkor, Eskom, Denel, Safcol, Broadband Infraco, South African Airways, Pebble Bed Modular Reactor and Transnet. The Department is responsible for ensuring that public entities perform to their best capabilities, "overseeing the implementation of skills development; board appointment processes; board induction and determining board remuneration" (Bulbuena SS *State-owned Enterprises in Southern Africa: A Stocktaking of Reforms and Challenges* (2014) 41). Also visit <http://www.dpe.gov.za/> for more information.

³³¹ Bulbuena SS *State-owned Enterprises in Southern Africa: A Stocktaking of Reforms and Challenges* (2014) 41. See also Robinett D *The Challenge of SOE Corporate Governance for Emerging Markets* (2006) 41.

consumer protection.³³² The DTI has developed a corporate governance model informed by requirements of the *King Reports* that is specific to public entities.³³³

To strengthen the effectiveness of all the above enforcement measures, South African authorities considered it essential that the country's judicial system should be strong and reliable. The judicial authority in South Africa is "vested in the courts, which are independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice".³³⁴ The Constitution provides for a number of courts namely; the Constitutional Court, Supreme Court, High Courts,³³⁵ magistrates' courts and any other court established or recognised in terms of an Act of Parliament.³³⁶ Other courts include; the Income Tax Court, Labour Court and the Labour Appeal Court, the Land Claims Court, the Competition Appeal Court, the Electoral Court, divorce courts, "military courts" and equality courts.³³⁷

³³² NEPAD African Peer Review Mechanism: Country Review Report of South Africa, September 2007 (NEPAD Country Review Report 2007) available at <http://www.aprm.org.za/docs/SACountryReviewReport5> (accessed on 18 July 2014). Also visit <http://www.thedti.gov.za/> for more information.

³³³ Koma SB "Conceptualisation and Contextualisation of Corporate Governance in the South African Public Sector: Issues, Trends and Prospects" (2009) 451-459. The DTI has also set up two significant governance structures, namely, the Executive Board (ExBo) and an Operations Committee (OPSCOM). The EXBO and OPSCOM are governed by clearly laid down terms of reference that are regularly reviewed "through assistance of external expertise aimed at drawing best practices related to corporate governance". The purpose of ExBo is to, in consultation with the Minister, provide direction towards the achievement of departmental strategic objectives. The ExBo annually conducts a strategic risk assessment to identify risks that could impede the department from achieving set targets and considers and approves policy recommendations of strategic importance. The OPSCOM was established as a consequence of the need to separate strategic policy and operational decision-making in the Department with the operational decision-making mandated to it (*Department of Trade and Industry Annual Report 2011/2012* 79-80 available at www.gov.za/sites/www.gov.za/files/AR2012sml_Part1b.pdf (accessed on 19 January 2015)).

³³⁴ Van der Merwe CG and Du Plessis JE *Introduction to the Law of South Africa* (The Hague: Kluwer Law International 2004) 19. See also Lewis C "A Mixed Legal System with a Constitution on Top: South African Law in the Era of Democracy" (2005) 57 *Journal of the Society for Advanced Legal Studies* 12-14 available at <http://sassoc.sas.ac.uk/148/1/LewisCaroleIssue057.pdf> (accessed on 27 April 2015) and Office of the Chief Justice *The South African Judiciary* available at www.judiciary.org.za/judicial-authority.html (accessed on 27 April 2015).

³³⁵ Decisions of the Constitutional Court, the Supreme Court of Appeal and the High courts are an important source of law. These courts uphold and enforce the Constitution, which has an extensive Bill of Rights binding all state organs and all people.

³³⁶ Section 166 of the Constitution and Van der Merwe CG and Du Plessis JE *Introduction to the Law of South Africa* (2004) 21-27. South African law employs the law of precedent or *stare decisis*, in that, lower courts are bound by the decisions of higher courts unless the decision was subject to a material error (Kotzé LJ and du Plessis A "Some Brief Observations on Fifteen Years of Environmental Rights Jurisprudence in South Africa" (2010) 3(1) *Journal of Court Innovation* 157-176). See also *South Africa Justice Sector and the Rule of Law* (A Review by AfriMAP and Open Society Foundation for South Africa 2005) 15-17 available at http://www.opensocietyfoundations.org/sites/default/files/afri-map-report_20060223.pdf (accessed on 27 April 2015).

³³⁷ *Ibid.*

Zimbabwe and South Africa have adopted similar frameworks with regard to promoting voluntary corporate governance compliance and enforcing compliance where necessary. The colonial and legal history of Zimbabwe, “although unique and independent, is interconnected and interrelated to the history of South Africa's legal developments and colonial developments”.³³⁸ As a result, the two countries’ legal judicial systems share many similarities.³³⁹ However, as seen above, South Africa has done more in terms of updating its legislation in line with local and international developments (e.g. overhauling the Companies Act). The new South African Companies Act has partially codified the directors’ duties, created a Companies and Intellectual Property Commission and provided for a register of disqualified directors which Zimbabwe has not done. South Africa has also established more supervisory and regulatory authorities to enforce compliance than Zimbabwe.

An assessment of the effectiveness of the guidelines, statutory and regulatory mechanisms put in place by the two countries in enhancing the enforcement of good corporate governance practices is done in chapter 7 below.³⁴⁰

5.3 PRELIMINARY CONCLUSIONS

Zimbabwe and South Africa have adopted comparable frameworks to promote good corporate governance practices in their respective countries and align their business practices with regional and international corporate governance standards.³⁴¹ The Institute of Directors has played a fundamental role in promoting good corporate governance in both jurisdictions.³⁴² The two countries have imitated United Kingdom’s corporate governance system that comprises of legal and regulatory sources and a system of non-binding codes of best practice. Both South Africa and Zimbabwe’s legal and regulatory frameworks comprise

³³⁸ Saki O and Chiware T *The Law in Zimbabwe* (2007) 2.

³³⁹ See Chapter 4, para 4.2.7 as regards the Zimbabwe’s judicial system.

³⁴⁰ See Chapter 7, para 7.2.7 below.

³⁴¹ See Chapter 4, para 4.2.1 above, for a detailed discussion of Zimbabwe’s corporate governance framework.

³⁴² Institutes of Directors seem to be common institutions globally, for example, the Australian Institute of Directors, Malawi Institute of Directors and UK Institute of Directors.

of, *inter alia*, the Constitution, Companies Act,³⁴³ Public Finance Management Act, Acts that constituted the public entities, sector legislation and policies, common law and case law.³⁴⁴

With regard to corporate governance codes, both countries have adopted the “apply or explain” approach.³⁴⁵ However, whilst South Africa adopted a national corporate governance code (*King Report*) as early as 1994, Zimbabwe only adopted its own *National Code* in 2015.³⁴⁶ In the same spirit as South Africa’s *Protocol*, Zimbabwe developed the *Corporate Governance Framework for State Enterprises and Public Entities* with the objective of promoting the efficient use of public resources and fostering a culture of accountability, observance and adherence to regional and international best practice in public entities.³⁴⁷

Internationally recognised corporate governance codes like the OECD *Principles of Corporate Governance*³⁴⁸ and CAGG *Guidelines* have influenced corporate governance developments in both jurisdictions.³⁴⁹ In addition, both countries subscribe to a number of corporate governance initiatives specifically targeted towards improving African countries’ corporate governance standards, for example, as New Partnership for Africa’s Development

³⁴³ Whilst South Africa reviewed and updated its Companies Act in 2008, Zimbabwe is still relying on the old and archaic Act which was promulgated in 1951 although amendments have been done to specific areas on a need basis (Saki O and Chiware T *The Law in Zimbabwe* (2007) 5-9).

³⁴⁴ A comparison of South African and Zimbabwean statutes indicates that the two countries borrow heavily from each other and from the United Kingdom’s legal system, with several provisions in the two jurisdictions’ statutes being similar to one another, in some cases word for word. An example is the section which deals with the removal of directors in the Companies Act of both countries (section 71 of the South African Companies Act and section 175 of the Zimbabwean Companies Act). See also the similarity of the provisions of the PFMA pertaining to public entities in both countries (sections 46-55 of the South African PFMA and sections 39-51 of the Zimbabwean PFMA). Furthermore, the two countries have greatly relied on each other’s case law (Dzvimbo RS *Should the Zimbabwean Companies Act Move Away From Judicial Management and Adopt Business Rescue?* (2013) 5-6 and Saki O and Chiware T *The Law in Zimbabwe* (2007) 5).

³⁴⁵ “Introduction and Background” to the *King III Report*, “Introduction” to the *Manual* and “Introduction and Background” to the *National Code*. However, the *King I* and *King II Reports*, unlike the *King III Report*, had adopted the “comply or explain” approach (see para 5.2.1.5 above).

³⁴⁶ The *Manual* (which was introduced in 2001) has, nonetheless, greatly served as a guiding framework to promote good corporate governance in Zimbabwe.

³⁴⁷ The objectives of the *Protocol* and *CGF* are to provide guidelines specific to public entities given their uniqueness and strategic national importance (para 1 of the *Protocol* and para 1 of the *CGF*).

³⁴⁸ Zimbabwe and South Africa are members of the ‘OECD Network on Corporate Governance of State-Owned Enterprises in Southern Africa’ which was launched in 2007. The Network’s main objective is to support regional and national reformers in their efforts to improve the performance of public entities in Southern Africa. The Network provides a “forum for regional dialogue and co-operation” aimed at improving the governance of public entities (OECD *Governance of State-Owned Enterprises in Southern Africa* (OECD Publishing 2013) 2 available at <http://www.oecd.org/daf/ca/SOESouthernAfrica2013.pdf> (accessed on 15 January 2015)).

³⁴⁹ Ncube B *Corporate Governance? Future Perspective in Light of the 2008/09 Global Economic Meltdown* (2010) 8-9. See also the “Introduction and Background” to the *King Report* and “Introduction” to the *Manual*.

(NEPAD), African Peer Review Mechanism (APRM), Africa Governance Forum (AGF) and African Corporate Governance Network. Stock Exchanges (ZSE and JSE) have also greatly contributed to the good corporate governance drive by publishing and monitoring the implementation of listings. The *Listing Requirements* have considerably contributed to the improvement of corporate governance practices of listed companies in both jurisdictions.³⁵⁰

Overall, the two countries acknowledge that, for boards of public entities to be effective, there is need for clarity and director education on the role of the board, the board selection process should be transparent and based on merit, the board should be properly composed in terms of expertise, independence and diversity, the board remuneration should be fair and performance related and the performance of the board should be evaluated regularly.³⁵¹ The countries have also put in place enforcement mechanisms ranging from punishment (fines or imprisonment) of individual directors, disqualification of directors and removal of individual directors or the whole board for misconduct or poor performance in terms of relevant legislation.³⁵²

Companies that default in complying with the *Listing Requirements* may be suspended or delisted in terms of the Stock Exchange *Listing Requirements*. Both countries have put in place a number of regulatory and supervisory bodies to enforce compliance with good corporate governance principles.³⁵³ Examples of such bodies are the Auditor-General and Anti-Corruption Commission. Zimbabwe and South Africa also share similar judicial systems mostly because of the similar colonial backgrounds.³⁵⁴ The judicial authority is vested in several courts, which are independent and subject only to the Constitution and the law.

³⁵⁰ The ZSE and JSE *Listing Requirements* require, as a condition of listing, that companies and directors observe certain corporate governance principles as enshrined in the corporate governance codes and provide for penalties for failure to observe the *Listings Requirements* (section 1.1-1.9 of the ZSE *Listing Requirements* and section 1.20 of the JSE *Listings Requirements*).

³⁵¹ See Chapter 4, paras 4.2.2-4.2.6 and Chapter 5, paras 5.2.2-5.2.6 above. The measures put in place by both countries to achieve these objectives are in compliance with internationally accepted corporate governance standards such as the OECD *Principles of Corporate Governance*, CAGG *Guidelines* and ICGN *Principles*. This is because the frameworks that Zimbabwe and South Africa instituted significantly borrow from these global instruments.

³⁵² Chapter 5, para 5.2.7 above.

³⁵³ Chapter 4, para 4.2.7 and Chapter 5, para 5.2.7 above.

³⁵⁴ See Chapter 4, para 4.2.1 and Chapter 5, para 5.2 above.

The next chapter considers the corporate governance framework of Australia, an example of a developed country that has influenced developments in South Africa and Zimbabwe.

CHAPTER 6

COMPARATIVE ANALYSIS OF THE ZIMBABWEAN AND AUSTRALIAN CORPORATE GOVERNANCE FRAMEWORKS

6.1 INTRODUCTION

With globalisation, innovation and flexibility have become as important for organisations in developing and emerging economies as they have been for organisations in developed countries.³⁵⁵ Innovation and flexibility enable timely responses to accelerated changes in the competitive environment leading to the success of long term development and corporate governance efforts.³⁵⁶ As a result, a number of lessons can be derived by developing and emerging economies in the way business has been conducted and corporate governance has been practiced in developed economies.³⁵⁷ However, it has been noted that, although helpful, the corporate governance standards used in developed countries may not be directly applicable in developing countries because of economic, political, cultural and technological differences.³⁵⁸ There is therefore, need for developing countries to develop their own corporate governance models that match their level of development and cultural backgrounds.³⁵⁹

In this chapter, a comparative analysis between Zimbabwe and Australia's corporate governance frameworks for public entities is conducted to establish the extent to which

³⁵⁵ Oman C *The Policy Challenges of Globalisation and Regionalisation* (OECD Centre Policy Brief No. 11 of 1996) 4-5 available at <http://www.oecd-ilibrary.org/development/the-policy-challenges-of-globalisation-and-regionalisation> (accessed on 3 March 2014).

³⁵⁶ Oman C, Fries S and Buitter W *Corporate Governance in Developing, Transition and Emerging-Market Economies* (OECD Development Centre Policy Brief No. 23 of 2003) available at <http://www.oecd.org/social/poverty/28658158.pdf> (accessed on 12 March 2014)).

³⁵⁷ Ibid. See also Ho LK *Reforming Corporate Governance in Southeast Asia: Economics, Politics and Regulations* (ISEAS Publications 2005) 38.

³⁵⁸ Mulili BM and Wong P "Corporate Governance Practices in Developing Countries: The Case for Kenya" (2011) 2(1) *International Journal of Business Administration* 14-27.

³⁵⁹ Ibid.

Zimbabwe has tried to harmonise its systems with developed countries and the areas of improvement that need to be given attention, if any.³⁶⁰

6.2 COMPARISON BETWEEN THE ZIMBABWEAN AND AUSTRALIAN CORPORATE GOVERNANCE FRAMEWORKS

6.2.1 Overview of Australian Corporate Governance Framework

The collapse of big companies in Australia,³⁶¹ perceived deficiencies in the legal duties of directors in the corporate regulatory framework and the need to keep pace with international corporate governance developments provided the impulsion for continuous corporate law reform, examination of the importance of directors' duties and ethics and an increased demand for accountability and reliability in the management of both private and public companies.³⁶² In response to these challenges and developments, the government developed a number of corporate governance instruments which include statutes and regulations (mandatory legislation), common law and 'if not, why not' guidelines (self-regulation)³⁶³ issued by organisations like the Australian Securities Exchange Corporate Governance Council's (ASX CGC)³⁶⁴ and Investment and Financial Services Association (IFSA),³⁶⁵ as well as policy documents and advisory guidelines.³⁶⁶

³⁶⁰ Like in the previous chapters, the main focus is on five aspects considered essential for board effectiveness (Chapter 1, para 1.5). In this chapter particular focus and greater details are provided on corporate governance developments in Australia given the fact that developments in Zimbabwe have been extensively discussed in Chapter 4 above.

³⁶¹ The first major collapse was that of Rothwells Ltd in 1987, followed by a number of other corporate failures like One-Tel Ltd., Harris Scarfe and Ansett Airlines. More recent considerations of corporate governance occurred in the Report of the HIH Royal Commission, following the collapse of one of the country's largest insurers, HIH Insurance Ltd. and the dramatic collapse of Opes Prime in 2008 (Meredith E *et al Public Sector Governance in Australia* (The Australian National University 2012) 43-46).

³⁶² Meredith E *et al Public Sector Governance in Australia* (2012) 43-46 and Psaros J *Australian Corporate Governance: A Review and Analysis of Key Issues* (Pearson Higher Education 2008) 45-46.

³⁶³ In contrast to the prescriptive rule-based approach to corporate governance that characterised the post-Enron approach in the United States of America, as enshrined initially in the Sarbanes-Oxley Act, Australia subscribes to a more flexible principle-based approach to corporate governance regulation (Horrigan B "Directors' Duties and Liabilities – Where Are We Now and Where Are We Going in the UK, Broader Commonwealth, and Internationally?" (2012) 3(2) *International Journal of Business and Social Science* 21-45).

³⁶⁴ The ASX CGC, which is composed of a mixture of 21 business, investment and shareholder groups, was established in 2002 to develop and deliver an industry wide supported framework for corporate governance that would provide a practical guide for listed companies, their investors and the wider Australian community. It has been considered as the principal contributor to corporate governance policies and practices in Australia (ASX CGC *Corporate Governance Principles and Recommendations* (Australian Securities Exchange Corporate Governance Council 2014) 2).

The legal³⁶⁷ and regulatory corporate governance framework for Australian companies comprise of the Australian Securities and Investments Commission (ASIC) Act 90 of 1989, the Corporations Act 50 of 2001, Commonwealth Authorities and Companies Act 153 of 1997, the Financial Management and Accountability Act 154 of 1997 (FMA Act), Public Governance, Performance and Accountability Act 123 of 2013, Acts enabling the establishment of the public entity (e.g. the Defence Housing Australia Act 101 of 1987 and the Australian Postal Corporation Act 64 of 1989), the Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 103 of 2004 and the Australian Stock Exchange *Listing Rules*.³⁶⁸

The voluntary codes include the *Bosch Report* titled ‘Corporate Practices and Conduct’ (hereinafter referred to as the *Bosch Report*), the *Hilmer Report*, the *Review of the Corporate Governance of Statutory Authorities and Office Holders, Report to Commonwealth of Australia* (hereinafter referred to as the *Uhrig Review*), Commonwealth Government Business Enterprise (GBE) *Governance and Oversight Guidelines* (hereinafter referred to as *GBE Guidelines*), *Governance Arrangements for Australian Government Bodies* and Australian Securities Exchange Corporate Governance Council’s (ASX CGC) *Principles of Good Corporate Governance and Best Practice Recommendations*.³⁶⁹

³⁶⁵ The IFSA first published its own corporate governance guidelines in 1995 referred to as “A Guide to Investment Managers and a Statement of Recommended Governance Practice” (commonly known as the Blue Book) (Du Plessis JJ, Hargovan A and Bagaric M *Principles of Contemporary Corporate Governance* (2010) 165-171). The IFSA Guide is available at <http://www.ifsa.com.au/>.

³⁶⁶ Psaros J *Australian Corporate Governance: A Review and Analysis of Key Issues* (2008) 43-44. Examples of organisations that produce advisory guidelines are the Australian Council of Super Investors (ACSI), Australian Institute of Company Directors (AICD), Australian Prudential Regulation Authority (APRA), Australian Shareholders’ Association (ASA) and Australian Securities and Investments Commission (ASIC). See also Armstrong A and Francis R “Loss of Integrity: the True Failure of the Corporate Sector” (2008) 3(3) *Journal of Business Systems, Governance and Ethics* 1-13.

³⁶⁷ Like Zimbabwe, Australia’s legal system is based on the English common law system developed in the United Kingdom (Akpet KO “The Australian Legal System: The Legal Profession and the Judiciary” (2011) 1 *Ankara Bar Review* 71-94 available at <http://www.ankarabaru.org.tr/siteiler/AnkaraBarReview/tekmakale/2011-1/6.pdf> (accessed on 12 May 2015). Within this legal system the sources of law are statutes and delegated legislation, common law, judge-made and international law (Jakhu RS *National Regulation of Space Activities* (Springer Science & Business Media 2010) 36)). See also Gillies P *Business Law* (Federation Press 2004) 1.

³⁶⁸ These statutes are discussed below (paras 6.2.1.1-6.2.1.7).

³⁶⁹ Some of these initiatives that have been considered essential for this research are discussed below (paras 6.2.1.8-6.2.1.13).

6.2.1.1 Australian Securities and Investments Commission (ASIC) Act

The main objectives of the ASIC Act are to provide for the establishment of ASIC,³⁷⁰ its functions, powers and business, among other issues.³⁷¹ The Act sets out the role of ASIC as to, *inter alia*, monitor and promote market integrity and consumer protection in relation to the Australian financial system and to be an overseer of corporate governance in Australia.³⁷²

6.2.1.2 Corporations Act

The Corporations Act is the principal legislation regulating private and public companies and some partnerships and managed investment schemes. The Act includes the framework surrounding the formation of companies, duties and liabilities of directors and shareholders' rights and remedies.³⁷³ It also makes financial reporting provisions which are aimed at ensuring that financial aspects of a company's governance practices are characterised by transparency and accountability.³⁷⁴ The majority of its provisions are obligatory with penalties imposed for non-compliance.³⁷⁵ However, the non-prescriptive provisions allow for company flexibility in terms of internal arrangements and management.³⁷⁶ Some provisions are optional for proprietary companies, but obligatory for public companies.³⁷⁷

³⁷⁰ The ASIC is an independent body established in order to facilitate corporate governance and to enforce the laws (primarily the Corporations Act and the Australian Securities and Investment Commission Act) relating to securities of publicly listed companies. This Act was repealed by Act No. 55 of 2001.

³⁷¹ Section 1 of the ASIC Act.

³⁷² Section 12 of ASIC Act. After the promulgation of the Act, a number of reports on corporate governance were prepared, for example, the *Bosch Report*, the *Hilmer Report* and the *Review of the Corporate Governance of Statutory Authorities and Office Holders, Report to Commonwealth of Australia (Uhrig Review)*.

³⁷³ See Chapters 2A-2D of the Corporations Act.

³⁷⁴ Chapter 2M of the Corporations Act. See also Du Plessis JJ, Hargovan A and Bagaric M *Principles of Contemporary Corporate Governance* (2010) 162-163.

³⁷⁵ *Ibid.* See also Sheehan K "The Regulatory Framework for Executive Remuneration in Australia" (2009) 31 *Sydney Law Review* 273-308 available at https://sydney.edu.au/law/slr/slr31/slr31_2/sheehan.pdf (accessed on 12 October 2015).

³⁷⁶ Sections 135(2) and 249X Corporations Act. See also du Plessis JJ, Hargovan A and Bagaric M *Principles of Contemporary Corporate Governance* (2010) 162-163.

³⁷⁷ See, for example, section 249X of the Corporations Act.

6.2.1.3 Commonwealth Authorities and Companies Act

The Commonwealth Authorities and Companies Act (hereinafter referred to as CAC Act) applied to Commonwealth authorities and Commonwealth companies as defined in section 7 and section 34 of the Act.³⁷⁸ This Act was one of the pieces of legislation that provided for a framework where observance of the law was the underlying principle applying to public sector governance.³⁷⁹ In particular, it detailed rules about reporting and accountability that apply in addition to the requirements of the Corporations Act.³⁸⁰

6.2.1.4 Financial Management and Accountability Act

The Financial Management and Accountability (FMA) Act provided the framework for the proper management of public money and public property by the Executive arm of the Commonwealth.³⁸¹ The Act sets out “the financial management, accountability, reporting and audit obligations of agencies that are financially part of the Commonwealth, in particular: for managing public resources efficiently, effectively and ethically”.³⁸² However, the FMA has since been repealed on 30 June 2014 and replaced by the Public Governance, Performance and Accountability Act which became effective on 1 July 2014.³⁸³

³⁷⁸ The CAC Act was repealed on 30 June 2014 and replaced by the Public Governance, Performance and Accountability Act from 1 July 2014. As a result, no much reference is made to it in this study.

³⁷⁹ Meredith E *et al* *Public Sector Governance in Australia* (2012) 41-45.

³⁸⁰ *Ibid.*

³⁸¹ Bowrey G *The Sustainability Of Public Sector Ecological Sustainable Development Reporting* (Research Paper presented at AFAANZ/IAAER Conference, Sydney, 6-8 July 2008) 2-3 available at <http://ro.uow.edu.au/commpapers/494> (accessed on 15 October 2015). Public money and public property is defined in the Act as money and property in the custody or control of the Commonwealth (See Part 2 of the FMA Act).

³⁸² Bowrey G *The Sustainability Of Public Sector Ecological Sustainable Development Reporting* (2008) 2-3.

³⁸³ Hamilton P *Amendments to the Public Governance, Performance and Accountability Act 2013* (Publication by the Australian Parliamentary Library of June 2014) available at http://www.aph.gov.au/.../Parliamentary_Library/Flagpost/2014 (accessed on 2 February 2015). No much reference is therefore be made to this Act in this study.

6.2.1.5 Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act

The Act 103 Of 2004 was enacted in July 2004 and is commonly known as Corporate Law Economic Reform Program (CLERP 9) and it significantly modified the Corporations Act 2001 which governs corporate law in Australia.³⁸⁴ The modifications were mostly based on the reform proposals contained in the CLERP 9 discussion paper and the Report of the HIH Insurance Royal Commission. The CLERP consisted of chronological reforms (CLERP 1–9) which began in 1997 in response to the Wallis Report on the Australian Financial System³⁸⁵ and were designed to systematically improve Australia’s corporate law and enforcement.³⁸⁶ The program mostly focused on principles of market freedom, investor protection and quality disclosure of relevant information to the market.³⁸⁷ One outstanding feature of the CLERP is that it made obligatory some of the corporate governance requirements that were previously non-mandatory with the aim of adding legal influence to some corporate governance practice in Australia.³⁸⁸

6.2.1.6 Public Governance, Performance and Accountability Act

The main objective of the Public Governance, Performance and Accountability Act (hereinafter referred to as PGPA Act) is to promote good corporate governance across public entities by creating a system of “high standards of governance, performance and accountability” that ensures that public resources are properly managed.³⁸⁹ The PGPA Act replaced the Financial Management and Accountability Act 1997 and the Commonwealth

³⁸⁴ Du Plessis JJ, Hargovan A and Bagaric M *Principles of Contemporary Corporate Governance* (2010) 170-171.

³⁸⁵ The *Wallis Report on the Australian Financial System* was produced in 1997 under the leadership of Hanratty Phil (Economics, Commerce and Industrial Relations Group). The *Report* proposed a number of fundamental changes to the financial regulatory arrangements in order to increase the efficiency and effectiveness of the system and build upon the existing achievements of financial deregulation (Hanratty P *The Wallis Report on the Australian Financial System: Summary and Critique* (Department of the Parliamentary Library, Parliamentary Research Service Research Paper 16 1996-97). The Report is accessible at austlii.edu.au/~alan/wallis-report.html (accessed on 17 June 2015).

³⁸⁶ Ibid. See also Department of Parliamentary Services *Australia’s Corporate Regulators — the ACCC, ASIC and APRA* (Research Brief No. 6 of 2005 (Commonwealth of Australia 2005) 14-17 <http://www.aph.gov.au/binaries/library/pubs/rb/2004-05/05rb16.pdf> (accessed on 17 June 2015).

³⁸⁷ Thomson D and Jain A “Corporate Governance Failure and Its Impact on National Australia Bank’s Performance” (2006) 2(1) *Journal of Business Case Studies* 41-56.

³⁸⁸ Ibid.

³⁸⁹ Section 5 of the PGPA Act.

Authorities and Companies Act 1997 (CAC Act) on 1 July 2014, consolidating the governance, performance and accountability requirements of the Commonwealth into a single piece of legislation.³⁹⁰ The Act applies to all Commonwealth entities and Commonwealth companies.³⁹¹

6.2.1.7 Acts Establishing Public Entities

A significant number of public entities in Australia are constituted in terms of a statutory instrument, for example, the Defence Housing Australia³⁹² and the Australian Postal Corporation.³⁹³ The Acts that established public entities detail the entities' mandate and provide for how they should be governed.³⁹⁴

6.2.1.8 Australian Stock Exchange (ASX) Listing Rules

The ASX *Listing Rules* apply to all companies and trusts (entities) listed on the ASX most of which are also subject to the requirements of the Corporations Act.³⁹⁵ The *Listing Rules* are enforceable under the Corporations Act against listed entities and their associates and a breach of the rules can result in a variety of sanctions against the company.³⁹⁶ The ASX *Listing Rules* require listed companies to provide a statement of the main corporate governance practices observed during the reporting period.³⁹⁷

³⁹⁰ Australian Government *PGPA Legislation and Associated Instruments* (Australian Government, Department of Finance 2014) available at <http://www.finance.gov.au/resource-management/pgpa-legislation/> (accessed on 12 March 2015).

³⁹¹ Section 5 of the PGPA Act.

³⁹² The Defence Housing Australia Act 101 of 1987 established the Defence Housing Australia (DHA) whose main function is to provide adequate and suitable housing for, and housing related services to members of the Defence Force and their families (sections 5-7 of the Defence Housing Australia Act).

³⁹³ The Australian Postal Corporation Act established the Australian Post whose principal function is to supply postal services or any business or activity relating to postal services within Australia and between Australia and places outside Australia (sections 14-16 of the Australian Postal Corporation Act).

³⁹⁴ For example Part 2 and 3 of the Australian Postal Corporation Act and sections 11-12 of the Primary Industries Research and Development Corporation Act 1989 in respect of the Grains Research and Development Corporation (GRDC).

³⁹⁵ See the "Introduction" to the ASX *Listing Rules* that are available at www.asx.com.au/regulation/rules/asx-listing-rules.htm. (accessed on 12 June 2014).

³⁹⁶ Sheehan K "The Regulatory Framework for Executive Remuneration in Australia" (2009) 273-308.

³⁹⁷ ASX *Listing Rule* 4.10.3. If a company considers that a *Recommendation* is inappropriate to its particular circumstances, it has the flexibility not to adopt it but just to explain why i.e. the "if not, why not" approach.

6.2.1.9 Hilmer Report

The *Hilmer Report* was prepared in 1993 by a committee chaired by Professor Fredrick Hilmer, alongside a number of major microeconomic reforms instituted by the Keating Government.³⁹⁸ The committee was tasked to review the Federal Trade Practices Act 1974 and come up with a *National Competition Policy* that sought to promote efficiency and economic growth through effective competition while providing for situations “where competition does not achieve efficiency or conflicts with other social objectives”.³⁹⁹ The Committee was thus set up to investigate and advise on appropriate changes to legislation and other measures in relation to anti-competitive conduct of persons or enterprises in areas of business, *inter alia*.⁴⁰⁰ The *Report* had important implications for public entities, “many of which had begun entering into commercial activities; the professions; which were excluded from the application of Federal law; certain agricultural marketing entities granted monopoly rights; and certain infrastructure entities”.⁴⁰¹

6.2.1.10 Bosch Report

The *Bosch Report* was developed by a Working Group formed by the Australian Institute of Company Directors (AICD), the Australian Society of Certified Practising Accountants (ASCPA), the Business Council of Australia, the Law Council of Australia, the Institute of Chartered Accountants in Australia (ICAA) and the Securities Institute of Australia under the chairmanship of Henry Bosch.⁴⁰² There were three *Bosch Reports*, the original one in 1991, the reviewed version of 1993 and the latest version being 1995.⁴⁰³ The aim of the report was

³⁹⁸ Corden S *Australia's National Competition Policy: Possible Implications for Mexico* (OECD Publishing 2008) 10-11 available at <http://www.oecd.org/daf/competition/45048033.pdf> (accessed on 19 October 2015)

³⁹⁹ *Ibid.* See also Hilmer FG *Hilmer Report: Strictly Boardroom: Improving Governance to Enhance Company Performance* 2nd ed. (Melbourne: Information, Australia 1998) xvi-xix.

⁴⁰⁰ *Ibid.*

⁴⁰¹ OECD *Competition Policy in Australia* (OECD Reviews of Regulatory Reform 2010) 8-10 available at www.oecd.org/gov/regulatory-policy/44529918.pdf (accessed on 17 February 2015).

⁴⁰² *Bosch Report: Corporate Practices and Conduct* 3rd ed. (Woodslane Pty Ltd 1995) and Psaros J *Australian Corporate Governance: A Review and Analysis of Key Issues* (2008) 45-46.

⁴⁰³ *Ibid.*

to improve the performance and reputation of Australian companies by encouraging and assisting the adoption of the highest standards of corporate governance as well as to keep corporate governance self-regulated.⁴⁰⁴ The *Bosch Reports* dealt with directors' duties and responsibilities and were specifically designed to guide directors, auditors and accountants to uphold principles of good corporate governance.⁴⁰⁵

6.2.1.11 Review of the Corporate Governance of Statutory Authorities and Office Holders, Report to Commonwealth of Australia

The *Review of the Corporate Governance of Statutory Authorities and Office Holders, Report to Commonwealth of Australia* (hereinafter referred to as the *Uhrig Review*) was conducted under Uhrig J's chairmanship and concluded in 2003.⁴⁰⁶ The objective of the review was to identify issues surrounding existing governance arrangements and to provide options for government to improve the performance and get the best from statutory authorities and office holders and their accountability frameworks.⁴⁰⁷ The review was tasked to develop a broad template of governance principles and arrangements that the government could extend to statutory authorities and office holders, and potentially beyond, to a wider range of public sector bodies.⁴⁰⁸

Subsequent to the *Uhrig Review*, the Department of Finance also published its *Governance Arrangements for Australian Government Bodies* which greatly sought to promote better practice of good governance of Australian Government bodies.⁴⁰⁹ This policy document outlines principles to help in determining the most appropriate structure and governance

⁴⁰⁴ Du Plessis JJ, Hargovan A and Bagaric M *Principles of Contemporary Corporate Governance* (2010) 170-171.

⁴⁰⁵ Ibid.

⁴⁰⁶ Uhrig J *Review of the Corporate Governance of Statutory Authorities and Office Holders* (2003) 1-2.

⁴⁰⁷ Ibid. See also Meredith E *et al Public Sector Governance in Australia* (2012) 49-50.

⁴⁰⁸ Ibid. See also Halligan J and Horrigan B *Reforming Corporate Governance in the Australian Federal Public Sector: From Uhrig to Implementation* (University of Canberra Issues Paper Series No. 2 of December 2005) 1-3 available at <http://www.academia.edu/4053323/> (accessed on 19 October 2015).

⁴⁰⁹ See the "Foreword" to the *Governance Arrangements for Australian Government Bodies Policy Document* of August 2005 that is available at www.finance.gov.au > *Financial Framework* (accessed on 13 August 2014).

arrangements for Australian Government bodies in line with the recommendations set out in the *Uhrig Review*.⁴¹⁰

6.2.1.12 Commonwealth Government Business Enterprise (GBE) - Governance and Oversight Guidelines

The Commonwealth Government Business Enterprise (GBE) *Governance and Oversight Guidelines* (hereinafter referred to as *GBE Guidelines*) were produced by the Government Businesses Advice Branch of the Department of Finance and Deregulation and should be read in conjunction with the CAC Act.⁴¹¹ The *GBE Guidelines* form the central part of the regulatory requirements imposed on public entities⁴¹² with regard to issues related to corporate governance.⁴¹³ They apply to Government Business Entities (GBEs) that are Commonwealth authorities and Commonwealth companies.⁴¹⁴ For Commonwealth companies that are not wholly-owned GBEs, the extent to which these *GBE Guidelines* apply are normally acknowledged in legislation applying specifically to the GBE, the company constitution or shareholders' agreement.⁴¹⁵ The *GBE Guidelines* complement government policy and seek to ensure that GBEs operate efficiently and effectively to keep pace with governance standards in the private sector and international community.⁴¹⁶ They consist of more prescriptive and descriptive details than relevant GBE legislation on the composition and appointment of the board.⁴¹⁷

⁴¹⁰ Ibid.

⁴¹¹ Para 1.4 of the *GBE Guidelines*.

⁴¹² In Australia, public entities are divided into entities that form part of the Commonwealth financial purposes (Financial Management and Accountability Act bodies) and those that are controlled by the Commonwealth while being legally and financially separate from it (CAC Act bodies). The CAC Act bodies are further separated into Commonwealth companies established under the Corporations Act (e.g. Australian Rail Track Corporation Limited) and Commonwealth authorities which are bodies established through an Act of Parliament for a particular purpose (e.g. Defence Housing Australia) (Dewan SM *Corporate Governance in Public Sector Enterprises* (2006) 143 145).

⁴¹³ Surgeon P and Dibbs Barker Gosling Lawyers *Corporate Governance and Directors' Duties* (Global Counsel Handbook 2003) 21-22 available at www.practicallaw.com/global (accessed on 13 August 2014).

⁴¹⁴ A Government Business Enterprise is a Commonwealth authority or Commonwealth company as defined by the Commonwealth Authorities and Companies Act 1997 (CAC Act) and prescribed as a GBE under the Commonwealth Authorities and Companies Regulations 1997 (CAC Act Regulations) (Dewan SM *Corporate Governance in Public Sector Enterprises* (Pearson Education, India 2006) 144-146).

⁴¹⁵ Dewan SM *Corporate Governance in Public Sector Enterprises* (2006) 144-146.

⁴¹⁶ Ibid.

⁴¹⁷ Ibid.

6.2.1.13 Australian Securities Exchange Corporate Governance Council's (ASX CGC) Principles of Good Corporate Governance and Best Practice Recommendations

The first edition of the ASX Corporate Governance Council's *Corporate Governance Principles and Recommendations* (hereinafter referred to as *ASX CGC Corporate Governance Principles and Recommendations*) was released in 2003 and the latest review was done in March 2014.⁴¹⁸ The main objective of the *ASX CGC Corporate Governance Principles and Recommendations* recommend corporate governance practices for entities listed on the ASX that, "in the Council's view, are likely to achieve good governance outcomes and meet the reasonable expectations of most investors in most situations".⁴¹⁹ The *ASX CGC Principles and Recommendations* are said to have been formulated based on the 'if not, why not' (comply or explain) approach.⁴²⁰ They are therefore, not obligatory and do not seek to prescribe the corporate governance practices that a listed entity must adopt.⁴²¹

In addition to the above, the *Good Governance Principles AS 8000-2003*⁴²² were developed to "assist members of boards, chief executive officers and senior managers to develop, implement and maintain a robust system of governance" and provide all other stakeholders with yardsticks against which to measure the performance of the entity, among other things.⁴²³ The Australian Institute of Company Directors (AICD) also published a *Company Directors Corporate Governance Framework* which is not prescriptive but designed to

⁴¹⁸ However, it is worth noting that the ASX makes reference to other prior general guides to best practice including the 'Code of Conduct' developed by the Australian Institute of Company Directors (AICD, 1995), 'Corporate Governance: A Guide for Investment Managers and Corporations, A Statement of Recommended Corporate Practice' by the Australian Investment Managers' Association (AIMA, 1997) and the *Bosch Report* (Psaros J *Australian Corporate Governance: A Review and Analysis of Key Issues* (2008) 45-46). See also Thomson D and Jain A "Corporate Governance Failure and Its Impact on National Australia Bank's Performance" (2006) 41-56.

⁴¹⁹ *ASX CGC Corporate Governance Principles and Recommendations* (2014) 3.

⁴²⁰ Ibid.

⁴²¹ Ibid.

⁴²² This Standard was prepared by the Standards Australia International Committee MB-004 Business Governance, first published in June 2003 and revised in November 2004. The Standard's main aim is to promote good corporate governance and it applies to a wide range of entities. It complements existing guidelines produced by Investment and Financial Services Association (IFSA) and the ASX CGC. The *Good Governance Principles AS 8000-2003* is accessible at infostore.saiglobal.com/store/PreviewDoc.aspx?saleItemID=396440 (accessed on 3 February 2015).

⁴²³ "Foreword" and section 1.3 of the *Good Governance Principles AS 8000-2003*. The *Good Governance Principles AS 8000-2003* emphasise the fact that there is no prescriptive model of corporate governance hence acknowledge the need for flexibility.

optimise corporate performance and accountability in the interests of stakeholders.⁴²⁴ Similarly, the Australian National Audit Office⁴²⁵ produced guidelines known as ‘*Better Practice Guides*’ to complement government policy in ensuring that public entities are up to date with international corporate governance standards.⁴²⁶

Other bodies like the Australian Institute of Company Directors (AICD) and Australian Investment Managers’ Association (AIMA) have also played a key role in coming up with best practice guidelines (based on international standards) to assist the companies to determine the most suitable corporate governance model for their individual circumstances.⁴²⁷ Australia, being one of the OECD member countries, is also guided by the *OECD Principles for Corporate Governance*⁴²⁸ as well as by other internationally recognised corporate governance codes like the *CACG Guidelines* and *ICGN Principles*.⁴²⁹ Some insights of key elements of good corporate governance are provided by other countries’ corporate governance instruments like the *Cadbury Report*, *Sarbanes-Oxley Act* and *Combined Code*.⁴³⁰

⁴²⁴ The Australian Institute of Company Directors’ *Company Directors Corporate Governance Framework* outlines the practices (skills, attributes and expertise) that embrace good director practice as demonstrated by responsible directors. The *Framework* is available at <http://www.companydirectors.com.au/Director-Resource-Centre/Publications> (accessed on 17 December 2014).

⁴²⁵ The Australian National Audit Office (ANAO) is an independent institution established in terms of section 38 of the Auditor-General Act (No. 151 of 1997). It was the primary advocate of corporate governance within the public sector in 2003 and adopted “public sector governance” for its guidelines.

⁴²⁶ The ANAO has published guidelines like *Public Sector Audit Committees: Independent Assurance and Advice for Chief Executives and Boards* (August 2011), *Public Sector Governance Strengthening Performance through Good Governance* (June 2014), *Human Resource Management Information Systems: Risks and Controls* (June 2013), *Preparation of Financial Statements by Public Sector Entities* (June 2013), among others. The guidelines are available at <http://www.anao.gov.au/Publications/Better-Practice-Guides>. The *Public Sector Governance Strengthening Performance through Good Governance* has been developed to align with implementation of the substantive provisions of the PGPA Act (see “Foreword” to the *Public Sector Governance Strengthening Performance through Good Governance* (ANAO *Better Practice Guides* 2014)).

⁴²⁷ Psaros J *Australian Corporate Governance: A Review and Analysis of Key Issues* (2008) 43-44.

⁴²⁸ For example, the *OECD Guidelines on Corporate Governance of State-Owned Enterprises*. Australia substantially adheres to OECD principles as shown in its own corporate governance framework (*Australia and the OECD*) (Australian Government Department of Foreign Affairs and Trade Publication of November 2013) 1-2 available at <http://www.dfat.gov.au/publications/trade/australia-and-the-oecd.html> (accessed on 7 August 2014)).

⁴²⁹ Barret P *Corporate Governance – A More Private Public Sector* (Australian National Audit Office 2007) 28-32.

⁴³⁰ Psaros J *Australian Corporate Governance: A Review and Analysis of Key Issues* (2008) 46.

Having given a general overview of the Australian corporate governance framework, the following sections consider the various mechanisms put in place by the country to enhance the effectiveness of the public entity boards.

6.2.2 Role of the Board

Comparable to Zimbabwe and South Africa, the traditional position in Australia was that directors should act in the best interests of the company.⁴³¹ However, there has been a considerable amount of law reform initiatives in Australia concerning the duties and obligations of the directors of companies.⁴³² In line with international developments, a number of corporate governance initiatives in Australia have recommended the adoption of the enlightened shareholder value approach which requires directors to take into account other stakeholders' interests as well as observe the tenets of corporate social responsibilities while promoting the success of the company for the benefit of members as a whole.⁴³³

Dyson Hey observed that, in the new era, the requirement that directors should act *bona fide* for the benefit of the company may be interpreted in four different ways. These are; “first, as an example of general duties which are owed by a fiduciary, secondly, as a duty to act *bona fide* for the company's benefit; thirdly, as a duty to act *bona fide* for the shareholders' benefit; and finally, as a duty to act *bona fide* in regard to all those who have interests in the company

⁴³¹ Section 181(1) of the Corporations Act 2001 requires directors and other corporate officers to exercise their powers and discharge their duties “in good faith in the best interests of the corporation”. See Chapter 3, para 3.6.1 as to the meaning of “in the best interests of the company”. See also Atrill P, McLaney E and Harvey D *Accounting: An Introduction* (Pearson Higher Education AU 2014) 38 and Du Plessis JJ, Hargovan A and Bagaric M *Principles of Contemporary Corporate Governance* (2010) 67-69. This traditional view was confirmed in *Percival v Wright* (1902) 2 Ch 421. In this case, directors acquired shares from shareholders without disclosing to the shareholders that they were negotiating to sell the shares to a third party at a higher price. The Court held that the directors had no obligation to disclose to the shareholders that negotiations were in progress to sell the shares at a higher price. The only duty that was imposed on the directors was to the company. According to Horrigan, Australia “subscribes to shareholder primacy as the foundation of corporate law and governance” (Horrigan B “Directors' Duties and Liabilities – Where Are We Now and Where Are We Going in the UK, Broader Commonwealth, and Internationally?” (2012) 21-45).

⁴³² The provisions on directors' duties are a mixture of the “newer statutory rules and older common law rules” (Tomasic R, Bottomley S and McQueen R *Corporations Law in Australia* (Federation Press 2002) 316-318).

⁴³³ Examples of the initiatives are *The Report on Corporate Responsibility: Managing Risk and Creating Value* prepared by the Parliamentary Joint Committee and Corporations and Financial Services (June 2006) available at http://www.aph.gov.au/Parliamentary_Business/.../corporate_responsibility/report/ and the *ASX CGC Corporate Governance Principles and Recommendations* (2014). See also Marshall S and Ramsay I “Stakeholders and Directors' Duties: Law, Theory and Evidence” (2012) 35(1) *UNSW Law Journal* 291-316.

or who have relations with it”.⁴³⁴ Therefore, according to Hey, the directors are expected to consider the interests of, *inter alia*, the different stakeholders in the company when undertaking their duties.⁴³⁵ But, some commentators have argued that the current Australian company law does not make it mandatory for directors to pursue stakeholders’ interests but permits directors sufficient freedom to do so.⁴³⁶ They further argue that instead of legislating for mandatory recognition of stakeholders’ interests, “policy makers have shown a preference for allowing a more temperate adaptation to current practices and views through case law developments”.⁴³⁷

In Australia, the general conduct of directors is subject to the provisions of the Corporations Act (for a wholly-owned Commonwealth company GBE), the CAC Act (for Authority GBEs), the PGPA Act, the legislation that established public entities,⁴³⁸ the company’s constitution and common law rules.⁴³⁹ The Corporation Act⁴⁴⁰ clearly stipulates that directors

⁴³⁴ Tomasic R, Bottomley S and McQueen R *Corporations Law in Australia* (2002) 321. See also *Allen v Gold Reefs of West Africa Ltd* (1900) 1 Ch 656 for the requirement that powers must be exercised “bona fide for the benefit of the company as a whole”.

⁴³⁵ *Ibid.* In their interpretations of directors’ duties, Australian courts have, to some extent, reflected business reality and offered flexibility to directors to consider other stakeholders’ interests provided that the interests of shareholders are thereby served. For example, the Australian courts have revealed a willingness to recognise a fiduciary relationship between directors and creditors of the company in circumstances such as the insolvency or near insolvency of the companies involved. In *Jeffree v National Companies & Securities Commission* it was stated unequivocally that the directors owe a fiduciary duty to present and future company creditors thus are obliged to keep the company’s property intact and accessible for the repayment of its debts (*Jeffree v National Companies & Securities Commission* (1989) 15 ACLR 217, 7 ACLC 556). Also, the James Hardie scandal is believed to be one of the recent cases that prompted Australia to reconsider its traditional shareholder centred approach to corporate law and the issue of corporate social responsibility generally (Hill JG *The Architecture of Corporate Governance in Australia - Corporate Governance - National Report: Australia* (European Corporate Governance Institute (ECGI) Law Working Paper No. 164/2010) 8 available at <http://ssrn.com/abstract=1657810> (accessed on 18 January 2015). In support of the need to consider the interests of other stakeholders, in the Hardie case the court of Appeal held that the test under section 674 of the Corporations Act is an objective one. The views of a company’s senior management or its directors cannot determine whether disclosure of any given information is required, though they may be relevant. The Court also said that: “Even if there were no other evidence apart from the company’s own deliberations, it remains for the trial judge to evaluate whether information is material so as to require disclosure under section 674” (*James Hardie Industries NV v ASIC* (2010) 274 ALR 85). See also *The Bell Group Ltd (in liq) v Westpac Banking Corporation* (No 9) (2008) 39 WAR 1, 534, Dunn E “James Hardie: No Soul to Be Damned and No Body to Be Kicked” (2005) 27(2) *Sydney Law Review* 339-353, Havenga MK *Fiduciary Duties of Company Directors with Specific Regard to Corporate Opportunities* Unpublished Thesis (University of South Africa 1995) 33-42 and *The Bell Group Ltd (in liq) v Westpac Banking Corp* (No 9) (2008) WASC 239.

⁴³⁶ According to Marshall and Ramsay, “directors do not typically look to the law of directors’ duties for specific guidance concerning the interests they should pursue as directors. Rather, that specific guidance is found in a raft of statutes other than the Corporations Act, such as labour laws” (Marshall S and Ramsay I “Stakeholders and Directors’ Duties: Law, Theory and Evidence” (2012) 291-316).

⁴³⁷ *Ibid.*

⁴³⁸ Section 11B of the Defence Housing Australia Act and section 23 of the Australian Postal Corporation Act specify the role and functions of the directors in the public entities.

⁴³⁹ Surgeon P and Dibbs Barker Gosling Lawyers *Corporate Governance and Directors’ Duties* (2003) 21-22. The Corporation Act and the CAC Act make reference to the applicability of common law in a number of sections, for example, sections 180 and 185 of the Corporation Act 2001 and section 22 of the CAC Act. According to the *Uhrig Review*, the board

have the duty to discharge duties with care and diligence expected of a reasonable person,⁴⁴¹ to act in good faith⁴⁴² without improperly using his position and abusing information obtained by virtue of his position and duty to disclose material personal interest when conflict arises.⁴⁴³ Failure to discharge the duties as prescribed attracts civil and criminal penalties.⁴⁴⁴

can undertake its duties only within the parameters set by the CAC Act, the GBE's corporate plan, the GBE's company constitution or related legislation and the constraints of being a government body (Uhrig J *Review of the Corporate Governance of Statutory Authorities and Office Holders* (2003) 41).

⁴⁴⁰ The provisions of the Corporations Act 2001 on duties of directors (section 180-184) are similar to those of sections 22-25 of the CAC Act and sections 25-29 of the PGPA Act. It would appear that most of the directors' common law duties have been incorporated within the company law.

⁴⁴¹ Section 180 of the Corporations Act 2001. According to Du Plessis, in Australia, "the standards of care and diligence expected of directors changed drastically with the case of *Daniels v Anderson* (1995) 16 ACSR 607 at 645, 657, where objective standards were used to determine a breach of directors' duty of care and diligence, and when objective standards of care and diligence were introduced in Australian corporations legislation" (Du Plessis JJ "A Comparative Analysis of Directors' Duty of Care, Skill and Diligence in South Africa and in Australia" 2010 *Acta Juridica* 263 available at: <http://www.companylaw.uct.ac.za/clh/research/journal/duplessis#sthash.g95r3qFH.dpuf> (accessed on 30 October 2015)). In *Daniels v Anderson* the Court observed that the standards of care and skill which are now expected of directors are now more demanding than they were a century ago. The Court of Appeal noted that more "recently the courts have recognized that at law more is required of a director than supine indifference. The legislature requires both diligence and action". A similar judgment was made in *Commonwealth Bank of Australia v Friedrich* (1991) 5 ACSR 111 at 126. In a recent Australian judgment, *Australian Securities and Investments Commission v Healey*, commonly referred to as the *Centro* case, the court emphasised the need for a director to exercise due care and diligence by paying appropriate attention to the business of the company and giving any advice due consideration and exercising his own judgment in the light thereof. The court found that "In the light of the significance of the matters that they knew, they could not have, nor should they have, certified the truth and fairness of the financial statements, and published the annual reports in the absence of the disclosure of those significant matters. If they had understood and applied their minds to the financial statements and recognised the importance of their task, each director would have questioned each of the matters not disclosed. Each director, in reviewing financial statements, needed to enquire further into the matters revealed by those statements. The judge further found that "the directors failed to take all reasonable steps required of them, and acted in the performance of their duties as directors without exercising the degree of care and diligence the law requires of them" (*Australian Securities and Investments Commission v Healey* (2011) FCA 717).

⁴⁴² Sections 181 of the Corporations Act 2001. In *Australian Metropolitan Life Assurance Company Ltd v Ure* (1923) 33 CLR 199 it was held that, whilst the company's constitution may give directors the power to make a certain decision, it must be exercised *bona fide*, not arbitrarily or at the absolute will of the directors, but honestly in the interests of the shareholders as a whole. In *CAC v Popoulias* (1980) 8 ACLC 849 at 851 it was held that "the duty of directors to act honestly is one familiar to the common law duty" to act in good faith. This common law duty has been incorporated within the statutory duty to act in good faith in section 181 of the Corporation Act 2001. Section 181(1) imposes a civil obligation of good faith whilst section 184 imposes criminal liability for intentional and reckless breach of the duty of good faith.

⁴⁴³ Sections 182-183 of the Corporations Act 2001. Directors are required to act in the best interests of the company, and to fulfil this duty they must avoid conflicts between their own interests and the interests of the company. The Australian courts have tended to take a practical approach in assessing the existence of a conflict. In the case of *Aberdeen Railway Co v Blaikie Brothers* (1843-1860) All ER 249 the court held that "it is a rule of universal application that no-one, having such duties to discharge, shall be allowed to enter into engagements in which he has, or can have, a personal interest conflicting, or which possibly may conflict, with the interests of those whom he is bound to protect". In *Fitzsimmons v R* (1997) 23 ACSR 355 the court found that the facts of each case will determine whether or not a conflict of interest arises. The court further found that "The minimum requirement will be disclosure of the interest. This is simply part of, or an extension of, the statutory obligation that a director who is in any way 'interested' in a contract or proposed contract with the company must declare the nature of the interest at a meeting of the directors . . . What action, above and beyond mere disclosure, the director must take will vary from case to case depending on the subject matter, the state of knowledge of the adverse information, the degree to which the director has been involved in the transaction, whether the director has been promoting the cause, the gravity of the possible outcome, the exigencies and commercial reality of the situation and so on. It may be enough for the director simply to refrain from voting or even to absent himself or herself from the meeting during discussion of the impugned business. The circumstances may require the director to take some positive action to identify clearly the perceived conflict and to suggest a course of action to limit the possible damage".

⁴⁴⁴ Sections 184 and 1317E of the Corporations Act and section 26 and Schedule 2 of the CAC Act. An example is the recent case of *Jones and Ors v Invion Ltd and Anor* (2015) QCA 100 (14/6136) which clearly indicates the consequences of acting

The Corporations Act further provides that directors may exercise all of the powers of the company which may be restricted by the company's constitution or related legislation.⁴⁴⁵ Similarly, the PGPA Act provides for the general duties of directors⁴⁴⁶ and states that the responsible authorities (which include the board) should govern an entity in a way that it, *inter alia*, achieves the purposes for which it was created through promoting the proper use and management of public resources, appropriately managing risk and encouraging the entity's financial sustainability.⁴⁴⁷ The PGPA Act requires that board committees should be created to assist the board to effectively discharge its duties.⁴⁴⁸

To complement the provisions of the Corporations Act, CAC Act and PGPA Act and to ensure that directors clearly understand what is expected from them, the Acts establishing the public entities define the role of the board.⁴⁴⁹ For example, the Australian Postal Corporation

in breach of the statutory duties in terms of the Corporations Act 2001. In this case, the first Respondent successfully brought proceedings against three former directors for compensation under section 1317H of the Corporations Act 2001 for breach of statutory duties under sections 180, 181 and 182 of the Act and equitable compensation for breach of fiduciary duties. The directors had varied the termination provisions in their contracts, without authorisation, purporting to act on Invion Ltd's behalf and deliberately misinformed the board as to the contractual position. The court found that the directors had breached their statutory duties under sections 180, 181 and 182 of the Act as their conduct was dishonest and "in dereliction of their duties as directors". The court ordered the directors to compensate Invion accordingly. It is also worth noting that since directors in Australia have the common law fiduciary duties of loyalty and care, under the Corporations Act they could be subjected to penalties under common law as well as statutes. Sections 179(1) and 185 of the Corporations Act actually make it clear that the statutory duties in the Act do not exclude the operation of other laws, including the general law.

⁴⁴⁵ Section 198A of the Act provides that the directors should manage and direct the business of a company in terms of the powers granted by the Act and the company's constitution. The responsibilities of public entity boards usually include the strategic monitoring of the company, the development and reviewing of the organisational strategy, the negotiation with the shareholders (as represented by ministers) of the general business plan and objectives, the appointment of the chief executive officer and monitoring of senior management performance and compliance with the law (Uhrig J *Review of the Corporate Governance of Statutory Authorities and Office Holders* (2003) 41). Although section 198A of the Corporations Act gives the directors the ultimate powers to manage and direct the business of the company, it makes it clear that certain powers may be granted to shareholders in a general meeting (Delpont PA "The Division of Powers in a Company" in Visser C and Pretorius JT *Essays in Honour of Frans Malan* (2014) 90-91).

⁴⁴⁶ The duties include duty of care and diligence, duty to act in good faith and for proper purpose, duty not to improperly use information and duty to disclose interests (sections 25-29 of the PGPA Act).

⁴⁴⁷ Sections 15-19 of the PGPA Act.

⁴⁴⁸ The most important committee appears to be the audit committee which is mandatory in Australia for wholly owned public entities (sections 17, 45 and 92 of the PGPA Act). The committee's main responsibility is to review the integrity of the company's financial reporting and oversee the independence of the external auditors (ANAO, Public Sector Audit Committees: Independent Assurance and Advice for Accountable Authorities (ANAO *Better Practice Guides* 2015) 3-5 available at <http://www.anao.gov.au/Publications/Better-Practice-Guides>).

⁴⁴⁹ Section 23 of the Australian Postal Corporation Act and sections 4-7 and 11 of the Defence Housing Australia Act. The Uhrig *Review* recommended that it is necessary for boards to have greater clarity in the definition of their function, direction and objectives and to be allowed sufficient independence to effectively discharge their duties. This could be achieved through a "Statement of Expectations" to statutory authorities by the relevant Minister (where he has a role in providing direction) which spells out government policies, current objectives and any expectations relevant to the authority. Each statutory authority would, in response, outline how it proposes to meet the government's expectations in a "Statement of

Act states the role of the board as to “decide the objectives, strategies and policies” of the Australia Post, “to ensure that the entity performs its functions in a manner that is proper, efficient and, as far as practicable, consistent with sound commercial practice”⁴⁵⁰ and to appoint the chief executive officer who meets its requirements.⁴⁵¹ Similarly, the Defence Housing Australia Act states the functions of the board as “to ensure the proper and efficient performance of the functions” of Defence Housing Australia.⁴⁵² Generally, in Australia, the role of the board should be clearly documented in a board charter and all board members should be provided with a letter of appointment setting out their duties and responsibilities.⁴⁵³ Directors, therefore, should have no excuse with regard to information relating to what is expected of them.

Similar to the above statutes, the ASX CGC recommends that board members, when discharging their duties, should exhibit care and diligence expected of a reasonable person, act in good faith without abusing their position and disclose material personal interest when conflict arises.⁴⁵⁴ Companies are expected to establish and disclose the respective roles and responsibilities reserved for the board and those delegated to senior executives in order to facilitate board and senior executives’ accountability to both the company and its shareholders.⁴⁵⁵ First, the ASX CGC recommends that a formal board charter that details the board’s functions and responsibilities should be put in place to enable the board to provide

Intent” wherein it should include key performance indicators agreed with the relevant Minister (Uhrig J *Review of the Corporate Governance of Statutory Authorities and Office Holders* (2003) 7-8).

⁴⁵⁰ Section 23 of the Australian Postal Corporation Act. Section 11B of the DHA Act provides the functions of the board as to ensure the proper and efficient performance of the functions of DHA and to determine the policy of DHA with respect to any matter.

⁴⁵¹ Section 83 of the Australian Postal Corporation Act, para 2.10 and 2.11 of the *GBE Guidelines*, Principle 1.1 of the *ASX CGC Corporate Governance Principles and Recommendations* (2014). Giving the board the opportunity to choose the CEO enables it to choose a competent person who is able to effectively lead other employees and thus assist the board in achieving the entity’s objectives (Uhrig J *Review of the Corporate Governance of Statutory Authorities and Office Holders* (2003) 84).

⁴⁵² The functions are articulated in the Act (sections 4-7 and 11 of the Defence Housing Australia Act). The entity is required to establish committees to assist the board, the most important of which is the audit committee (section 26 of The Defence Housing Australia Act).

⁴⁵³ ANAO *Principles and Better Practices, Corporate Governance on Commonwealth Authorities and Companies* (Discussion Paper prepared by Australia National Audit Office, 2000) 19 available at <http://www.anao.gov.au/uploads/documents>. (accessed on 13 September 2014)).

⁴⁵⁴ Principle 3 of the *ASX CGC Corporate Governance Principles and Recommendations* (2014).

⁴⁵⁵ Principle 1 of the *ASX CGC Corporate Governance Principles and Recommendations* (2014). The Principle details the general roles and responsibilities of the board.

strategic guidance for the company.⁴⁵⁶ The second suggestion is that, upon appointment, formal letters should be issued to directors setting out the key terms and conditions relative to that appointment so that the directors have a clear understanding of their roles and responsibilities and of the entity's expectations of them.⁴⁵⁷

As a third measure, it is recommended that the board should establish committees to assist it in the effective performance of its functions and the exercise of its powers.⁴⁵⁸ Fourthly, the Council recommends the appointment of a corporate secretary whose role is to support the effectiveness of the board by ensuring that board policies and procedures are followed and coordinating the timely completion and despatch of all relevant material.⁴⁵⁹ In the fifth instance, the board should be provided with the information it needs to discharge its responsibilities effectively and be allowed to, where necessary, seek for independent expert advice at the company's expense.⁴⁶⁰ Lastly, the Council recommends that the board should establish a program for inducting new directors and provide appropriate professional development opportunities for directors to develop and uphold the skills and knowledge essential to enable them to successfully execute their role in accordance with the statutes and corporate governance standards.⁴⁶¹

In a similar spirit, the *GBE Guidelines* provide that the board's critical responsibility is to ensure that an entity performs as expected by all stakeholders.⁴⁶² The board is thus expected

⁴⁵⁶ Principle 1 of the *ASX CGC Corporate Governance Principles and Recommendations* (2014). The role and responsibility of the board could be set out in a board charter or in some other document published on the entity's website or in its annual report.

⁴⁵⁷ The letter of appointment should cover things like term of appointment, powers and duties of directors, shareholder Minister's expectations, any special duties or arrangements attaching to the position, remuneration, induction training and continuing education arrangements, a copy of the company constitution, among others (See Principle 1 of the *ASX CGC Corporate Governance Principles and Recommendations* (2014)).

⁴⁵⁸ Principle 2 of the *ASX CGC Corporate Governance Principles and Recommendations* (2014). See also section 26 of The Defence Housing Australia Act and Uhrig J *Review of the Corporate Governance of Statutory Authorities and Office Holders* (2003) 95-96.

⁴⁵⁹ Principle 1 of the *ASX CGC Corporate Governance Principles and Recommendations* (2014).

⁴⁶⁰ The board charter should set out the entity's policy on when and how directors may seek independent professional advice at the expense of the entity (Principle 1 of the *ASX CGC Corporate Governance Principles and Recommendations* (2014)). See also section 24(9) of the Defence Housing Australia Act and section 68(4) of the Australian Postal Corporation Act.

⁴⁶¹ Principle 2 of the *ASX CGC Corporate Governance Principles and Recommendations* (2014). See also Uhrig J *Review of the Corporate Governance of Statutory Authorities and Office Holders* (2003) 102.

⁴⁶² Para 2.2 of the *GBE Guidelines* and Uhrig J *Review of the Corporate Governance of Statutory Authorities and Office Holders* (2003) 102.

to implement effective governance frameworks to support its role and responsibilities and report on their implementation in the annual report.⁴⁶³ To ensure that the board is fully aware of expected deliverables, the *GBE Guidelines* require the Shareholder Minister to issue an appointment letter⁴⁶⁴ to the directors which clearly states the fiduciary and other duties expected from directors.⁴⁶⁵ The individual directors are required to formally undertake to discharge the said duties effectively.⁴⁶⁶

Like the *ASX CGC Corporate Governance Principles and Recommendations*, the *GBE Guidelines* recommend that directors should be subjected to induction, continuous education and training to update and enhance their skills and knowledge so that they are able to effectively discharge their duties.⁴⁶⁷ It is worth noting that in Australia formal board induction is considered so important that it is mandatory within most individual public entities.⁴⁶⁸ Furthermore, the *GBE Guidelines* also recommend that the board should have access to external expert advice and should set up board committees to enable it to effectively undertake its roles.⁴⁶⁹

Australia has also put in place measures to minimise government interference by requiring that all Ministerial directions to public entity boards should be in writing and tabled in both Houses of Parliament. For example, the Postal Corporations Act forbids the Minister from

⁴⁶³ Para 2.2 of the *GBE Guidelines*.

⁴⁶⁴ The appointment letter should provide information on director powers, directors' responsibilities, the operations and legislative obligations of the GBE, director's term of appointment and remuneration arrangements, among others (para 2.3 of the *GBE Guidelines*). See also Witherell W H *Corporate Governance of State-Owned Enterprises: A Survey of OECD Countries* (OECD Publishing 2005) 90 available at <http://www.oecd.org/daf/ca/corporategovernanceofstate-ownedenterprises> (accessed on 12 February 2015).

⁴⁶⁵ Para 2.3 of the *GBE Guidelines*. In addition, the government expects GBE boards to establish and maintain a code of conduct for directors which covers, *inter alia*, directors' professional conduct, work practices and performance and directors' declaration of interests (paras 2.5-2.6 of the *GBE Guidelines*).

⁴⁶⁶ *Ibid*.

⁴⁶⁷ The education and training programs could cover key developments in the company, industry and general environment which should incorporate information on general public sector, legal, meeting arrangements, performance and accountability obligations (para 2.16 of the *GBE Guidelines*).

⁴⁶⁸ *OECD Board of Directors of State-Owned Enterprises: An Overview of National Practices* (OECD Report of December 2012) 37 available at www.oecd-ilibrary.org/.../board-of-directors-of-state-owned-enterprises (accessed on 27 July 2014). See also Australian Capital Territory (ACT) *Government Boards and Committees Handbook* (2009) 20-21 available at http://www.cmd.act.gov.au/_data/assets/pdf_file/0003/113583/boards-committees-handbook09.pdf (accessed on 5 May 2015).

⁴⁶⁹ Paras 2.7-2.8, 2.18 of the *GBE Guidelines*. Audit committees are mandatory in Australia for wholly owned public entities in terms of section 17 of the PGPA Act.

giving a directive in relation to certain activities conducted by Australia Post.⁴⁷⁰ Where the Minister considers it in the public interest to give a directive in terms of the Act, he must consult the board and “cause a copy of the direction to be laid before each House of the Parliament within 15 sitting days of that House after giving the direction”.⁴⁷¹ Furthermore, Australia has moved towards a reduced role for sector Ministries by centralising the ownership function.⁴⁷² The centralisation function or oversight role is performed by the Government Business and Private Financing Advice Unit (GBPFAU)⁴⁷³ which reports to the Minister for Finance and Administration.⁴⁷⁴ The advantages of centralising shareholder oversight is that it has assisted in achieving consistent treatment of GBEs, clarity with respect to the government’s shareholder objectives and expectations, clear separation of shareholder function from policy and regulation and has enabled development of GBE governance policy.⁴⁷⁵

It is clear from the above that the framework put in place by Australia to enhance the effectiveness of public entities boards in performing their roles is similar in most respects to Zimbabwe’s framework.⁴⁷⁶ Comparable to Australia, Zimbabwe’s corporate governance framework provides for mechanisms that ensure that directors are aware of and empowered

⁴⁷⁰ Section 49 of the Australian Postal Corporations Act.

⁴⁷¹ Section 49 of the Australian Postal Corporation Act. Section 50 of the Act further provides that except as otherwise provided by or under the Act or any other Act, Australia Post and its board are not subject to direction by or on behalf of the Australian Government.

⁴⁷² The Parliamentary Joint Committee of Public Accounts and Audit (JCPAA) held an inquiry into the corporate governance and accountability arrangements for Australian GBEs and came up with a number of recommendations that were presented before Parliament in 2000. One of the recommendations was that all portfolio Ministers should be removed from their GBE shareholder responsibilities, but remain as the responsible Minister under GBEs’ enabling legislation. The Government’s shareholder interests in GBEs would then be represented by, and be the responsibility of, the Minister for Finance and Administration. As a result, the GBPFAU was formed (Witherell WH *Corporate Governance of State-Owned Enterprises: A Survey of OECD Countries* (OECD Publishing 2005) 44).

⁴⁷³ The GBPFAU was established in 1997, following the *Humphry Report*’s recommendation. The Unit provides oversight, management, and strategic advice on the commercial performance of GBEs by “analysing their operations and environment, engaging in discussions with them and consulting with their Stakeholders”. It provides strategic advice to the Minister for Finance and Administration on the operations and commercial performance of the GBEs and ensures the quality and robustness of the GBE corporate governance framework (Witherell WH *Corporate Governance of State-Owned Enterprises: A Survey of OECD Countries* (2005) 44).

⁴⁷⁴ The main disadvantage is the risk of too much focus on commercial issues at the expense of other important issues (Witherell WH *Corporate Governance of State-Owned Enterprises: A Survey of OECD Countries* (2005) 44).

⁴⁷⁵ Ibid.

⁴⁷⁶ See Chapter 4, para 4.2.2 for a comparative discussion on Zimbabwe.

to effectively discharge their duties and responsibilities.⁴⁷⁷ However, the two countries differ on a number of aspects. First, unlike Zimbabwe, Australia provides for a detailed appointment letter and requires individual directors to formally undertake to discharge their duties effectively. Secondly, Australia has put more stern measures to minimise government interference than Zimbabwe. Examples are the Australian requirement for the responsible Minister to consult the board before giving directives of national interest and to put the directive in writing and to report to the House of the Parliament. The third difference is that Australia has centralised the supervision of public entities to an independent entity to minimize political interference in the operations of the entities and to ensure uniform governing of the entities. Australia has also moved towards making it mandatory for public entity board members to be formally inducted which Zimbabwe has not yet done.

6.2.3 Selection and Appointment of Board Members

The corporate governance framework of Australia advocates for a formal and transparent process of selection, appointment and re-appointment of directors to the board to promote transparency, investor understanding and confidence in the appointment process.⁴⁷⁸ The Corporation Act provides for minimum qualifications for one to be appointed as a director.⁴⁷⁹ Under the Corporations Act, individual resolutions are required for the election of each public company director, unless the meeting has resolved, with no dissenting votes, to appoint multiple directors by single resolution.⁴⁸⁰ The Acts that established public entities prescribe that board members should be appointed by the Minister⁴⁸¹ by a written instrument.⁴⁸² The

⁴⁷⁷ Ibid.

⁴⁷⁸ Principle 2 of the ASX *CGC Corporate Governance Principles and Recommendations* (2014) and paras 2.7-2.9 of the *GBE Guidelines*. To reinforce transparency in the exercise of ministerial powers, the State of Queensland in Australia requires the publication of any ministerial decision affecting Government Owned Corporations (“GOCs”) (The State of Queensland (Queensland Treasury), *Corporate Governance Guidelines for Government Owned Corporations*, Version 2 of 2009) available at <http://www.treasury.qld.gov.au/services/government-owned-businesses/documents/corporate-governance-guidelines.pdf> (accessed on 14 May 2014).

⁴⁷⁹ Section 201B of the Corporation Act. But, the Corporations Act does not impose minimum standards of education, training or competence on directors. Also, in *Re Brazilian Rubber Plantations & Estates Ltd*, the court found that a director “is not bound to bring any special qualifications to his office. He may undertake the management of a rubber company in complete ignorance of everything connected with rubber, without incurring responsibility for the mistakes which may result from such ignorance” (*Re Brazilian Rubber Plantations & Estates Ltd* (1911) 1 Ch 425 at 437).

⁴⁸⁰ Section 201E of the Corporation Act. Sections 201E(2) and (3) provide further limitations on the operation of this rule.

⁴⁸¹ This can be the responsible Minister or the Minister of Finance depending on the circumstances prevailing (section of the Defence Housing Australia Act).

Acts also require that relevant experience should be considered as one of the key factors when appointing board members to the respective entities.⁴⁸³ Under the *ASX Listing Rules*, listed companies are required to hold an election of directors annually and a director is not permitted to hold office, without re-election by shareholders, for a period exceeding three years.⁴⁸⁴

The country has also developed structured and clearly skill-based nomination systems and specific eligibility guidelines.⁴⁸⁵ The guidelines require that boards of state-owned enterprises should comprise people who are of good standing,⁴⁸⁶ with an appropriate mix of relevant skills and experience, who are appointed on the basis of their individual capacity to contribute to the board's effectiveness in driving the entity towards achieving its objectives.⁴⁸⁷ The process for public entity board appointments involves recommendations by the board chairperson, through the board,⁴⁸⁸ of possible candidates to the responsible Minister who then consults the Prime Minister before the Cabinet's approval of the appointment of a director.⁴⁸⁹

⁴⁸² The Australian Postal Corporations Act provides that directors should be appointed by the Governor-General on the nomination of the Minister (section 73 of the Australian Postal Corporations Act).

⁴⁸³ See section 14(2) of the Defence Housing Australia Act and section 73 of the Australian Postal Corporations Act.

⁴⁸⁴ *ASX Listing Rules* 14.4-14.5.

⁴⁸⁵ Structured systems are based on an organised assessment of current boards in terms of competences, skills and experience to determine the requirements for new board appointments. Thereafter, potential candidates are "systematically identified, interviewed and assessed based on profiles drawn up for each board position" (OECD *Corporate Governance of State-Owned Enterprises: A Survey of OECD Countries* (OECD Publishing 2006) 93-94).

⁴⁸⁶ The ASX CGC recommends that listed entities should ensure that appropriate checks are undertaken before a person is appointed as a director. These should include "checks as to the person's character, experience, education, criminal record and bankruptcy history". In addition, the independence of the director should be checked through obtaining details of any interest, position, association or relationship that might influence, or reasonably be perceived to influence, in a material respect his or her capacity to bring an independent judgment to bear on issues before the board and to act in the best interests of the entity (Principle 1 of the *ASX CGC Corporate Governance Principles and Recommendations* (2014)).

⁴⁸⁷ Ministers are supposed to appoint directors based on merit and to take into account skills, qualifications and experience. Examples of relevant skills have been listed as commerce, finance, accounting, law, marketing, workplace relations and management as well as the capacity to contribute to the achievement of the GBE's objectives (Para 2.7 of *GBE Guidelines* and Uhrig J *Review of the Corporate Governance of Statutory Authorities and Office Holders, Commonwealth of Australia* (2003) 97-98). See also section 14(2) of the Defence Housing Australia Act which requires some of the board appointees to have a background in Defence, property development or management, finance or business management.

⁴⁸⁸ The board should establish a nomination committee, headed by the board chairman, which should be responsible for coming up with recommendations on board composition and membership. It has been argued that having a separate nomination committee can be an efficient and effective mechanism to bring the transparency, focus and independent judgment needed in coming up with an appropriately composed board (Principle 2 of the *ASX CGC Corporate Governance Principles and Recommendations* and para 2.8 of the *GBE Guidelines* (2014)).

⁴⁸⁹ Paras 2.8- 2.12 of the *GBE Guidelines*. Under the Corporations Act (section 201) shareholders are responsible for the election of directors. The Defence Housing Australia Act provides that the chairperson and the other appointed members, other than the member appointed by the Finance Minister, are to be appointed by the responsible Minister by written

The appointment process should take into account the strategic requirements of the public entity, government policy objectives on fostering a governance culture regarding diversity in board composition⁴⁹⁰ and other reporting requirements.⁴⁹¹ As an example, with regard to gender, the Australian Government's target was that 40% of Government board members should be women, 40% of board members to be men, and the remaining 20% of positions to be held by either women or men by 2015.⁴⁹² The *GBE Guidelines* propose public advertising or the use of executive search processes as additional processes for identifying board candidates so as to ensure that appointments are drawn from the best possible field of candidates.⁴⁹³

To further enhance transparency and consistency in the board appointment process, the GBPFAU has been tasked to advise the Minister on possible board candidates.⁴⁹⁴ It is also recommended that board appointments should normally be for terms of three years to promote new ideas and perspectives.⁴⁹⁵ However, appointment terms may be extended,

instrument (section 14(1) of the Defence Housing Australia Act). The Australian Postal Corporation Act gives the responsibility to appoint the board to the Governor-General on the nomination of the Minister who must consult with the Chairperson or representatives of industrial organisations before nominating a person for appointment as a director (section 73 of the Australian Postal Corporation Act).

⁴⁹⁰ According to the *GBE Guidelines*, diversity includes, but is not limited to, gender, age, ethnicity and cultural background (para 2.8 of the *GBE Guidelines*).

⁴⁹¹ Para 2.8 of the *GBE Guidelines*. See also Uhrig J *Review of the Corporate Governance of Statutory Authorities and Office Holders* (2003) 96.

⁴⁹² Para 2.8 of *GBE Guidelines*. The ASX diversity guidelines actually require companies to disclose the number of women on staff, in senior management and on the board (DU Plessis JJ, Saenger I and Foster R "Board Diversity or Gender Diversity? Perspectives from Europe, Australia and South Africa" (2012) 207-249.

⁴⁹³ However, this has to be done in consultation with the Shareholder Minister(s) (para 2.8 of the *GBE Guidelines*).

⁴⁹⁴ The GBPFAU is the coordinating agency which is responsible for providing, *inter alia*, strategic advice to the Minister on board appointments and the commercial performance of the Government's investment in entities like the Australian Postal Corporation, Australian Rail Track Corporation Limited and Airservices Australia (OECD *Board of Directors of State-Owned Enterprises: An Overview of National Practices* (2012) 33). The GBPFAU plays an informal role in the appointment process and makes recommendations to widen the pool from which the Minister may choose from (OECD *Comparative Report on Corporate Governance of State-Owned Enterprises* (OECD Publishing 2005) 90 available at <http://www.oecd.org/daf/ca/corporategovernanceofstate-ownedenterprises/34803211.pdf> (accessed on 14 July 2014).

⁴⁹⁵ See para 2.13 of the *GBE Guidelines* and section 14(2) of the Defence Housing Australia Act which limit the term of office to 3 years. In this regard, the non-executive directors' term of office should not normally exceed two terms (i.e. six years) and for the chairman three terms (i.e. nine years). However, some public entities limit the term of office to 5 years or less, for example the Australia Post (section 74 of the Australian Postal Corporation Act). The term of office is limited to allow for new board members who may bring unique and different experiences, attachments and new ideas for the growth of the entity as well as to maintain directors' independence which is likely to be compromised if they stay for too long.

spread over a period of time or varied in period to maintain board continuity.⁴⁹⁶ Similarly, reappointments after expiry of one's term may be considered on a case-by-case basis taking into account all relevant circumstances, including evidence of good performance, the continued need for specific skills or knowledge of an individual director, among other issues.⁴⁹⁷ It is also a requirement that individual board members should be able to devote sufficient time to the tasks assigned to them hence the number and nature of their directorships and other commitments should be taken into account before appointment.⁴⁹⁸ The Australian corporate governance structure therefore, discourages numerous directorships.

In addition to the above initiatives, Australia has undertaken important reforms to professionalise and empower public entities boards. To this end, they seek to limit political interference and increase the independence and competence of public entity boards through creating a policy that prohibits the appointment of public servants to boards of the entities, except in exceptional circumstances.⁴⁹⁹ This assertion is further confirmed by the new legislation being put in place by the country. For instance, the National Broadcasting Legislation Amendment Act 112 of 2012 formalises a merit-based and independent board appointment process. The Act, *inter alia*, places responsibility for assessing candidates in the hands of an Independent Nomination Panel established at arm's length from the Government. The Act also specifies that vacancies are to be widely advertised, establishes a set of core criteria (with additional criteria added if the minister so decides) and mandates a report from the panel to the minister, including a short-list of at least three recommended candidates.⁵⁰⁰

⁴⁹⁶ Ibid. See also Principle 2 of the ASX CGC Corporate Governance Principles and Recommendations (2014) and Uhrig J Review of the Corporate Governance of Statutory Authorities and Office Holders (2003) 101.

⁴⁹⁷ Para 213 of GBE Guidelines, Principle 2 of the ASX CGC Corporate Governance Principles and Recommendations (2014) and section 15 of the Defence Housing Australia Act. In terms of the ASX Listing Rules, directors must submit for re-election at the third annual general meeting following appointment, or after three years, whichever is longer (ASX Listing Rule 14.4).

⁴⁹⁸ Principle 2 of the ASX CGC Corporate Governance Principles and Recommendations (2014).

⁴⁹⁹ Para 2.7 of the GBE Guidelines. The Australian definition of independence excludes government or political board members (The World Bank Corporate Governance of State-Owned Enterprises: A Toolkit (2014) 168-169). The Uhrig Review discouraged representative board appointments, including the placement of public servants on boards, because they "can fail to produce independent and objective views" and are likely to be primarily concerned with the interests of those they represent, rather than the success of the entity they are responsible for governing (Uhrig J Review of the Corporate Governance of Statutory Authorities and Office Holders (2003) 97-98). See also OECD Comparative Report on Corporate Governance of State-Owned Enterprises (2005) 84-89.

⁵⁰⁰ Section 24 A-C and 43 of the National Broadcasting Legislation Amendment Act. If the provisions of this legislation were to become broader and strictly applied to all public entity boards, then Australia could be said to possess a comprehensive merit-based appointment process.

The Nomination Panel is not subject to direction by or on behalf of the Government and has the “privileges and immunities of the Crown of the Commonwealth”.⁵⁰¹ Similarly, the ASX CGC has recommended that directors should be nominated through the services of external consultants and the use of a “Nomination Committee”.⁵⁰²

Judging from the above, Australia and Zimbabwe’s board appointment processes share a number of common features and are aligned to internationally accepted corporate governance standards.⁵⁰³ For instance, the two countries provide for formal and transparent processes of selection and appointment of directors, the need to observe board diversity and to balance board expertise, approval of board appointments by the responsible Minister and limitation of directors’ term of office and number of directorships.⁵⁰⁴ However, Zimbabwe appears to be lagging behind Australia in so far as other initiatives to enhance transparency in the appointment of board members are concerned. First, Australia has developed structured and clearly skill-based nomination systems and specific eligibility guidelines which Zimbabwe has not yet done.

In the second instance, Australia’s new legislation provides for the creation of an Independent Nomination Panel to oversee the selection and appointment of board members of a public entity. Zimbabwe’s corporate governance instruments have not yet created such an institution although they advocate for transparency in the board appointment process.⁵⁰⁵ Thirdly, whilst Australia has advocated for no public servants appointment to the public entities boards, except in exceptional circumstances, Zimbabwe has provided for the exclusion of only the Permanent Secretary from board appointments living room for other ministry officials to be appointed as board members.⁵⁰⁶ Another area of difference is that in Zimbabwe boards are not approved by Cabinet, as in Australia, but by the President, following recommendations by the responsible Minister. More so, Zimbabwe’s enabling statutes do not provide for the need

⁵⁰¹ Sections 24 C-D of the National Broadcasting Legislation Amendment Act.

⁵⁰² Principle 2 of the ASX *CGC Corporate Governance Principles and Recommendations*.

⁵⁰³ The alignment is clear, for instance, if one considers Part VI and Annotations to Chapter VI of the OECD *Guidelines on Corporate Governance of State-owned Enterprises* and Part Two (VI) of the OECD *Principles of Corporate Governance*.

⁵⁰⁴ See Chapter 4, para 4.2.3 above for more details on Zimbabwe.

⁵⁰⁵ Ibid.

⁵⁰⁶ Ibid.

for the responsible Minister to consult the board or board chairman before nominating a person for appointment as a director as does Australia's statutes.⁵⁰⁷ Zimbabwe is also still to establish an organisation with a mandate similar to GBPFAU to assist it in enhancing transparency in the board selection process.

6.2.4 Composition of Board

Generally, Australia has adopted the universally accepted principle that the board of an entity should be appropriately composed if it is to effectively discharge its duties.⁵⁰⁸ The Acts establishing public entities require that boards of the entities should be properly balanced in terms of qualifications and experience.⁵⁰⁹ It is also a widely accepted principle that a board should be of a reasonable size to effectively carry out its obligations. Although the size of boards in Australia differs, the statutes creating public entities set limits for the size of the board. For example, the Defence Housing Australia Act and the Australian Postal Corporation Act limit the number of board members to nine including the chief executive officer.⁵¹⁰ The Corporation Act sets the minimum number of directors for public companies to at least three directors, two of which must ordinarily reside in Australia.⁵¹¹

The *GBE Guidelines* and *ASX CGC Corporate Governance Principles and Recommendations* recommend that the board should be large enough to comprise of directors possessing an appropriate range of perspectives, skills, expertise and diversity.⁵¹² In determining the size of the board, the responsible authorities should consider factors such as “the size, complexity and risk of the entity’s operations and the needs of the board, including

⁵⁰⁷ However, Zimbabwe acknowledges the importance of consulting relevant industrial organisations and related ministries before nominating a person for appointment as a director (see para 4.2.3 above).

⁵⁰⁸ Principle 2 of the *ASX CGC Corporate Governance Principles and Recommendations* and para 2.7 of the *GBE Guidelines*.

⁵⁰⁹ Section 73 of the Australian Postal Corporation Act and section 14 of the Defence Housing Australia Act.

⁵¹⁰ Section 12 and section 22 respectively.

⁵¹¹ See section 201A(2) of the Corporations Act.

⁵¹² Principle 2 of the *ASX CGC Corporate Governance Principles and Recommendations* (2014) and para 2.7 of the *GBE Guidelines*.

the number of board committees that may be required”.⁵¹³ Furthermore, the ASX CGC *Corporate Governance Principles and Recommendations* recommend that the majority of the board should be independent directors,⁵¹⁴ the chair should be an independent director and the roles of chairman and chief executive officer should not be exercised by the same individual to promote objectivity.⁵¹⁵ Similarly, the statutes constituting public entities provide for a board composed of a majority of non-executive directors with the chief executive officer being the only executive director.⁵¹⁶

Australia’s corporate governance framework requires that board appointment processes should observe government policy on promoting a governance culture that takes into account the need for gender equality in board structures.⁵¹⁷ The country enacted the Workplace Gender Equality Act 179 of 2012.⁵¹⁸ The main objectives of the Act are to, *inter alia*, promote and improve gender equality in employment and in the workplace through providing for full and equal participation of women in employment and in the workplace and elimination of discrimination on the basis of gender.⁵¹⁹ It has also established a Workplace Gender Equality Agency whose principal object is to ensure that the objectives of the Act are achieved.⁵²⁰ The Agency advises and assists employers to promote and improve gender equality in employment and in the workplace through issuing guidelines and undertaking

⁵¹³ Uhrig J *Review of the Corporate Governance of Statutory Authorities and Office Holders* (2003) 96 and paras 2.7 and 2.13 of the *GBE Guidelines*.

⁵¹⁴ An independent director is defined as being “a non-executive director, who is not a member of management and, who is free of any business or other relationship that could materially interfere with or could reasonably be perceived to materially interfere with the independent exercise of their judgement” (Principle 2 of the ASX CGC *Corporate Governance Principles and Recommendations* (2014) and para 2.4 of the *GBE Guidelines*).

⁵¹⁵ Para 2.7 of the *GBE Guidelines* and Principle 2 of the ASX CGC *Corporate Governance Principles and Recommendations* (2014).

⁵¹⁶ Section 12 of the Defence Housing Australia Act and section 22 of the Australian Postal Corporation Act.

⁵¹⁷ Para 2.8 of the *GBE Guidelines*. The ASX CGC actually recommends that an entity should develop a diversity policy which requires the board or a relevant board committee “to set measurable objectives for achieving gender diversity and to assess annually both the objectives and the entity’s progress in achieving them” (Principle 2 of the ASX CGC *Corporate Governance Principles and Recommendations* (2014)). In addition, the AICD offers professional and career development mentoring programs to “assist women in obtaining board positions after completion, and allow aspiring female directors to form contacts in the industry and acquire knowledge and insight into what is involved in working as a company director” (Kashyap M *Gender Diversity on Australian Boards (With Reference to Approaches in Europe and India)* 9 available at <http://www.law.unimelb.edu.au/files/dmfile/201343.pdf> (accessed on 19 March 2015)).

⁵¹⁸ The Act replaced the Equal Opportunity for Women in the Workplace Act 1999.

⁵¹⁹ Section 2A of the Workplace Gender Equality Act.

⁵²⁰ Part III of Workplace Gender Equality Act.

research and educational programs, among others.⁵²¹ Australia has also ratified a number of international agreements that seek to promote gender equality, for example, the United Nations *Convention on the Elimination of All Forms of Discrimination against Women, CEDAW 1979*.⁵²²

To further demonstrate its commitment to promote gender balance, Australia has created an office for the Minister for Status of Women that assists the Prime Minister for Women through working with “other Government Ministers to ensure that women’s issues and gender equality are taken into consideration in policy and program development and implementation”.⁵²³ An Office for Women has also been established by the federal government and each of the state governments to support the Minister’s role in promoting gender issues by advancing women’s interests and providing advice on the impact of government policies and programs for women.⁵²⁴

The standards set in Australia as regards board composition are similar to those provided for and recommended by the Zimbabwean corporate governance instruments.⁵²⁵ However, on the issue of gender equality, Australia has come up with more legislative instruments than Zimbabwe. A further difference is that the Australian Government has gone to the extent of

⁵²¹ The Workplace Gender Equality Agency (formerly known as the Equal Opportunity for Women in the Workplace Agency) was established in terms of section 8A of the Workplace Gender Equality Act 2012. The Agency can impose sanctions for noncompliance which include being labelled as non-compliant in a report to the Minister for the Status of Women and not being able to receive future Commonwealth grants or assistance (See Australian Government *The Workplace Gender Equality Agency* available at <http://www.wgea.gov.au/>) (accessed on 13 January 2015)).

⁵²² Australia actively participates in UN forums on gender equality, including the Commission on the Status of Women (CSW) and the Convention on the Elimination of Discrimination against Women (CEDAW) Committee. The Commission on the Status of Women (CSW) was established in 1946 by a UN Council Resolution with the main objective of promoting gender equality and women empowerment (See www.unwomen.org/en/csw for more details on the Commission on the Status of Women). To promote gender equality and women empowerment, in July 1983, Australia ratified the United Nations *Convention on the Elimination of All Forms of Discrimination against Women, CEDAW 1979* and in 2008 also became a party to the CEDAW Optional Protocol (Publication titled *United Nations Convention on the Elimination of All Forms of Discrimination against Women: (CEDAW) (2008)* produced by Australian Government Office for Women and the Human Rights Commission in 2008) available at <https://www.humanrights.gov.au/our-work/.../publications/women-s-human-rights-united-nations-convention-elimination> (accessed on 13 January 2015).

⁵²³ Broderick E *How to Promote Gender Equality in Laws and Policies in Australia?* (Paper presented at All China Women’s Federation (ACWF) Workshop held in Beijing, China in June 2014) available at <https://www.humanrights.gov.au/news/speeches/how-promote-gender-equality-laws-and-policies-australia> (accessed on 12 March 2015). See also Alston M *Breaking through Grass Ceiling* (Routledge 2014) 60-61.

⁵²⁴ Visit <https://www.dpmc.gov.au/office-women> for more information.

⁵²⁵ See Chapter 4, para 4.2.4 above. The two countries’ approach to the independence of boards is broadened in that it takes into consideration not only the independence of board members, but also the separation of the board chairman from the CEO. It is then the role of the board to select the CEO, although responsible Ministers are consulted as part of this process.

setting specific time-framed targets aimed at promoting gender equality, that is, 40% of Government board members should be women, 40% should be men and the remaining 20% of positions to be held by either women or men by 2015. Zimbabwe has not set such specific targets.

6.2.5 Remuneration of Directors

In Australia, director remuneration is regulated by the Corporations Act, the Acts establishing public entities, the *ASX Listing Rules* and the *ASX CGC Corporate Governance Principles and Recommendations*.⁵²⁶ In response to the corporate scandals,⁵²⁷ the CLERP 9 Act and the *ASX CGC Corporate Governance Principles and Recommendations* advocated for the need to clearly link remuneration to performance, enhance disclosure when reporting and increase shareholder participation in directors' and executive management's remuneration decisions.⁵²⁸ It is also a requirement that the level and composition of remuneration of directors should serve the long term interest of the company and be sufficient and reasonable to attract the right people.⁵²⁹ It is further recommended that the board should establish a remuneration committee⁵³⁰ whose mandate is to design a remuneration policy that, among other things, clearly distinguishes the structure of non-executive director remuneration from executive remuneration and enables the entity's sustainable development.⁵³¹

⁵²⁶ Principle 8 of the *ASX CGC Corporate Governance Principles and Recommendations* (2014).

⁵²⁷ Examples of some of the corporate scandals that took place in Australia include HIH Insurance, Harris Scarfe and One.Tel. The collapse of these big corporations demonstrates that weaknesses in governance practice in relation to internal control system, financial reporting quality, audit quality, management scrutiny, management communication with the board, and the executive pay-to-performance link can be catalysts to corporate collapse (Thomson D and Jain A "Corporate Governance Failure and Its Impact on National Australia Bank's Performance" (2006) 41-56).

⁵²⁸ Sections 202A and 674 of the Corporations Act, *ASX Listing Rule* 3.1, Principle 5 of the *ASX CGC Corporate Governance Principles and Recommendations* and para 2.14 of the *GBE Guidelines*.

⁵²⁹ Para 2.14 of the *GBE Guidelines* and Principle 8 of the *ASX CGC Corporate Governance Principles and Recommendations* (2014). The Corporations Act prescribes that the remuneration to be paid to directors of a company should be determined through a company resolution and should include directors' expenses for attending board or committee meetings (e.g. travelling and accommodation expenses) and other business related expenses (Section 202A of the Corporations Act).

⁵³⁰ The recommended committee should consist of a majority of independent directors, be chaired by an independent chair and have at least three members to discharge its mandate effectively. The ASX CGC further recommends that the board should provide information on the remuneration committee and how its functions are carried out including seeking independent external advice from remuneration consultants (Principle 8 of the *ASX CGC Corporate Governance Principles and Recommendations* (2014)). See also *ASX Listing Rule* 12.8.

⁵³¹ Principle 8 of the *ASX Corporate Governance Principles and Recommendations* (2014). See also section 300A of the Corporations Act which requires that the "directors' report for a financial year for a company must also include (in a

Furthermore, to “de-politicise the directors’ remuneration issue and to avoid conflicts of interest”, Australia has set up a specialised statutory authority, the Remuneration Tribunal,⁵³² whose responsibility is to determine public entities boards’ remuneration that is commensurate with their roles and responsibilities.⁵³³ The statutes constituting the public entities specifically provide that the remuneration of board members should be determined by the Remuneration Tribunal.⁵³⁴ In setting remuneration, the Remuneration Tribunal should take into account a number of factors, for example, “the workload and work value of the office, fees in the private sector, wage indices, non-cash benefits provided and other economic indices and rates set for other bodies”.⁵³⁵ The establishment of an independent body to set board remuneration brings in some objectivity and transparency in the process.

The other important matters concerning directors’ remuneration relate to shareholders’ approval of non-executive director remuneration, continuous disclosure and reporting in terms of the statutes, *ASX CGC Corporate Governance Principles and Recommendations*, *ASX Listing Rules* and *GBE Guidelines*.⁵³⁶ To further enhance transparency and accountability in director’ remuneration, the framework requires that there be adequate disclosure of the directors’ fees and benefits in the entity’s annual reports.⁵³⁷ As another

separate and clearly identified section of the report)” the remuneration of a member of the key management personnel for the company and that of directors.

⁵³² OECD *Corporate Governance of State-Owned Enterprises: A Survey of OECD Countries* (2005) 154. The Remuneration Tribunal is an independent statutory body established in terms of the Remuneration Tribunal Act 215 of 1973. The Tribunal was set up to determine the remuneration payable in respect of certain public offices, such as the judiciary, directors of boards and Principle Executive Officers of Commonwealth entities (Preamble and section 5 of the Remuneration Tribunal Act). See also OECD *Comparative Report on Corporate Governance of State-Owned Enterprises* (2005) 108-109.

⁵³³ Para 2.14 of the *GBE Guidelines*.

⁵³⁴ Section 76 of Australian Postal Corporation Act and section 17 of the Defence Housing Australia Act.

⁵³⁵ Para 2.14 of the *GBE Guidelines*.

⁵³⁶ Section 250R of the Corporations Act, Principle 5 of the *ASX CGC Corporate Governance Principles and Recommendations* (2014), *ASX Listing Rules* 3.1 and 4.10.3 and para 3.13 of the *GBE Guidelines*.

⁵³⁷ Each year, companies are required, under the Corporations Act (section 250R), to produce a “remuneration report” as part of their annual report. The Act specifies the information that needs to be provided in the report. Sanctions for breaches of Corporations Act provisions involve fines and, in some cases, imprisonment. In terms of para 3.13 of the *GBE Guidelines*, directors of a GBE are required to provide an annual report to the Shareholder Minister(s) in accordance with the requirements of the CAC Act and the Corporations Act. See also Principle 5 of the *ASX CGC Corporate Governance Principles and Recommendations* (2014) which provide for timely and balanced disclosure that complies with both the letter and the spirit of the continuous disclosure requirements in the Corporation Act and the *ASX Listing Rules*. Similarly the Australian Postal Corporation Act (section 44) provides for the production of an annual report in terms of section 9 of the CAC Act.

checking mechanism, the Corporations Act makes it a requirement for listed companies to submit a remuneration report to shareholders for a non-binding vote and to fully disclose directors' remuneration in the financial statements.⁵³⁸ A listed entity is therefore not permitted to increase the total amount of director fees payable without shareholder approval by ordinary resolution and non-executive director remuneration must be a fixed sum.⁵³⁹ However, for the majority of public entities, the remuneration paid to board members is determined by the Remuneration Tribunal, as indicated above.

It can be concluded that both Zimbabwe and Australia have put in place remuneration frameworks that comply with the recommendations of, *inter alia*, the OECD *Principles of Corporate Governance* and ICGN *Principles* which have guided corporate governance practices worldwide.⁵⁴⁰ Both countries have put in place systems that ensure that the remuneration for directors is sufficient and reasonable to attract competent people, takes into account the long term interests of the entity and is performance related.⁵⁴¹ They both require transparency in board remuneration hence the requirements that directors' remuneration should be adequately disclosed in the entity's annual reports, independently determined by a third party and subjected to shareholders' approval.⁵⁴² However, Australia has gone a step further than Zimbabwe in that it has set up an independent statutory body, the Remuneration Tribunal, to determine board remuneration for public entities yet, in Zimbabwe, the responsible Minister still determines board remuneration.⁵⁴³

⁵³⁸ The requirements for a remuneration report and a non-binding shareholder vote was introduced in 2004 as part of the CLERP 9 amendments (see section 250R of the Corporations Act). Shareholders have a non-binding or advisory vote on the annual report at the annual general meeting. They also have a binding vote on any increases to the total pool of non-executive director fees as well as on remuneration involving the issue of equity to directors. The main aim of the provision is to ensure that shareholders are provided with sufficient information about corporate performance to allow them to make informed decisions about the board's performance when setting remuneration for directors (Clarke T and Banson B *The SAGE Handbook of Corporate Governance* (SAGE 2012) 574-576).

⁵³⁹ ASX *Listing Rule* 10.17 and Principle 8 of the ASX CGC *Corporate Governance Principles and Recommendations* (2014).

⁵⁴⁰ Part Two (VI) of the OECD *Principles of Corporate Governance* and Principle 5 of the ICGN *Principles*. See Chapter 4, para 4.2.5 above for Zimbabwe's comparative position.

⁵⁴¹ See Chapter 4, para 4.2.5 above.

⁵⁴² *Ibid.*

⁵⁴³ It is not yet clear whether Zimbabwe's *Corporate Governance and Remuneration Policy Framework* will provide for an institution to carry out functions similar to Australia's Remuneration Tribunal.

6.2.6 Evaluation of Board Performance

In Australia, public entity board evaluation may not have been taken seriously in the past but it now viewed as “an essential tool to assist in achieving better board performance and effectiveness”.⁵⁴⁴ The Australian framework provides for regular evaluation of board performance as an on-going activity.⁵⁴⁵ To show the importance that has been attached to board evaluations, the country has legislated for it.⁵⁴⁶ The PGPA Act prescribes that the accountable authority (which includes the board) of a public entity “must measure and assess the performance of the entity in achieving its purposes”, in accordance with any requirements prescribed by the rules.⁵⁴⁷ In addition, the Auditor-General is required to examine and produce a report on the entity's annual performance statements, a copy of which should be given to the responsible Minister and subsequently tabled in each House of the Parliament as soon as practically possible.⁵⁴⁸

Board evaluations provide constructive feedback which should lead to a continuous improvement of boards’ and individual directors’ performance and capabilities.⁵⁴⁹ According to the framework, the evaluation should be conducted on the board, its committees and individual directors by the shareholding entities/ministers, the board itself (if possible through the nomination committee) or independent professional experts, preferably on an annual basis.⁵⁵⁰ The performance assessment should include, among others, a review of the level of director attendance at board meetings which attendance should be reported in the annual

⁵⁴⁴ CCG *Board Performance and Effectiveness: The State of Play on Board Evaluation in Corporate Australia and Abroad*, (Research Paper prepared by the Centre for Corporate Governance (CCG) in October 2010) 6 available at <http://www.uts.edu.au/research-and-teaching/our-research/centre-corporate-governance> (accessed on 13 January 2015).

⁵⁴⁵ Sections 37-40 of the PGPA Act, para 2.17 of the *GBE Guidelines* and Principle 2 of the *ASX CGC Corporate Governance Principles and Recommendations* (2014). The objective of board evaluations is to give the ownership entities confidence about the performance of appointed board members. It gives an opportunity and a formal means of assessing the board’s skills and evaluating the adequacy of the appointment system in enabling the board to effectively perform its duties (Section 3.6 of the *Public Sector Governance Strengthening Performance through Good Governance* (ANAO *Better Practice Guides* 2014) and Uhrig J *Review of the Corporate Governance of Statutory Authorities and Office Holders* (2003) 103).

⁵⁴⁶ Sections 37-40 of the PGPA Act.

⁵⁴⁷ *Ibid.*

⁵⁴⁸ *Ibid.*

⁵⁴⁹ *Ibid.* See also Principle 1 of the *ASX CGC Corporate Governance Principles and Recommendations*.

⁵⁵⁰ Principle 1 of the *ASX CGC Corporate Governance Principles and Recommendations*. See also Uhrig J *Review of the Corporate Governance of Statutory Authorities and Office Holders* (2003) 103.

report.⁵⁵¹ Also, it is a requirement that the performance of the board, its committees and individual directors should be reviewed against appropriate set measures and the entities should disclose the process for evaluating the performance of the board.⁵⁵²

To enable the shareholder to assess whether the board has effectively discharged its duties, the CAC Act and the PGPA Act require directors of a public entity to keep the responsible Minister or Minister of Finance (where necessary) informed of the operations of the entity and its subsidiaries.⁵⁵³ The public entities are required to prepare a corporate plan⁵⁵⁴ at least once a year and submit a number of reporting documents⁵⁵⁵ to the responsible Minister by set deadlines for presentation to Parliament.⁵⁵⁶ Furthermore, within specified dates, the board is required to submit, to the shareholder Minister, quarterly progress reports which include, *inter alia*, financial statements, an analysis of the GBE's quarterly and year-to-date

⁵⁵¹ Para 2.17 of the *GBE Guidelines* and Principle 1 of the *ASX CGC Corporate Governance Principles and Recommendations*.

⁵⁵² Principle 1 of the *ASX CGC Corporate Governance Principles and Recommendations* and para 2.17 of the *GBE Guidelines*. In this regard, a *Director's Checklist* is provided to assist directors to assess the strength of their current governance framework (Appendix A, *Public Sector Corporate Governance: A Director's Checklist*, in "*Principles and Better Practices, Corporate Governance on Commonwealth Authorities and Companies*" (Discussion Paper by Australia National Audit Office, 2000) 38 available at <http://www.anao.gov.au> (accessed on 25 August 2014). The ASX CGC further recommends that when reporting the entity should include "whether or not a performance evaluation for the board, its committees and directors has taken place in the reporting period and whether it was in accordance with the process disclosed".

⁵⁵³ Sections 16 and 41 of the CAC Act, and sections 19 and 91 of the PGPA Act, para 3.3 of the *GBE Guidelines* and sections 38-40 of the Australian Postal Corporation Act. See also para 3.19 of the *GBE Guidelines* which provides that GBEs should follow a disclosure principle which is similar to the continuous disclosure requirements of the *ASX Listing Rules*. Notwithstanding, there is nothing in the CAC Act which gives either the Responsible Minister(s), Finance Minister or other relevant authority the power to direct the actual operations of the particular public entity but such power may be provided in the entity's enabling legislation, memorandum and articles of association or simply by virtue of the fact that the government is the majority shareholders.

⁵⁵⁴ Corporate plans are supposed to be prepared as provided for in the CAC Act and CAC Act Regulations. The Corporate plan covers, *inter alia*, the objectives and broad mandate of the GBE, the business strategies of the GBE, financial targets and projections for the GBE, non-financial performance measures for the GBE, analysis of factors likely to affect achievement of targets or create significant financial risk for the GBE and review of performance against previous corporate plans and targets. The role of corporate plans for public entities is to clarify the aims and objectives of the organisation at the broad strategic level and outline the actions and resources required to achieve those objectives. The plans also form part of the accountability process by setting out key outputs against which performance can be measured. (Sections 17 & 42 of the CAC Act and regulation 6AAA of the CAC Act Regulations, sections 35 and 95 of the PGPA Act, para 3.1-3.3 of the *GBE Guidelines* and sections 38-40 of the Australian Postal Corporation Act).

⁵⁵⁵ The other reporting documents include the annual report (sections 9 & 36 of the CAC Act and sections 46 & 97 of the PGPA Act), Statement of Governance (Clause 15 of the CAC Act Orders), Supplementary Interim Reports (section 13 & 38 of the CAC Act) and Performance Audit (section 40 of the PGPA Act and sections 16 and 17 of the Auditor-General Act (No. of 1997)). The annual report is supposed to be prepared in compliance with the provisions of the CAC Act, the PGPA Act, the Corporations Act, the authority's enabling legislation and any other applicable legislation and guidance issued by the Finance Minister or portfolio (Para 2.2 of the *GBE Guidelines*). Boards are supposed to implement sound governance frameworks to support their role and responsibilities, and report on their implementation in the annual report (Para 2.13 of the *GBE Guidelines*).

⁵⁵⁶ Sections 9, 11, 16, 17, 36, 41, and 42 of the CAC Act and sections 37-39 of the PGPA Act.

performance against corporate plan forecasts for the corresponding period and explanations for deviations from corporate plan forecasts.⁵⁵⁷ The Minister then uses the various reports to evaluate whether the board has effectively discharged its duties as per the performance targets set in the corporate plan and to give appropriate guidance.⁵⁵⁸

In addition to the above, the GBPFAU assists in evaluating board performance and the performance of the public entities in general. It provides oversight, management and strategic advice to the Minister for Finance and Administration on the operations and commercial performance of the GBEs,⁵⁵⁹ seeks to ensure that GBEs operate efficiently and effectively and adhere to best practices in governance outlined in the *GBE Guidelines*, CAC Act and PGPA Act, strategically influences “the direction of the entity via the Corporate Planning process”, develops, maintains and monitors “Key Performance Indicators (KPIs) (including benchmarking with similar public or private sector organisations)” and makes sure that there is “a sound and robust governance framework in place by initiating change and contributing to policy development”.⁵⁶⁰ The GBPFAU also greatly assists in achieving transparency and accountability in public entity performance.⁵⁶¹

Public entities are further required to conduct annual strategic meetings, to which the responsible Ministers or their delegates are invited to attend.⁵⁶² The main focus of the meetings is to discuss both the board’s and the entity’s performance over the past year and to develop a new strategy for the future. Where, after the performance assessment, the Minister discovers that certain issues need to be addressed, he writes to the GBE requesting the board to attend to the matters raised.⁵⁶³ In some situations, the Minister is empowered to dismiss

⁵⁵⁷ Paras 3.10 -3.12 of the *GBE Guidelines*. However, it is worth noting that should the board become aware of any information that may have a material effect on the entity’s value and/or performance, it should not wait for scheduled reports but must immediately provide that information to the Shareholder Minister (Para 3.19 of the *GBE Guidelines*).

⁵⁵⁸ The board is expected to provide shareholder Ministers with an annual review of the board’s performance to enable him to conduct his assessment (sections 37-39 of the PGPA Act, Para 3.18 of the *GBE Guidelines* and section 40 of the Australian Postal Corporation Act).

⁵⁵⁹ The GBPFAU conducts the performance of GBEs by “analysing their operations and environment, engaging in discussions with them and consulting with their Stakeholders” (Witherell WH *Corporate Governance of State-Owned Enterprises: A Survey of OECD Countries* (2005) 44).

⁵⁶⁰ Dewan SM *Corporate Governance in Public Sector Enterprises* (2006) 150-151.

⁵⁶¹ Ibid.

⁵⁶² Para 3.26 of the *GBE Guidelines*.

⁵⁶³ Para 3.18 of the *GBE Guidelines*.

and/or replace the board prior to the completion of their term of appointment.⁵⁶⁴ As an example, the Australian Postal Corporations Act empowers the Governor-General to terminate the appointment of the board or a particular director if the Minister proposes so.⁵⁶⁵ The basis of the termination may be the Minister's opinion that the performance of the board or a particular director has been unsatisfactory for a significant period of time or that they have failed to comply with an obligation under the Act or a relevant provision of any other statute.⁵⁶⁶

Australia and Zimbabwe have put in place similar corporate governance frameworks with regard to board evaluation.⁵⁶⁷ However, Australia appears to have performed better than Zimbabwe by trying to promote the evaluation of public entity boards' performance in a standardised manner in the form of a 'Director's Checklist'. Australia has also legislated for board evaluations to enhance compliance. Secondly, unlike Zimbabwe, Australia has set up the Government Business and Private Financing Advice Unit (GBPFAU) to assist the ministers in conducting performance evaluations and to minimise the interference on the operations of public entities by the responsible ministers. The other difference is that, whilst Zimbabwe has come up with performance agreements which might be equated to the Australian corporate plans, the Zimbabwean instruments do not give as much detail as the Australian instruments. The framework for Australia adequately guides the board, Shareholder Minister or any independent person such that it is easier to objectively evaluate the performance of the board.⁵⁶⁸ A uniform board evaluation standard is proposed in Australia whereas in Zimbabwe public entities may adopt different performance measurement tools.

⁵⁶⁴ Section 79 of the Australian Postal Corporations Act, section 21 of the Defence Housing Australia Act and para 2.15 of the *GBE Guidelines*. It is important to note that directors may also leave through resignation prior to the expiry of their term of office as provided in section 14(2) of the Defence Housing Australia Act and section 78 of the Postal Corporations Act.

⁵⁶⁵ Section 79 of the Australian Postal Corporations Act.

⁵⁶⁶ Ibid. See also section 21 of the Defence Housing Australia Act and Para 2.15 of the *GBE Guidelines*.

⁵⁶⁷ See Chapter 4, para 4.2.6 above for Zimbabwe's comparative position.

⁵⁶⁸ For instance, the *GBE Guidelines* clearly spell out how performance targets are to be set, areas to be covered, reports to be submitted within set timeframes and how the evaluation should be conducted whereas the Zimbabwe's *CGF* just indicates that the board shall be evaluated against agreed performance indicators and targets in accordance with the guidelines developed by the responsible Minister.

6.2.7 Enforcement Mechanisms

Australia has largely relied on a self-regulation environment in its approach to corporate governance.⁵⁶⁹ However, following the continued collapse of corporate entities, Australia has established a number of regulatory instruments and bodies as a way of enhancing the effectiveness of boards of public entities, promoting good corporate governance in the entities and enforcing the mechanisms put in place. The Corporation Act, PGPA Act, the legislation establishing public entities and other relevant Acts provide measures to enforce compliance with the provisions of the Acts and to encourage boards to effectively undertake their duties.⁵⁷⁰ A number of these statutory provisions have the potential to strengthen enforcement and accountability under Australian corporate law, partly due to the fact that the director's "liability for breach of the duty of care and insolvent trading has become more stringent".⁵⁷¹ In particular circumstances, directors may also incur criminal liability if they breach some of the statutory provisions.⁵⁷² Private persons, especially members of the company, disadvantaged by a breach of directors' fiduciary duties may pursue private law remedies to claim their rights.

Australia's regulatory system relies on a public enforcement model.⁵⁷³ Some commentators have argued that the most important enforcement development has been the use of the civil

⁵⁶⁹ The CLERP continued to emphasise the non-prescriptive approach to corporate governance (Corporate Law Economic Reform Program (Audit Reform & Corporate Disclosure) Bill of 4 December 2003). See also Hill J "Evolving 'Rules of the Game' in Corporate Governance Reform" (2007) 1 (2) *The GovNet eJournal* 112-139 available at <https://www104.griffith.edu.au/index.php/govnet/article/download/93/69>. (accessed on 27 February 2015).

⁵⁷⁰ Examples are sections 180-184 and 1317E of the Corporation Act, sections 26-27J and Schedule 2 of the CAC Act, section 79 of the Australian Postal Communication Act which provide for penalties to be imposed on directors for failing to perform their duties as prescribed in law. As an example, contravention of certain provisions of the CAC Act subjects a director to 2,000 penalty units or imprisonment for 5 years, or both.

⁵⁷¹ Hill JG *The Architecture of Corporate Governance in Australia - Corporate Governance - National Report: Australia* (2010) 112-139. The *Centro* decision provides valuable guidance on the corporate accountability of directors under the Corporations Act. In this matter, ASIC alleged that the directors of companies within the Centro Group had contravened various provisions (e.g. sections 180(1), 601FD(3) and 344) of the Corporations Act relating to directors' duties. In passing judgement, Justice Middleton found that the directors had breached their duties to act with reasonable care and diligence and to take all reasonable steps to comply with the financial reporting obligations in Part 2M.3 of the Act. The ruling was based on the principles that; directors are required to have the financial literacy to understand basic accounting standards; directors cannot rely on management for matters which the Act dictates are specifically within the responsibility of the directors, each director must apply an enquiring mind to the review of the financial statements and directors cannot rely on "information overload" as a defence (*ASIC v Healey & Ors* (2011) FCA 717).

⁵⁷² Section 180(1) of the Corporations Act 2001. In *Permanent Building Society (in liq) v McGee* (1993) 11 ACSR 260 at 287 it was held that it was not enough for a director to merely disclose his interest and abstain from voting. He had an obligation to take positive steps to protect the interests of Permanent Building Society. It was also held that the duty of care and skill should "not be equated with or termed a 'fiduciary' duty".

⁵⁷³ Under the public enforcement model, the Australian security and Investments Commission (ASIC) operates as the enforcement mechanism for breach of directors' duties under the Australian civil penalty regime (Hill JG *Evolving*

penalty regime by the Australian Securities & Investments Commission (ASIC)⁵⁷⁴ and the provisions of the Corporations Act.⁵⁷⁵ ASIC monitors and enforces the relevant provisions of Corporations law, sets standards, issues best practice guides and, together with ASX, has a key role in disseminating information to the market.⁵⁷⁶ The ASIC may seek criminal sanctions, civil or administrative action in terms of the relevant Acts and codes against defaulting companies.⁵⁷⁷ The ASIC, in situations of breach of any of the legislative provisions, can also enforce civil penalty provisions and may seek a disqualification order, a pecuniary penalty order⁵⁷⁸ or a compensation order.⁵⁷⁹ Recently, the courts have been awarding considerable damages against directors for breach of duties. Examples are the award of damages close to \$97 million against the Chairman of the National Safety Council in *Commercial Bank of Australia v Friedrich*,⁵⁸⁰ the award of \$81 million against the Chief Executive Officer of State Bank of South Australia in *State Bank of South Australia v Marcus*

Directors' Duties in the Common Law World (2013) in Paolini A *Research Handbook on Directors' Duties* (Edward Elgar Publishing: Cheltenham 2014) 10-14).

⁵⁷⁴ The Australian security and Investments Commission (ASIC) operates as the enforcement mechanism for breach of directors' duties under the Australian civil penalty regime. As a result of the extensive powers it possesses, ASIC has in recent years instituted several litigation proceedings alleging breach of directors' duties.⁵⁷⁴ Examples of cases where ASIC instituted legal proceedings for breach of director's duty to exercise due care, skill and diligence are *Australian Securities and Investments Commission v Healey*, *ASIC v Rich* and *ASIC v Macdonald*.

⁵⁷⁵ Contravention of a significant number of the provisions under the Corporations Act, together with the directors' statutory duties (sections 181-183) and the insolvent trading provisions may result in liability under the civil penalty provisions of the Corporations Act (Part 9.4B of the Corporations Act). See also Welsh M "Civil Penalties and Responsive Regulation: The Gap between Theory and Practice" (2009) 33 *Melbourne University Law Review* 908-933 available at http://www.law.unimelb.edu.au/files/dmfile/33_3_9.pdf (accessed on 9 January 2015).

⁵⁷⁶ Sections 11 and 12A of the ASIC Act. The ASX works closely with the ASIC to identify matters that may require investigation. It is empowered to discipline defaulters through a warning letter, requesting for explanations, suspending trading rights (for serious breaches of trading rules and regulations), imposing a fine and recommending prosecution by ASIC (for serious cases) (Uhrig J *Review of the Corporate Governance of Statutory Authorities and Office Holders* (2003) 89-91).

⁵⁷⁷ Sections 49 and 50 of the Australian Securities and Investments Commission Act. If ASIC believes that an offence may have been committed, it can commence prosecution itself or refer the matter to the Commonwealth Director of Public Prosecutions (DPP) (Welsh M "Civil Penalties and Responsive Regulation: The Gap between Theory and Practice" (2009) 908-933 and Crowley LK *The Basics of Commonwealth Crime* (Paper Presented to the News South Wales Bar Association on 13 March 2007) 17-18 available at http://www.criminalcle.net.au/attachments/Basics_of_Commonwealth_Crime.pdf (accessed on 19 April 2015).

⁵⁷⁸ The ASIC has the power to seek orders for pecuniary penalties of up to A\$200,000 for an individual and A\$1 million for corporations (section 1311 and schedule 3 of the Corporations Act). See also Austin RP, Ford HAJ and Ramsay IM *Company Directors: Principles of Law and Corporate Governance* (Lexisnexis Butterworths, Sydney 2004) 271-276.

⁵⁷⁹ A company may bring an action against its directors under the civil penalty provisions, but is restricted to a compensation order (Du Plessis JJ, Hargovan A and Bagaric M *Principles of Contemporary Corporate Governance* (2010) 261).

⁵⁸⁰ See para 6.2.2 above.

Clark⁵⁸¹ and the imposition of civil penalty fines of A\$30,000 and 5 year disqualification orders on the non-executive directors in *ASIC v Macdonald (No 11)*.⁵⁸²

The power of shareholders to remove directors from office is also an important governance device under Australian corporate law.⁵⁸³ The Corporations Act empowers shareholders of a public company to remove directors from office at any time, with or without cause.⁵⁸⁴ The legislation establishing public entities also provide for the removal of directors for misconduct and poor performance. As an example, the Australian Postal Communication Act provides for the removal of the board where the Minister is of the opinion that the performance of the board or a particular director has been unsatisfactory for a significant period of time.⁵⁸⁵ Similarly, the *GBE Guidelines* provide for the removal of a non-performing board or director.⁵⁸⁶ To achieve the same objective, the CAC Act and PGPA Act provide for penalties for failure to comply with the requirements in the Acts.⁵⁸⁷

However, Australia has also tried to protect directors from criminal liability where they would have made decisions in good faith but the decisions turn out not to be the best for the company.⁵⁸⁸ To achieve this objective, the Federal Government introduced the Personal Liability for Corporate Fault Reform Act 180 of 2012 which is intended to address the

⁵⁸¹ *State Bank of South Australia v Marcus Clark* (1996) 19 ACSR 606 at 646. See also *ASIC v Adler* (2002) 41 ACSR 72 where ASIC successfully took legal action against the directors and officers of HIH. The directors were found guilty of violating the statutory duty of care and diligence, duty to act in good faith and for proper purposes and duty not to abuse of position in terms of sections 180-182 of the Corporations act. The court imposed all forms of civil penalty liability, including the making of disqualification orders in accordance with section 206B of the Corporations Act.

⁵⁸² *ASIC v Macdonald (No 11)* (2009) NSWSC 287.

⁵⁸³ Du Plessis J and McConvill J “Removal of Company Directors in A Climate of Corporate Collapses” (2003) 31(4) *Australian Business Law Review* 251-264.

⁵⁸⁴ Section 203D(1) of the Corporations Act. However, the Act prohibits the removal of a director by the board in the case of public companies since this has the potential to compromise director independence and corporate governance principles. See *Scottish & Colonial Ltd v Australian Power & Gas Co Ltd & Ors* (2007) NSWSC 1266 where the court found that director removal mechanisms contained in section 203D of the Corporations Act must be strictly adhered to notwithstanding what is written in the company’s constitution. See also *Allied Mining & Processing & Anor v Boldbow Pty Ltd* (2002) WASC 195.

⁵⁸⁵ Section 79 of the Australian Postal Communication Act. Similarly, section 21 of the Defence Housing Australia Act provides for the termination of a director’s appointment for failing to comply with the provisions of the CAC Act without reasonable excuse and for being absent from 3 consecutive board meetings without prior approval from relevant authority.

⁵⁸⁶ Para 3.15 of the *GBE Guidelines* and section 203D of the Corporations Act.

⁵⁸⁷ Sections 9, 17, 36, and 42 of the CAC Act and sections 67-70 of the PGPA Act.

⁵⁸⁸ The provision applies only in relation to a positive decision or business judgment of the board. The Corporations Act defines “business judgment” to mean any decision to take or not take action in respect of a matter relevant to the business operations of the corporation (section 180(3) Corporations Act).

differing standards of director's fault and responsibility that exist under various statutes, in an attempt to promote greater certainty for directors by reducing the liability of directors in circumstances where the corporation is at fault or where the director would have diligently made a decision.⁵⁸⁹

As another compliance and performance enforcement measure, it is a requirement that public entities' financial statements should be audited annually and the audited financial statements should be published to enable the public to assess the entity's performance.⁵⁹⁰ In most public entity cases, the audits are conducted by the Auditor- General in terms of the Auditors General Act 1997,⁵⁹¹ Corporations Act and internationally accepted audit standards.⁵⁹² Australia has also established a number of bodies to enforce compliance with the corporate governance provisions, for example, Australian Crime Commission (ACC),⁵⁹³ ASX,⁵⁹⁴ Attorney General's Department⁵⁹⁵ and ANAO.⁵⁹⁶ Further to these regulatory bodies, certain

⁵⁸⁹ A director is deemed to have complied with the requirements of the duty of care and diligence if the director has made a business judgment in good faith for a proper purpose, does not have a conflicting interest, has adequately informed himself, and rationally believes that the decision is in the best interests of the corporation (section 180(2) of the Corporations Act). See also *ASIC v Rich* (2009) NSWSC 1229.

⁵⁹⁰ Sections 307-310 of the Corporations Act, sections 43, 97-99 of the PGPA Act, paras 3.15-3.16 of the *GBE Guidelines*.

⁵⁹¹ Act 151 of 1997. This Act establishes an office of the Auditor General and sets its mandate. This Act also establishes the ANAO and provides for the appointment of an Independent Auditor to audit the Office.

⁵⁹² Paras 3-13-3.16 of the *GBE Guidelines*. Corporate collapses, such as Enron in the US and HIH and One.Tel in Australia, raised concerns about the role of auditors. In response to these concerns, the CLERP 9 Act 2004 introduced a range of reforms relating to the audit process in Australia (Ch 2M of the Corporations Act). Principle 4 of the ASX corporate governance principles also requires listed companies to have in place a structure of review and authorisation to ensure truthful and factual presentation of the company's financial position. According to Principle 4, the structure should include review of the accounts by an audit committee and a process to ensure that the company's external auditors are independent and competent.

⁵⁹³ The Australian Crime Commission (ACC) is a statutory body established in terms of the Australian Crime Commission Act (ACC Act 2002 (No. 41 of 1984 as amended)) to improve the integrity of the public sector, combat corruption and investigate allegations of misconduct against public officers, among others. It took over from the Anti-Corruption Commission and has jurisdiction over all government departments, instrumentalities and boards as well as universities and local governments. Visit <https://www.crimecommission.gov.au/> for more information.

⁵⁹⁴ The ASX is responsible for supervision of trading activity and market participants, as well as investigation and enforcement of ASX *Listing Rules* under the Corporations Act. It imposes a wide range of disclosure requirements and it can take disciplinary action against a company that violates its *Listing Rules* (sections 2-4 of the *ASX Enforcement Rulebook* available at <http://www.asx.com.au/regulation/rules/asx-enforcement-rulebook.htm> (accessed on 15 December 2014)). Following alleged conflicts of interest in relation to ASX's market supervisory role, in 2010, the Australian government transferred the ASX's detection powers in relation to market abuse to ASIC (Hill JG *The Architecture of Corporate Governance in Australia - Corporate Governance - National Report: Australia* (2010) 55-56).

⁵⁹⁵ The Attorney General's Department is a department of the Government of Australia whose responsibility is to provide essential legal and other related expertise to the government in "the maintenance and improvement of Australia's system of law and justice". This department also plays an "active role in combating corruption through developing domestic policy on anti-corruption and engagement in a range of international anti-corruption forums". Visit <http://www.ag.gov.au/> for more information.

aspects of the governance of CAC bodies are also subject to supervision and investigation by organisations such as the Commonwealth Ombudsman,⁵⁹⁷ GBPFAU,⁵⁹⁸ and Administrative Appeals Tribunal,⁵⁹⁹ among others.⁶⁰⁰ Another body that has actively participated in the promotion of corporate governance is the Australian Institute of Company Directors (AICD). Although AICD does not have powers to enforce compliance, it has spearheaded developments and encouraged compliance with good corporate governance standards through research, disseminating information and conducting training sessions for directors and other stakeholders.

All the above efforts to enforce compliance can only be effective if adequately supported by a reliable and efficient judicial system. Australia's jurisprudence is based on the common law system developed in the United Kingdom.⁶⁰¹ Its judicial system is complicated⁶⁰² and comprises a variety of courts and tribunals at both the federal and state and territory levels.⁶⁰³ The courts can be divided into superior and inferior courts. Superior Courts consist of the High Court⁶⁰⁴ and Supreme Court of each of the States and Territories⁶⁰⁵ and are the highest

⁵⁹⁶ One of ANAO's functions is to encourage corporate governance through promoting public accountability, auditing annual financial statements and conducting performance audits in public entities (section 39 of the Auditor-General Act).

⁵⁹⁷ The Ombudsman is an independent and impartial institution whose objective is to improve public administration through investigating and coming up with suggestions or recommendations to rectify complaints about the administrative actions and decisions of Australian Government agencies. See www.australia.gov.au/directories/australia/ombudsman for more details.

⁵⁹⁸ The Unit oversees and ensures that Government Business Enterprises operate efficiently and adhere to best practices in governance principles outlined in the Government Business Enterprises Governance Arrangements and CAC Act.

⁵⁹⁹ The Administrative Appeals Tribunal (AAT) is an independent body established in terms of the Administrative Appeals Tribunal Act 1975. It is responsible for reviewing a broad range of administrative decisions made by Australian Government ministers and officials, authorities and other tribunals. See <http://www.australia.gov.au/directories/australia/aat> for more details.

⁶⁰⁰ ANAO *Corporate Governance in Commonwealth Authorities and Companies* (Discussion Paper prepared by Australian National Audit Office 1999) 7 available at www.anao.gov.au (accessed on 3 February 2015).

⁶⁰¹ Akpet KO "The Australian Legal System: The Legal Profession and the Judiciary" (2011) 71-94.

⁶⁰² Given the complexity of Australia's judicial system this research has not attempted to go into greater detail about the system as it is beyond the scope of the research.

⁶⁰³ The country has eight legal systems; one federal system and eight state and territory legal systems. Each of the nine systems has its own parliament, courts and tribunals (Akpet KO "The Australian Legal System: The Legal Profession and the Judiciary" (2011) 71-94). See also Opeskin B "The State of the Judicature: A Statistical Profile of Australian Courts and Judges" (2013) 35 *Sydney Law Review* 489-517 available at http://sydney.edu.au/law/slr/slr_35/slr35_3/Opeskin.pdf (accessed on 25 May 2015).

⁶⁰⁴ The High Court of the Commonwealth of Australia was established by the Constitution of Australia. It is the highest court in Australia being at the "top of both the Commonwealth court and tribunal system, and the court and tribunal systems of all states and territories". It is the final court of appeal (only on matters of law) and deals with matters relating to the Constitution (Visit www.hcourt.gov.au/ for more information).

courts in their section of the Australia court hierarchy.⁶⁰⁶ Examples of superior courts are the High Court of Australia, Family Court of Australia and Federal Court of Australia. Inferior courts have restricted powers and operate within the mandate granted to them by the specific legislation.⁶⁰⁷ Examples of inferior courts are the Magistrates Court and the District Courts. The Australian judiciary is independent of the other branches of government to the greatest extent possible.⁶⁰⁸ The main purpose for this is to ensure that the judiciary considers matters in a fair, transparent, impartial and equal manner.⁶⁰⁹

The above analysis indicates that Zimbabwe and Australia have acknowledged that voluntary compliance has its limitations, hence they put other interventions in place to create the climate necessary to ensure adherence to the corporate governance guidelines.⁶¹⁰ The interventions are in the form of statutes and regulatory/enforcement bodies like the Stock Exchange and Anti-Corruption bodies.⁶¹¹ Both countries have tried to develop their judicial systems so that they are in a position to effectively enforce compliance where necessary. In contrast to Zimbabwe where the primary means of enforcing breach of directors' duties is through private litigation, Australia's regulatory system relies on a public enforcement model.⁶¹² Also, Australia has more regulatory and enforcement bodies and has come up with more statutory instruments to enforce compliance than Zimbabwe.⁶¹³ The Australian courts, unlike Zimbabwe's, appear to have been more aggressive in trying to compel directors to

⁶⁰⁵ The Supreme Court of each of the States and Territories was established by the "constitution of the individual state or territory or the self-government act for the Australian Capital Territory or Northern Territory" (Symth R "The Business of the Australian State Supreme Courts over the Course of the 20th Century" (2010) 7(1) *Journal of Empirical Legal Studies* 141-163 available at http://www.researchgate.net/profile/Russell_Smyth/publication/229978529 (accessed at 27 April 2015)).

⁶⁰⁶ Akpet KO "The Australian Legal System: The Legal Profession and the Judiciary" (2011) 71-94.

⁶⁰⁷ Ibid.

⁶⁰⁸ Greenwood E "An Independent Judiciary?" (2012) VIII *Cross-sections, the Bruce Hall Academic Journal* 29-40 available at <http://eview.anu.edu.au/cross-sections/vol8/pdf/ch03.pdf> (accessed on 12 May 2015).

⁶⁰⁹ Ibid.

⁶¹⁰ See Chapter 4, para 4.2.7 with regard to Zimbabwe's enforcement framework.

⁶¹¹ The Anti-Corruption bodies are the Zimbabwe Anti-Corruption Commission and Australian Crime Commission.

⁶¹² Hill JG *Evolving Directors' Duties in the Common Law World* (2013) in Paolini A *Research Handbook on Directors' Duties* (2014) 10-14.

⁶¹³ See para 6.2.7 above.

undertake their duties carefully and diligently.⁶¹⁴ Nevertheless, considering the major differences in the two countries' levels of economic and social developments, Zimbabwe should be applauded for the significant strides it has made to improve the effectiveness of boards of its public entities.

6.3 PRELIMINARY CONCLUSIONS

The analysis in this chapter showed that Australian corporate law is of comparative value to Zimbabwean company law, because both legal systems are based on the English common law. Also, both countries' frameworks consist of mandatory and self-regulatory attributes⁶¹⁵ which make almost similar provisions.⁶¹⁶ Both countries have modelled their corporate governance frameworks around internationally recognised corporate governance instruments like OECD *Principles of Corporate Governance*, CAGG *Guidelines* and ICGN *Guidelines*. The roles of bodies like the Institute of Directors, Stock Exchange Authorities and Auditor General in the promotion of good corporate governance are similar features in the two countries.

However, differences occur in the scale at which the two countries have developed their corporate governance frameworks with Australia appearing to have started seriously focusing on promoting good corporate governance practices earlier than Zimbabwe.⁶¹⁷ Unlike Zimbabwe which recently adopted a *National Code*, Australia has done much more in that it has undertaken extensive programs like the *Bosch Report* and *Uhrig Review*, adopted the *ASX CGC Corporate Governance Principles and Recommendations*, developed guidelines like the *GBE Guidelines* and *ANAO Better Practice Guides* and produced a corporate governance

⁶¹⁴ This is supported by the numerous recent cases the courts have handled (see paras 6.2.2 and 6.2.7 above).

⁶¹⁵ As indicated in Chapter 4, para 4.2 above, the legal and regulatory framework of corporate governance in Zimbabwe is determined by various statutes, *ZSE Listings Requirements*, common law and a self-regulation framework provided for in codes of corporate governance.

⁶¹⁶ Examples are the *CGF* and the *GBE Guidelines* which make similar provisions to promote good corporate governance practices in public entities. The two frameworks have borrowed significantly from the *OECD Guidelines on Corporate Governance of State Owned Enterprises*. The similarity of the frameworks is confirmed in the discussions on specific issues above (paras 6.2.1-6.2.7).

⁶¹⁷ Zimbabwe should be commended for recently adopting its first *National Code* and for the initiatives undertaken in promoting good corporate governance in its public entities given its level of economic and social development.

specific Act (PGPA Act)⁶¹⁸ relating to public entities, among other initiatives. In addition, Australia has more institutions which seek to promote good corporate governance in the country's entities, for example, the Australian Investment Managers' Association and Financial Services Association.

Zimbabwe has also more to learn from some of the good aspects of Australia's corporate governance standards to enhance its own systems. For example, currently, Zimbabwe has no specific guidelines on board appointment and remuneration and is still to adopt a *Corporate Governance and Remuneration Policy Framework* specific to its public entities. Zimbabwe can consider creating institutions like the Australian Nomination Panel and Remuneration Tribunal to improve its board appointment and remuneration processes. Zimbabwe also appears not to be as serious as Australia to achieve the gender equality agenda given the nature of initiatives it has put in place and the apparent lack of specific and time framed implementation targets.⁶¹⁹ Zimbabwe should thus try to vigorously implement the measures it has put in place to promote gender equality and also learn from some of Australia's initiatives.

Although Australia and Zimbabwe have advocated for self-regulated corporate governance practices, the continued corporate collapses in both jurisdictions motivated the need to legislate for some aspects so that they can be legally enforceable. As a result, both jurisdictions have put in place enforcement mechanisms that include punishment of individual directors for misconduct in the form of fines, imprisonment or dismissal; removal of the whole board for poor performance in terms of relevant legislation and suspension or delisting of defaulting companies in terms of the Stock Exchange *Listing Rules*.⁶²⁰ Australia has, however, put in place more statutory instruments, comprehensive enforcement systems and regulatory bodies than Zimbabwe.

Judging from the recent court decisions, Australia also appears to have a judicial system that is more vibrant and geared towards eliminating or at least minimising the potential for

⁶¹⁸ Whilst similar in some respects to Zimbabwe's PFMA, Australia's PGPA makes board evaluations mandatory and covers the issues of corporate governance more extensively than the former does.

⁶¹⁹ See Chapter 4, para 4.2.4 above.

⁶²⁰ See Chapter 4, para 4.27 and Chapter 6, para 6.2.7 above.

directors to abuse the managerial powers conferred upon them to the detriment of all relevant stakeholders. Despite the differences in levels of enforcement, I'm of the view that it would be unreasonable to expect Zimbabwe to match Australia's enforcement mechanisms and level of compliance with good corporate governance standards given the significant differences in the two countries' levels of economic and social development.⁶²¹

⁶²¹ See Chapter 7, paras 7.2.2.2-7.2.7.2 for the comparison of Australia's level of compliance with good corporate governance standards to that of Zimbabwe.

CHAPTER 7

ANALYSIS OF RESULTS AND DISCUSSION

7.1 INTRODUCTION

The main objective of this study is to examine corporate governance in Zimbabwean public entities with particular emphasis on the effectiveness of boards of these entities and the initiatives that the government has put in place to improve corporate governance practices. First, the thesis examines the level of compliance with existing legal and institutional frameworks, regulatory requirements and voluntary corporate governance codes by four selected public entities. Secondly, the survey examines the challenges encountered by public entity boards in implementing good corporate governance standards. To achieve the objective, a literature analysis was carried out,¹ interviews were conducted with and questionnaires circulated to participants holding current positions in the four selected public entities.² The interviews and questionnaires were designed to obtain in-depth information and to elicit the participants' perceptions of the status of corporate governance in the institutions they work for.³ The questions were thus chosen to focus participants' answers to the researcher's particular areas of interest.⁴

7.2 RESULTS

50 questionnaires were distributed to selected participants. Of the 50 questionnaires, 43 responses (inclusive of interviews) were received of which all were usable in that they had

¹ Chapters 3-6 above. Since most of the findings from literature analysis were articulated in previous chapters, this chapter tries to avoid unnecessary repetition and where appropriate reference is made to the relevant section that would have discussed the matter.

² See Appendix B and C for the actual questionnaires used in the survey.

³ See Chapter 1, para 1.5 above on the main areas focused on.

⁴ It is important to note that after interviewing the four company secretaries, the questionnaires had to be adjusted on the section on board evaluation when it became apparent that some of the questions posed were no longer relevant given the absence of evaluation of board performances systems in the four entities.

fully completed responses to questions. The response rate was therefore 86% and considered satisfactory.⁵ The participants included board members, chief executive officers, company secretaries, senior management and shareholder representatives of the public entities. The sample consisted of four board chairpersons (one woman and three men), eight board members (three women and five men), four chief executive officers (four men), four company secretaries (two women and two men), eighteen senior managers (six women and twelve men) and five shareholder representatives (two women and three men).⁶ Of the 43 participants, none had less than 5 years of experience, 16 had between 5 and 10 years of experience whilst the rest (27) had over 10 years of experience. The ages of the participants ranged from 34 to 61 years.

This chapter presents and analyses the results obtained from the literature examination,⁷ interviews and questionnaires. With regard to the interviews and questionnaires, the discussions below are based on the participants' opinions or perceptions. Each questionnaire was summarised focusing the participants' responses on the particular areas covered by the research. At first the thesis discusses the participants' views on corporate governance generally, then their views on the specific research areas namely; role, selection and appointment, composition, remuneration and evaluation of the board. Finally, based on research undertaken, South Africa and Australia's positions on the specific research areas are discussed in comparison to Zimbabwe's position.

7.2.1 General Corporate Governance

The majority (95%) of the participants articulated well the meaning of corporate governance⁸ and had an appreciation of what the *Corporate Governance Framework (CGF) for State Enterprises and Public Entities*' objectives are. All of the participants believed that the *CGF*

⁵ The response rate was considered acceptable given the fact that a response rate of approximately 60% has been found to be adequate to enable the researcher to make reasonable conclusions (Fincham JE "Response Rates and Responsiveness for Surveys, Standards and the Journal" (2008) 72(2) *American Journal of Pharmaceutical Education* 43-49 available at <http://www.ncbi.nlm.nih.gov/pmc/articles/PMC2384218/> (accessed on 28 February 2015)).

⁶ Efforts were made to gender balance the sample, although in some cases the positions were occupied by men only, for instance, in the case of CEOs.

⁷ Chapters 3-6 of this thesis.

⁸ Of the 43 participants, 19 cited Cadbury's definition of corporate governance that simply says that it is "the system by which companies are directed and controlled".

adequately covers the needs of public entities because it was drafted in compliance with internationally accepted corporate governance principles. However, they were of the view that the *CGF* had not greatly impacted on the performance of the board of their organisations because no sufficient effort had been made to fully comply with its provisions, starting from the responsible Minister to the board members and management.

All four public entities did not have a corporate governance committee as part of their board committees at the time of conducting the interviews. However, all the entities had board charters to guide the board members' conduct. On the assessment of their organisation's corporate governance systems and level of compliance, 52% of the participants indicated that the systems and level of compliance were poor, 37% rated their organisation's systems and level of compliance as fair whilst the rest thought their systems and level of compliance were good.

7.2.2 Role of the Board

Universally, it has been accepted that boards play a vital role in the successful governance of public entities.⁹ According to the *OECD Guidelines on Corporate Governance of State-Owned Enterprises*, the responsibilities of the board are to formulate, review and implement corporate strategy, set and monitor implementation of performance objectives, monitor the effectiveness of the company's governance practices and recruit company executives, among others.¹⁰

All the participants were able to articulate well the main responsibilities of the board although they differed in terms of which of the roles are more important than the other. One of the participants identified the role of the board as including "setting overall strategic plans, managing risk; monitoring the performance of the organisation, giving guidance to management and appointing or dismissing the CEO". It has been found that it is the board's critical duty to ensure that the organisation achieves its objectives through its effective guidance.¹¹ In this study, the participants agreed that the board needs to take and accept the

⁹ See Chapter 3, para 3.6.1 for a discussion of the directors' duties.

¹⁰ *OECD Guidelines on Corporate Governance of State-Owned Enterprises* (2005) 47-50.

¹¹ See Chapter 3, para 3.6.1 above.

ultimate responsibility for the performance of the entity. As a result, the directors need to be knowledgeable about the operations of the entity and the applicable laws and regulations so as to be able to appropriately drive the company's strategy, guide management and effectively contribute during discussions in board meetings.

But, according to 44% of the participants, there seems to be a lack of commitment on the part of directors to make meaningful contributions to the boards to which they are elected because of the "misconception that corporate governance is the responsibility of management". Another reason cited for poor commitment was the fact that directors "are thrown at the deep-end without the necessary training" with regard to the responsibilities, obligations and fiduciary duties of their positions. The participants highlighted that there is a lack of a proper working framework that prescribes the way in which board members should carry out their duties.¹² According to participants from all four entities, board members are normally just issued with incomprehensive appointment letters indicating that they have been appointed as board members and thereafter briefed by the Minister on what is expected of them.¹³ Thus, none of the entities has a written policy for formal briefing of directors by the appointing authority to ensure that they have a proper understanding of their role.

Despite lack of formal policy or sufficient guidance by the Minister, of the twelve board members, nine indicated that they had been taken through an induction process which consisted of an induction workshop conducted by IoDZ¹⁴ and presentations by management on the operations of the entity.¹⁵ The other three board members indicated that they had not been subjected to formal induction programmes to familiarise with the company's operations,

¹² The framework that was said to be absent was that from the relevant ministry as participants from all four entities indicated that there was a board charter to guide the board's operations and which also provided for formal briefing and professional development of directors. However, the main challenge was said to be lack of implementation of the provisions of the charters.

¹³ Samples of appointment letters availed to the researcher simply stated that "I'm pleased to advise that His Excellency, the President of the Republic of Zimbabwe has approved your appointment to the Board of Directors ofwith effect from....for a period of three (3) years..... I implore upon you on the importance of entrepreneurial leadership guided by objectivity and result oriented performance. I take this opportunity to congratulate you and hope that your expertise and wealth of experience will stirto be the leadingin the country".

¹⁴ It was reported that the induction programs offered by IoDZ include training on board responsibilities, the public entity's relationship with government and relevant ministries as well as board procedures.

¹⁵ The four company secretaries indicated that they were responsible for arranging for the board's induction and familiarisation tours.

various levels of management they have to deal with and its business environment.¹⁶ They, therefore, had to learn on the job which tended to compromise the quality of their performance and effectiveness in achieving the objectives of the entity. Of the twelve board members, two board members ranked their general understanding of the business of the organisation as very good, three as good, five as fair and two as poor. The company secretaries, chief executive officers and some senior managers confirmed that the majority of their board members had a fair understanding of the operations of their entities.

Over and above proper induction, it has generally been found that continuous training and development of directors is crucial in enabling the board to effectively undertake its responsibilities.¹⁷ The majority of the participants commended IoDZ for a good job in so far as promoting director's training and development is concerned. A number of local and international institutions and foreign training facilitators were also said to provide training and development programs for directors in the hope that these will greatly add to the effectiveness of boards, inclusive of those from public entities. However, some participants highlighted "time constraints and lack of commitment" as the major limitations for directors to attend the training sessions which consequently compromises the quality of their performance and effectiveness.¹⁸

The second concern raised was the lack of feedback from the appointing authority on whether or not the board was carrying out its responsibilities as expected. All participating board members indicated that there was no formal feedback on whether or not the shareholders' expectations are met. This was also confirmed by all the chief executive officers and company secretaries who indicated that, although board minutes and quarterly reports were being submitted to the ministry, no feedback was received. In addition, participants in all entities indicated that there was no system in place to ensure that the board and the individual members are accountable with respect to their duties and responsibilities. According to one

¹⁶ According to participants from the entities, these three members joined an existing board that had already undergone induction and training hence the oversight.

¹⁷ Principle 2.20 of the *King III Report* and Vagliasindi M *The Effectiveness of Boards of Directors of State Owned Enterprises in Developing Countries* (2008) 10. See also Uhrig J *Review of the Corporate Governance of Statutory Authorities and Office Holders* (2003) 102.

¹⁸ It has been found that most directors shun formal training but prefer to do their learning on the job and through meetings with management and auditors, interactions with outside experts and memberships on other boards. However, on the job training has been considered insufficient in developing countries like Zimbabwe where skilled individuals are in short supply (Frederick W *Enhancing the Role of the Boards of Directors of State-Owned Enterprises* (2011) 25-26).

participant, “the only formal feedbacks normally received by board members are dismissal letters which are then followed by press reports that the board has been fired for inefficiency and incompetence”. This view was supported by the majority of the participants.

Concerning the board’s role in strategy formulation and implementation, 94% of the participants believed that the board played a significant role. Although this was not consistently adhered to, two entities were said to review the implementation of the entity’s strategy biannually whilst two conducted the reviews annually. A question was asked as to the time it took for the board to communicate to management the decisions that will have been taken at board and committee meetings. The respondents indicated that this was determined by the importance and urgency of the matter as well as the need to comply with statutory deadlines. In all four entities, management is normally represented by the chief executive officer and company secretary in board meetings and by the chief executive officer, company secretary and heads of key departments in committee meetings.¹⁹ This makes it “easier for the board to delegate authority to the respective heads of departments” that are then supervised by the chief executive officer. More so, it becomes easier to ascribe accountability to the appropriate board member, committee or manager if certain decisions are not actioned or implemented timeously. In all cases, the company secretaries were said to be responsible for ensuring that the board resolutions are implemented through following up with the relevant board members/committees and managers.

With regard to the board’s role of policy formulation, participants from all four entities indicated that the board was responsible for formulating policies to guide the operations of their entities. In coming up with the policies, the boards were said to be guided by best practices and the existing legal framework. However, the “policies have to be submitted to the Minister for approval before implementation”. In some cases ministerial approval was said to take long to be granted, thus delaying the implementation of the policies. On the issue of whether or not the board and its committees are permitted to seek independent professional advice at the organisation’s expense, participants from all entities indicated that this was

¹⁹ The majority of the participants highlighted that inviting departmental heads provides the board with a firsthand opportunity to ask probing questions and monitor the performances of the senior management team. However, other board member participants displayed disappointment with senior managers who provide them with misleading information resulting in mistrust and lack of confidence in the information provided by specific managers.

possible provided that prior authority had been granted by the board in a proper meeting or by the board chairman, in consultation, with other board members, where necessary.

The other critical role of the board is to, in consultation with the responsible Minister, appoint the chief executive officer who meets its requirements.²⁰ Giving the board the opportunity to choose the chief executive officer enables it to choose a competent person who is able to effectively drive the entity under its direction.²¹ However, according to all the participating board members and other managers, the main challenge is the involvement of the responsible Minister in the appointment and removal of the chief executive officer which sometimes diminishes the board's effectiveness especially where the chief executive officer has a strong and effective relationship with the Minister.²² The board's power to give directives and supervise the chief executive officer may thus be compromised to such an extent that it is unable to provide effective governance and discharge its other duties successfully.²³

Furthermore, because of the involvement of the Minister in the appointment and removal of the chief executive officer, participants from all of the entities indicated that their entities, at some point, had not had any substantive chief executive officers for periods ranging from two to six years.²⁴ This was said to be as a result of the fact that the Ministers could have been "too busy and did not give the matter the priority it deserves" or boards were too frequently changed before recruiting a chief executive officer. Respondents from one entity indicated that three successive boards had been prematurely dissolved at the stage of short listing potential candidates for the chief executive officer post resulting in the entity going for five years without a substantive chief executive officer.

²⁰ See Chapter 4, para 4.2.2, Chapter 5, para 5.2.2 and Chapter 6, para 6.2.2 above.

²¹ Ibid.

²² For example, where a CEO seeks to influence the direction of the board, he may present the views of the Minister, as expressed in previous conversations, to exert pressure on the board to act in a certain way. This was confirmed by the *Uhrig Review* (Uhrig J *Review of the Corporate Governance of Statutory Authorities and Office Holders* (2003) 41-42).

²³ Previous researchers have made similar findings as shown in Chapter 3, para 3.6.1 above. For example, Agrawal and Chadha found that a CEO's influence on the board can reduce the board's effectiveness in monitoring the performance of managers and detecting irregularities (Agrawal A and Chadha S "Corporate Governance and Accounting Scandals" (2005) 48(2) *Journal of Law and Economics* 371-406).

²⁴ GMB had an acting CEO from 2006 to 2008, ZMDC for the period 2010 to mid-2011, NRZ for the period August 2013 to August 2014 and MMCZ for the years 2010 to 2015.

It has also been globally acknowledged that it is very important that the board should be empowered and independent enough to undertake its functions.²⁵ Responses from the majority of the participants (mostly board members) indicated that the board was not sufficiently empowered to perform its roles largely as a result of too much interference by the responsible Minister in the operations of the entity and lack of clear policy objectives.²⁶ In most cases, the Minister was said not give clear policy direction and to interfere with the entity's operations both through the influence of its board appointees and directly issuing directives to the chief executive officer,²⁷ in the process usurping the powers of the board.²⁸ All the participating board members expressed serious concerns with the Minister dealing directly with the chief executive officer as they highlighted the fact that the chief executive officer and senior managers, because of the easy access to the Minister, "appear to be under the view that they are answerable to the Minister and not to the board".²⁹ The board members expressed strong reservations on the attendance and participation in the proceedings of board and committee meetings by some public servants.³⁰ Their view was that this tended to compromise their "independence and objectivity in decision making".

In some cases the responsible Minister was reported to issue directives³¹ to the board without giving the later the opportunity to question the logic of implementing the directive or proffer

²⁵ See Chapter 3, para 3.6.1 above and Robinett D *The Challenge of SOE Corporate Governance for Emerging Markets* (2006) 23.

²⁶ Similar sentiments were expressed in an article entitled "*Political Meddling Stifles Parastatals*" that appeared in *The Financial Gazette* of 8-14 October 2015 18. This position has been found to be a common problem in most countries (Mwaura K "The Failure of Corporate Governance in State Owned Enterprises and the Need for Restructured Governance in Fully and Partially Privatized Enterprises: The Case of Kenya" (2007) 34-75).

²⁷ Research has established that, in most cases, these directives may circumvent prescribed systems of control to the detriment of the entity (Robinett D *The Challenge of SOE Corporate Governance for Emerging Markets* (2006) 24-25 and Mwaura K "The Failure of Corporate Governance in State Owned Enterprises and the Need for Restructured Governance in Fully and Partially Privatized Enterprises: The Case of Kenya" (2007) 34-75).

²⁸ For similar views, see Sifile O *et al* M "Corporate Board Failure in Zimbabwe: Have Non – Executive Directors Gone to Sleep?" (2014) 78-86.

²⁹ The participants' observation and frustrations with political interference in the day to day management of public entities has been supported by previous researchers. Wong, for example, observed that the "history of SOEs is replete with examples of disruptive political meddling" and "does little to ensure effective accountability" (Wong SCY "Improving Corporate Governance in SOEs: An Integrated Approach" (2004) 5-15). See also Chapter 3, para 3.6.1 above.

³⁰ Section 14 of the MMCZ and ZMDC Act provide that certain officers of the Public Service are "entitled to attend meetings and to take part in the proceedings of the Board or of a committee". However, these officers should not vote on any question before the board or committee.

³¹ Some of the Acts that created the public entities provide that the Minister may give to the entity "directions in writing of a general character relating to the exercise by it of its functions, duties and powers as appear to the Minister to be requisite in the national interest". The entity is required to "with all due expedition, comply with any" such direction (section 43 of the Grain Marketing Act and section 25 of the MMCZ and ZMDC Acts and section 23 of the Railways Act).

alternative solutions.³² The board is thus not given adequate freedom to make important strategic decisions since a number of the issues that determine the success of the public entity's operations are directed by the government. The participants further highlighted the challenge created by some statutory instruments that require that certain decisions or transactions should not be implemented without prior government approval through the responsible Minister.³³ They argued that, for example, "there is little or no flexibility to adjust the budget in response to changing government directives or the needs of a dynamic business environment" considering the lengthy budget approval process by the ministry.³⁴

Contrary to the majority of the participants, three shareholders' representatives and one manager were of the view that the Minister intervenes only when he considers it necessary to give direction and guide the board hence he cannot be said to be interfering. Overall 69% of the participants ranked the level of ministerial involvement in the performance of duties by the board as excessive, 21% as sufficient and 10% as inadequate. Those who said the level of involvement was inadequate argued that poor corporate governance in public entities was a result of lack of involvement and supervision of the board by the responsible Minister. On the contrary, the other participants argued that the responsible Minister was not playing an oversight role but was interfering with the day to day running of the entity.

It has also been argued that some specific functions are performed better if they are performed by board committees comprising of members with specialised skills in the related field.³⁵ The Zimbabwean corporate governance framework has likewise, prescribed the formation of various board committees to assist the board in effectively discharging its functions and responsibilities. The study revealed that all of the four public entities complied

³² It has been shown that such a state of affairs places boards in unsustainable situations, "torn between their obligation of loyalty to the public entity and the need to act on behalf" of the shareholders (Frederick W *Enhancing the Role of the Boards of Directors of State-Owned Enterprises* (2011) 10 and Ashe PA *Governance in Antigua and Barbuda: A Qualitative Case Study of Five State Owned Enterprises* (2012) 47).

³³ A number of issues have to be approved by the Minister before they can be implemented. For example, section 24 of the MMCZ and ZMDC Acts which provide that the board can appoint a General Manager (CEO) subject to approval from the Minister and section 47 of the Public Management Finance Act which makes it mandatory for public entities to submit their annual income and capital budgets to the parent Ministry for approval prior to implementation.

³⁴ Participants from three of the entities indicated that they had operated without approved budgets for periods close to two years (2013-2015).

³⁵ See Chapter 3, para 3.6.1 above. The OECD *Principles of Corporate Governance*, King III Report, *GBE Guidelines*, CAGG *Guidelines*, enabling legislation in various countries and the CGF recommend the establishment of various board committees that would largely support the board in effectively discharging its functions and responsibilities.

with the requirement to establish board committees. According to the entities' annual reports and confirmation from the participants, all of the entities have remuneration, audit and finance committees plus other mandate specific committees.³⁶ The participants also indicated that all the committees have comprehensive terms of reference and a clear life span.

However, according to the majority of the participants, what appears to be a challenge is the poor composition of these committees as, in some instances, "the committees consist of members with irrelevant expertise". For example, the participants indicated that on a number of occasions, of all the MMCZ board members, none had a financial background which made it difficult to properly constitute audit and finance committees.³⁷ Participants from ZMDC also indicated that during 2011 the ZMDC board had no member with legal or human resources experience which compromised the effectiveness of the committees, especially the legal and remuneration committees. The absence of relevant expertise in committees makes it practically difficult to effectively carry out committee responsibilities.

As to how best the board can be supported to effectively perform its role, the majority of the participants highlighted the need for the Minister not to interfere with the entity's operations but to give only necessary guidance and supervision to the board. All participants agreed that it was crucial to give the board enough independence and powers to effectively discharge its responsibilities and for the Minister to intervene only when it is necessary to do so. They also suggested that there should be clear policy objectives to avoid the confusion caused by contradicting goals. There was also consensus that there are sufficient training and development programs in place for directors and all they need to do is to create time to attend the programs so as to enhance their knowledge and effectiveness.

As seen from the participants' observations above, in reality, the role of the board for public entities has not been as clear as portrayed in the various statutes, regulations and guidelines.³⁸

³⁶ MMCZ has five committees (Finance & Investments, Audit and Risk, Human Resources, Business Development and Marketing and Projects), ZMDC has four committees (Finance & Investments, Legal, Risk & Audit Committee, Human Resources and Technical), GMB has five committees (Finance and Risk Management, Audit and Internal Controls, Human Resources and Remuneration, Corporate Strategic and Projects) and NRZ has four committees (Audit, Risk & Compliance, Finance & Budgeting, Technical, Operations & Marketing and Human Resources).

³⁷ The Comptroller and Auditor General's Management Letter presented to MMCZ on 5 April 2014 confirmed the concerns by the participants that board committees were not properly constituted.

³⁸ See Chapter 3, para 3.6.1 for similar observations.

In addition, the board has not been fully empowered or sufficiently independent to discharge its duties as provided for in the corporate governance framework.³⁹ The other challenge is the lack of familiarity with board functions and fiduciary responsibilities as well as absence of clear procedural rules to ensure that directors are empowered to make meaningful contributions to the functioning of the board.⁴⁰ Board committees have also not been properly composed in terms of relevant expertise and have thus failed to successfully assist the board in effectively discharging its duties.⁴¹ Another challenge that has fuelled the ineffectiveness of boards of the four public entities is the existence of conflicting policies and delays in approval of important strategic matters.⁴²

7.2.2.1 Comparative Analysis of the Findings to those of South Africa

South Africa has, similar to Zimbabwe, adopted the approach that, given the importance that has been ascribed to the role of the board in the modern economy, it is necessary to empower boards of its public entities. The country developed a corporate governance framework that, if properly observed, should enable boards of public entities to effectively discharge their duties.⁴³ South Africa has established a number of institutions to train and develop directors on board responsibilities, with the IoDSA playing the leading role.⁴⁴ Further to the training and development of directors, the roles and responsibilities are clearly laid out in the board performance contracts⁴⁵ and charters for ease of reference by the board members.⁴⁶ The board

³⁹ Ibid.

⁴⁰ Many state-owned entities board members in African countries, Zimbabwe included, have limited understanding of their roles, are outright incompetent and are usually open to manipulation by management, chairmen, or principal shareholders (Okeahalam CC and Akinboadek OA *A Review of Corporate Governance in Africa: Literature, Issues and Challenges* (2003) 3).

⁴¹ Previous researchers have made similar findings as shown in Chapter 3, para 3.6.1 above.

⁴² Ibid.

⁴³ See Chapter 5, para 5.2.1 above.

⁴⁴ See Chapter 5, paras 5.2.1 and 5.2.2 above. In addition to the IoDSA, private consultants, large auditing and accounting firms, and higher education institutions (including business schools) offer training and development sessions for directors (Armstrong P *Corporate Governance in South Africa – a Perspective from an Emerging Market* (2004) 25).

⁴⁵ Unlike Zimbabwean statutes which do not specifically provide for performance contracts, South African public entity legislation provides for establishment of performance agreements between the Minister and the board (section 5 of the South African Civil Aviation Authority Act).

⁴⁶ See Chapter 5, para 5.2.2 above. The annual reports state that the directors' duties were borrowed from the *King III Report* and the entities' board charters (*South African Civil Aviation Authority 2013-2014 Annual Report* 45 available at <http://www.caa.co.za/> and *South African National Roads Agency Limited 2014 Annual Report* 107 available at

charters for public entities provide for induction and training of board members which, if properly implemented, should eliminate the challenge of the existence of board members who are uninformed and incompetent.⁴⁷

Secondly, unlike Zimbabwe where committees lack the requisite skills, the committees in the majority of South African public entities are properly composed in terms of skills and experience.⁴⁸ As an example, the Audit and Risk Committees for South African National Roads Agency Limited and South African Civil Aviation Authority included consist of people with finance and accounting experience which is best practice.⁴⁹ Furthermore, the majority of board committees have clear terms of reference to guide their operations.⁵⁰ However, according to a research conducted by Thomas (2012), 20% of the public entities sampled did not have committees that were properly composed in terms of skills and experience.⁵¹

A third comparative factor is that, like Zimbabwe, South African public entities recruit company secretaries whose roles and responsibilities are clearly stated in the board charters and individual contracts of employment.⁵² Fourthly, the board is empowered to seek for independent professional advice and services so as to enhance their independence such that they do not entirely depend on management for information and advice.⁵³ All the above are

<http://www.nra.co.za/> (accessed on 13 March 2015)). However, what could not be established from the annual reports are the commitment levels of the South African directors to participate in the training sessions.

⁴⁷ The South African Civil Aviation Authority Annual Report states that the Authority's board is guided by a board charter which clearly details the duties and responsibilities of the board and provides for induction and professional development of directors (*South African Civil Aviation Authority 2013-2014 Annual Report* 45).

⁴⁸ This is confirmed by the entities' annual reports. See the *South African Civil Aviation Authority 2013-2014 Annual Report* 44-46 and *South African National Roads Agency Limited 2014 Annual Report* 107.

⁴⁹ Ibid.

⁵⁰ *South African Civil Aviation Authority 2013-2014 Annual Report* 44-46 and *South African National Roads Agency Limited 2014 Annual Report* 106-108.

⁵¹ Thomas A "Governance at South African State-Owned Enterprises: What Do Annual Reports and the Print Media Tell Us?" (2012) 8(4) *Social Responsibility Journal* 448 – 470.

⁵² The company secretary's main responsibilities are to assist the board through advice and guidance as well as provision of secretarial services like maintaining statutory records and arranging for board and committee meetings (*South African Civil Aviation Authority 2013-2014 Annual Report* 49 and *South African National Roads Agency Limited 2014 Annual Report* 105).

⁵³ *South African Civil Aviation Authority 2013-2014 Annual Report* 49 and *South African National Roads Agency Limited 2014 Annual Report* 105.

clear indications of the efforts put by South African public entities to comply with good corporate governance practices as provided in the country's statutes and guidelines.⁵⁴

Despite the commendable framework put in place to empower directors, South Africa, like Zimbabwe, has not been spared from a number of the common challenges.⁵⁵ The South African government has been criticised for interfering with the affairs of the public entities.⁵⁶ This is because the government may, in certain circumstances, take over the responsibilities of the board by working directly with management without involving the board.⁵⁷ This tends to compromise the board's authority in the supervision of management. The other challenge is that the board is not empowered to conduct one of its critical functions in terms of good corporate governance practices, that of appointing the chief executive officer. This is because the chief executive officer is appointed by the shareholder Minister.⁵⁸ This statutory requirement has been found to unavoidably affect the accountability for performance by the board as it has little or no actual influence over a chief executive officer who, for all intents and purposes, is accountable for managing the operations of the entity.⁵⁹

More so, complaints have been made by boards of public entities that although they are "subjected to reporting and accountability measures" they do not receive any feedback from the shareholder Minister.⁶⁰ The absence of meaningful feedback makes the requirement for

⁵⁴ See Chapter 5, para 5.2.2 above.

⁵⁵ See Chapter 3, para 3.6.1 for the common challenges. Public entities in South Africa have often been reported in the media for "poor performance in delivering on government guarantees; corporate governance breaches; routine unqualified audited financial statements; and ineffective boards and CEOs" (Arries C *Comparative Study on Specific Governance Elements in the State-Owned Entities Overseen by the Department of Public Enterprises (DPE) and the Department of Transport (DOT) in South Africa* (2014) 1-3.

⁵⁶ Thomas A "Governance at South African State-Owned Enterprises: What Do Annual Reports and the Print Media Tell Us?" (2012) 448 – 470.

⁵⁷ In a study conducted by Spencer Stuart some survey participants indicated that the biggest factor affecting the execution of board responsibilities in a state owned enterprise are the terms and conditions laid down by the Public Finance Management Act which restrict innovation and flexibility (Spencer Stuart *Board Governance in South Africa (A Study to Review the State of Corporate Governance in South Africa* conducted by Spencer Stuart in 2009) 6-9 available at https://www.spencerstuart.com/.../Board-Governance-in-South-Africa_01 (accessed on 21 February 2015)).

⁵⁸ *South African National Roads Agency Limited 2014 Annual Report* 109 and section 11 of the South African Civil Aviation Authority Act. While the board may recommend candidates for the position of chief executive officer, it is ultimately the relevant Minister who makes the appointment decision.

⁵⁹ Thomas A "Governance at South African State-Owned Enterprises: What Do Annual Reports and the Print Media Tell Us?" (2012) 448 – 470.

⁶⁰ Gumede W *South African State-Owned Enterprises: Boards, Executives and Recruitment* (2012) 34.

accounting, reporting and oversight of public entities of no significance.⁶¹ Although the board is mandated to come up with strategies and policies for the entity, no implementation can take place before ministerial approval which, in most cases, delays the implementation process to the detriment of the entity.⁶² The board is, therefore, incapacitated to fully discharge its duties due to other processes beyond its control, processes which may matter greatly in the achievement of the entity's objectives. In addition, it has been shown that there is general lack of adherence to fiduciary duties by South African directors who are, in some cases, not knowledgeable enough about the affairs of the public entity.⁶³

Despite these challenges, when broadly assessing the corporate governance performance of South African public entities, it appears that, there is a significant level of compliance to the principles of good corporate governance. This is because, as shown above, the role of the board is laid out in performance agreements and board charters, board members are inducted and trained, proper committee structures have been put in place, communication with shareholders (in the form of audited financial statements and annual reports)⁶⁴ has been established and the board has access to independent professional advice.⁶⁵ Judging from this, South Africa appears to have performed better than Zimbabwe in empowering public entity boards through implementation of the systems that it has put in place. This is also confirmed by international organisations that have ranked South Africa better than Zimbabwe as far as upholding good corporate governance principles is concerned.⁶⁶ Nonetheless, South Africa still has to put more effort towards addressing issues relating to board independence, director

⁶¹ Ibid. The challenges of the Minister usurping the powers of the board are therefore likely to occur in certain instances.

⁶² Chapter 5, para 5.2.2 above. See also Gumede W *South African State-Owned Enterprises: Boards, Executives and Recruitment* (2012) 34 and Mwaure K "The Failure of Corporate Governance in State Owned Enterprises and the Need for Restructured Governance in Fully and Partially Privatized Enterprises: The Case of Kenya" (2007) 34-75.

⁶³ Thomas A "Governance at South African State-Owned Enterprises: What Do Annual Reports and the Print Media Tell Us?" (2012) 448 – 470.

⁶⁴ However, concerns have been raised about the quality of the accounting and auditing standards and the adequate disclosure of risk in the public entities' financial statements and annual reports (Thomas A "Governance at South African State-Owned Enterprises: What Do Annual Reports and the Print Media Tell Us?" (2012) 448 – 470).

⁶⁵ South Africa appears to have performed better than Zimbabwe in empowering public entity boards through implementation of the systems that it has put in place. This is confirmed by international organisations that have ranked South Africa better than Zimbabwe as far as upholding good corporate governance principles is concerned (Schwab K *The Global Competitiveness Report 2014 – 2015* (World Economic Forum Geneva, Switzerland 2014-2015) 341 & 391 available at www3.weforum.org/.../WEF_GlobalCompetitivenessReport_2014-15.pdf (accessed on 15 December 2015).

⁶⁶ Schwab K *The Global Competitiveness Report 2014 – 2015* (World Economic Forum Geneva, Switzerland 2014-2015) 341 & 391 available at www3.weforum.org/.../WEF_GlobalCompetitivenessReport_2014-15.pdf (accessed on 15 December 2015).

development, timely approval of issues by responsible ministers and minimisation of political interference in board operations.

7.2.2.2 Comparative Analysis of the Findings to those of Australia

Australia, similar to Zimbabwe, has acknowledged the fact that, for boards of public entities to be effective, there is need for role clarity, director education and full empowerment of the boards. To achieve this, Australia has, in compliance with international corporate governance standards, tried to promote board role clarity and board independence/empowerment through comprehensive corporate governance legislation and guidelines.⁶⁷ First, the public entities provide appropriate induction and training to their board members to equip them to effectively undertake their duties.⁶⁸ As a second measure, the role of the board has been clarified in the enabling statute, board charter and code of conduct.⁶⁹ It has been found that Australia is one of the few countries where public entity boards are empowered to perform one of the key board functions, that of appointing the chief executive officer which gives them the powers to give directives and supervise him.⁷⁰ Some public entities issue directors with detailed appointment letters which outline the board's responsibilities.⁷¹

⁶⁷ See Chapter 6, para 6.2.2 above.

⁶⁸ See *Sugar Research and Development Corporation (SRDC) 2013-2014 Annual Report* 28 and *Grains Research and Development Corporation (GRDC) 2013-2014 Annual Report* 83. The country's Institute of Company Directors (AICD) has successfully provided induction and training sessions for directors and disseminated information on current international corporate governance developments. In addition to the AICD, other international organisations have also offered training and development courses to directors (Australian Government *Australian Corporate Governance Training Compendium* available at <http://archive.treasury.gov.au/documents/182/HTML/docshell.asp?URL=full.asp#AICD> and ANAO *Public Sector Governance* (ANAO Better Practice Guide Volume 1 of 2003) 14 available at <http://www.anao.gov.au/~media/Files/Better%20Practice%20Guides/Public%20Sector%20Governance.pdf> (accessed on 12 November 2015)).

⁶⁹ *GRDC 2013-2014 Annual Report* 83 and *SRDC 2013-2014 Annual Report* 27. The Grains Research and Development Corporation (GRDC) is a statutory authority established under the Primary Industries Research and Development Act 1989 (PIRD Act) to plan and invest in research, development and extension for the Australian grains industry. The GRDC is subject to accountability and reporting obligations set out in the CAC Act. Visit <http://www.grdc.com.au/> for more information.

⁷⁰ Witherell WH *Corporate Governance of State-Owned Enterprises: A Survey of OECD Countries* (2005) 98.

⁷¹ The annual reports for some public entities confirm that directors are issued with detailed appointment letters, properly inducted and educated on their responsibilities (*Australian Postal Corporation (APC) 2014 Annual Report* 44-47 available at <http://auspost.com.au/annualreport2014/> (accessed on 12 February 2015). See also the annual report for the SRDC that is available at <http://www.sugarresearch.com.au/> (accessed on 17 February 2015). The SRDC is an Australian statutory authority established in terms of the Sugar Research and Development Services Act 113 of 2013. The Corporation is responsible for investigating and evaluating the research and development requirements of the Australian sugar industry. Visit <http://www.sugarresearch.com.au/> for more information.

Thirdly, the public entity board committees have, unlike in Zimbabwe, been composed of directors with the relevant skills and experience to enable the effective discharge of the boards' responsibilities.⁷² In the fourth instance, Australian public entities have engaged competent company secretaries to assist the board in undertaking their mandate.⁷³ Lastly, the boards are capacitated to seek for independent professional advice at the public entity's expense, on matters arising in the course of their board and committee duties to enable them to effectively discharge their responsibilities.⁷⁴

Notwithstanding the vigorous efforts, Australia has experienced challenges, though at different scales from Zimbabwe, regarding shareholder or political interferences in board responsibilities or operations of public entities which compromise the effectiveness of the board in discharging its roles.⁷⁵ In Australia, even in the most "independent" of CAC bodies, the effectiveness of the board is extensively constrained by the demands of government policy.⁷⁶ Both the independence of the board and the dynamics of board decision-making are thus undermined by the unnecessary ministerial intrusion,⁷⁷ conflicting objectives, excessive regulation and red tape.⁷⁸ In addition, in Australia, the board's purpose and the extent of the delegation of power to the board by the shareholder Minister is not very clear which

⁷² APC 2014 Annual Report 46 and SRDC 2013-2014 Annual Report 29-31.

⁷³ Grains Research and Development Corporation (GRDC) 2013-2014 Annual Report 82 and SRDC 2013-2014 Annual Report 28.

⁷⁴ SRDC 2013-2014 Annual Report 28 and GRDC 2013-2014 Annual Report 83.

⁷⁵ Parret B *Corporate Governance – A More Private Public Sector* (Presentation paper prepared by Auditor-General for Australia, Australian National Audit Office 2007) 10-11 available at http://anao.gov.au/././Documents/corporate_governance_a_more_private_public_sector1.pdf (accessed on 26 March 2015).

⁷⁶ Meredith E *et al Public Sector Governance in Australia* (2012) 133-135. An example of a situation that compromises the effectiveness of the board is the involvement of the Minister in the appointment of the CEO. The fact that the CEO of the state owned enterprise is usually appointed by the shareholder Minister means that the effectiveness of the board in being able to sanction poorly performing management is significantly reduced. In some situations, the CEO has been asked to report directly to the Minister, bypassing the board altogether thus rendering the board ineffective (*Corporate Governance in Commonwealth Authorities and Companies* (Discussion Paper by Australian National Audit Office, 1999) 19-20 available at <http://www.anao.gov.au> (accessed on 25 January 2015).

⁷⁷ Like in Zimbabwe, Australian public entities are faced with the challenges of political/government interference running of the operations of the entity as well as delays in approvals of certain strategic matters (Edwards M and Clough R *Corporate Governance and Performance An Exploration of the Connection in a Public Sector Context* (University of Canberra, Australia Issues Series Paper No. 1 of January 2005) 16-17 available at http://www.canberra.edu.au/corpgov-aps/pub/IssuesPaperNo.1_GovernancePerformanceIssues.pdf (accessed on 27 April 2015).

⁷⁸ Meredith E *et al Public Sector Governance in Australia* (2012) 142. To confirm the extent of government intervention, in the research conducted by the World Economic Forum, Australia was ranked 96 out of 144 in so far as burden of government regulation is concerned (Schwab K and Sala-I-Martin X *The Global Competitiveness Report 2012–2013* (World Economic Forum Geneva, Switzerland 2012-2013) 95 available at www.konkurentnost.hr/lgs.axd?t=16&id=390 (accessed on 21 March 2015).

significantly reduces the ability of the board to effectively discharge its duties.⁷⁹ On a similar note, the lack of experience by a majority of board members in governing enterprises of the size of many public entities and the likelihood of conflicts of interests have been found to be hindrances to effective performance by Australian public entity boards.⁸⁰

Another important point to note is that, although the Australian corporate governance framework provides for regular performance feedback from the relevant Minister,⁸¹ the feedback has not been consistently received.⁸² The absence of formal feedback was attributed to, among other things, “insufficient evaluation skills available within the public service” and lack of a standard approach to conduct regular performance evaluations and give appropriate feedback by ministries.⁸³ As shown above, the absence of formal feedback on whether the shareholders’ expectations are met tends to compromise the effectiveness of boards as they may sometimes lack proper guidance.⁸⁴ Like Zimbabwe, Australia, therefore also still has much to do with regard to implementation of the corporate governance standards that seek to promote public entity board role clarity and empower the boards to effectively undertake their mandate.

7.2.3 Selection and Appointment of the Board

It is a universally accepted principle that nomination of directors should be based on merit and conducted transparently, professionally and objectively.⁸⁵ Potential candidates for board appointment should thus have relevant qualifications and expertise to competently discharge their duties and minimise the risk of being misled by management. Nevertheless, it has been established that, in practice, the manner by which public entity directors are selected and

⁷⁹ Parret B *Corporate Governance – A More Private Public Sector* (2007) 11.

⁸⁰ Uhrig J *Review of the Corporate Governance of Statutory Authorities and Office Holders* (2003) 42-43.

⁸¹ See Chapter 6, para 6.2.2 above.

⁸² Mackay K *The Australian Government’s Performance Framework* (World Bank Evaluation Capacity Development Working Paper No. 25 of 2011) 28-31 available at <http://www.worldbank.org/ieg/ece> (accessed on 25 March 2015).

⁸³ *Ibid.* This is common in most public entities internationally (Chapter 3, para 3.6.1)

⁸⁴ See Chapter 3, para 3.6.1 above, for similar observations.

⁸⁵ See Chapter 3, para 3.6.2 above. See also Principle 2.19 of the *King III Report*, para 5.1.6 of the South African *Protocol on Corporate Governance in the Public Sector* (RSA Department of Public Enterprises 2002) and section B of the UK *Corporate Governance Code*.

appointed does not always follow a transparent and objective process.⁸⁶ According to the participants, in reality it has been “difficult to find suitable board candidates” and to achieve the objective of selecting board members in a transparent and unbiased manner. The reasons cited for appointment of unsuitable candidates were the limited number of experienced and qualified individuals to serve as directors,⁸⁷ poor director remuneration and the greater risk of being sued associated with directorship in public entities.⁸⁸

The majority (78%) of the participants agreed that the appointment of board members was poor and not transparent largely due to the fact that there are no specific guidelines for the identification and selection of directors. This has resulted in the responsible Minister and the President, who are mandated to appoint public entity boards, having “too wide latitude in the appointment of board members”.⁸⁹ Other participants accused the Minister and the President of abusing their power to appoint and remove board members of public entities as a tool of political influence.⁹⁰ Some participants indicated that this was prominent during the period of Government of National Unity⁹¹ where it was clear that board members were “appointed based on their political background and allegiance, tribalism and nepotism but not

⁸⁶ Ibid. The newly appointed board chairman for Premier Service Medical Aid Society was reported to have said that the previous board was “ineffective and wracked by poor skills mix hence the rampant abuse of power by a few” (*Daily News* of 12 February 2014 6 available at <http://businessdaily.co.zw>).

⁸⁷ As a result, multiple directorships are a common feature in Zimbabwe (Wushe T, Shenje J and Ndlovu D “Too Many Seats Too Little Talent: An Analysis of Optimum Number of Seats for Board of Directors in State Owned Enterprises (SOEs) in Zimbabwe” (2015) 6(2) *Environmental Economics* 109-116). Random statistics collected by *The Herald* in February 2014 indicated that one board member sat on 20 public and private companies’ boards, two sat on 6 boards, one on 5 boards, three on 4 boards and 3 on 3 boards (*The Herald* of 22 February 2014 1). The shortage of qualified and experienced directors has resulted in some board members being appointed to too many boards rendering them ineffective in discharging their duties. In addition, it was said that in some cases inexperienced and unqualified people end up being appointed to boards of public entities.

⁸⁸ Participants from two of the entities reported that their entities had a history of suing directors based on malicious allegations. According to the majority of the participants, in a number of situations, the boards have tended to focus more on past events, concentrating on uncovering wrongs and malpractices committed by previous boards and management at the expense of achievement of futuristic strategic and more important issues. Zimbabwean newspapers were awash with news that several boards had been dissolved for incompetence, fiduciary shortcomings and unscrupulous dealings (See *Newsday* of 3 January 2014 and 6, 12 & 13 February 2014 available at <https://www.newsday.co.zw>, *The Herald* of 15 November 2013, 12 December 2013, 6 & 12 February 2014 1 and 6 July 2015 1 and *Daily News* of 15 November 2013 7 and 12 February 2014 2). All board members were thus painted with the same brush yet some might have been competent and professional.

⁸⁹ See Zhou G “Public Enterprise Sector Reforms in Zimbabwe: A Macro Analytical Approach” (2000) 27(ii) *Zambezia Journal of Humanities of the University of Zimbabwe* 195-219, for similar sentiments.

⁹⁰ This was also confirmed in Zhou G “Public Enterprise Sector Reforms in Zimbabwe: A Macro Analytical Approach” (2000) 195-219.

⁹¹ The Government of National Unity refers to Zimbabwe’s coalition government that was formed on 13 February 2009 among three political parties, namely President Robert Mugabe’s Zimbabwe African National Union – Patriotic Front, Morgan Tsvangirai’s Movement for Democratic Change and Arthur Mutambara’s MDC. The coalition government lasted for five years, 2009 to 2013.

competence and relevant experience”.⁹² In addition, the majority of the participants strongly described the process as lacking transparency and objectivity due to the fact that board positions are never advertised (although it is not a statutory requirement) and the appointment process is not publicised.

The participants were concerned that, in some cases, directors who are “publicly known to be responsible for the collapse of some public entities have later been appointed to other directorships”. As a result, 82% of the participating managers were of the view that most board members are not appointed with the right qualifications and for the relevant industry and professional experience, but based on other undisclosed reasons.⁹³ They expressed the views that a lot still requires to be done with regard to the appointment criteria to board positions in public entities as the process was far from complying with the framework put in place by the policymakers and good corporate governance principles in general. All the participating board members were not aware of how they were selected save for the fact that they were approached and requested to be board members of the entities in question. However, all the participating board members and ministry representatives were of the view that it was an exaggeration and unfair to conclude that all public entity boards lacked the necessary skills as some board members had the relevant skills and experience.

The participating board members indicated that they “actually possessed the required skills and professional experience” which they believed was the main consideration in their appointment. They had this to say; “we carry out our duties responsibly and diligently but the challenge is that our efforts may be too insignificant to improve the performance of the board and overall corporate governance systems and practices” in the public entities. Also, the participating board members and managers expressed concern on the appointment of public servants and senior ex-military officers⁹⁴ as board members of public entities because they

⁹² For similar observations, see Mwaura K “The Failure of Corporate Governance in State Owned Enterprises and the Need for Restructured Governance in Fully and Partially Privatized Enterprises: The Case of Kenya” (2007) 34-75 and Ashe PA *Governance in Antigua and Barbuda: A Qualitative Case Study of Five State Owned Enterprises* (2012) 47.

⁹³ This view was confirmed by Ruhanya P (an Academic and director with the Zimbabwe Institute of Directors) when he commented that “the running down of SEPs was largely hinged on the politics of patronage” where “top military personnel who do not have the expertise to manage the firms” were rewarded unjustly (Mambo E *CEO Salaries Bleed Parastatals (Zimbabwe Independent of 11 October 2013)* 1).

⁹⁴ According to the *Zimbabwe Independent*, some of the public entities in which ex-military personnel hold board positions “include the NRZ, GMB, Minerals Marketing Corporation of Zimbabwe, ZBC, Broadcasting Authority of Zimbabwe and Zimpapers” (Mambo E *CEO Salaries Bleed Parastatals (Zimbabwe Independent of 11 October 2013)* 1).

believed this had the “tendency of intensifying government interference in the functions of the board”. The public servants were said to focus more on “achievement of government’s interests at the expense of the public entity’s interests and good corporate governance”. The participants also noted that board members appointed to reward their political support usually refused to participate or vote on issues which they believed would unfavourably affect the government.⁹⁵

To compound the above challenges, 86% of the participants indicated that the appointment process did not allow for any smooth hand over take over processes as at times the whole board is dissolved without allowing for continuity and stability to leadership.⁹⁶ The existing board members in two of the entities indicated that the absence of a hand over take over process “created challenges for the new boards as they had to overly rely on management to continue from where the previous boards would have left”. More so, a lot of time was unnecessarily lost with the new boards trying to understand the business of the entity before they could make sound and informed decisions. The participants were also concerned about the too frequent turnaround of boards in the public entities.⁹⁷ Participants in two of the entities indicated that their organisations had been served with three different boards in a period of four years.⁹⁸ During the same period the other entity had been led by one board which had three members retired and replaced by new ones.

⁹⁵ In support of this view, other researchers have also argued that public entity boards may generally be concerned more about their chances of being re-elected to current board positions, which makes them inclined to focus on the kinds of governance decisions that please the government-owner sometimes at the expense of good corporate governance (Ludvigsen *S State Ownership and Corporate Governance: Empirical Evidence from Norway and Sweden* (2010) 22-23).

⁹⁶ The *CGF* (para 3.2.4-3.2.6) and the *National Code* (para 98) provide that proper balance should be maintained between continuity of board membership and the sourcing of new ideas through the appointment of new members. However, in certain situations the whole board is dissolved without considering the need for continuity, for example, the whole MMCZ and ZMDC boards were dissolved on 30 June 2011, 28 December 2012 and 10 December 2013 (*Newsday* 12 December 2013 1 and *The Herald* of 3 January 2013 and 12 December 2013 1)). Similarly the whole of Zimbabwe Broadcasting Corporation of Zimbabwe’s board was dissolved on 14 November 2013 for incompetence and poor corporate governance (*Newsday* of 15 November 2013 1 and *The Herald* of 15 November 2013 1) and that of Air Zimbabwe was dissolved in March 2012 (See *The Herald* of 11 March 2012 3). Although the *CGF* (para 3.7.4) recommends that the tenure of the board should not be affected by the tenure of office of the responsible Minister, practice has shown that a new Minister always dissolves the existing board and comes up with a completely new one. The board dissolutions cited above came into effect when new Ministers came into office after national elections of 2013.

⁹⁷ There were regular press reports of boards’ dissolution to confirm this assertion (Manayiti O *Ministry Dissolves Allied Timbers, Zimparks Boards* (*Newsday* of 2 January 2014 2), Chakanyuka R *Energy Minister Dissolves Parastatal Boards* (*Dailynews* of 7 February 2014 1), *Natpharm, MCAZ Boards Dissolved* (*The Herald* of 14 February 2015 1) and Munyoro F *Potraz Board Fired Over Graft* (*The Herald* of 3 July 2015 1).

⁹⁸ The annual reports for MMCZ for the years 2011- 2013 show boards composed of different people in each year.

The Zimbabwean corporate governance framework limits the period to which a director can serve as a board member to three years and the number of directorships to two.⁹⁹ However, in two of the entities, the appointed civil servants and some other board members were said to sit on more than two boards thus diluting their capacity to understand the business of the entities and devote sufficient time to them.¹⁰⁰ According to the survey results, the term of office of three years has not been consistently observed as some boards have lasted for less than a year as in the case of MMCZ¹⁰¹ whilst others have served for more than seven years as in the case of three members on the GMB Board.¹⁰²

The survey also revealed that the main challenge in selecting appropriate board members for public entities is the inadequate number of seasoned and skilled professionals in Zimbabwe.¹⁰³ This has resulted in the “few skilled and competent professionals serving and spreading their efforts on too many boards across industries” thus, eventually reducing their capacity to effectively contribute to these boards.¹⁰⁴ Some participants also indicated that, in certain circumstances, some skilled persons refuse to be appointed to public entity boards because of the “excessive interference of the parent ministry in the operations of the public entities which renders the board ineffective” and also for fear of the reputational damage associated with being a public entity board member.¹⁰⁵ On the question of what attracted

⁹⁹ See Chapter 4, para 4.2.3 above. The main objective of so doing is to enable individual board members to devote sufficient time to the tasks assigned to them.

¹⁰⁰ Of the public servants holding multiple directorships one was said to be a board member in three other government related institutions and two sat on two other boards. From the participating board members, one had the highest number of directorships of four whilst the rest had a maximum of two. The participants’ observation that board members with multiple directorships tend to be less effective when it comes to participation in board issues was in line with previous research findings. Wong noted that the corporate governance framework within public entities was compromised by directors who did not spend enough time on board matters (Wong SCY “Improving Corporate Governance in SOEs: An Integrated Approach” (2004) 5-15).

¹⁰¹ As an example, MMCZ had two completely different boards within a period of less than two years (2011 and 2012).

¹⁰² Three directors have been board members since 25 July 2007 to date. For confirmation of the extended term of office for the GMB board members, see Muperi W *Parly Grills GMB Board* (*Dailynews* of 7 July 2015 3).

¹⁰³ For similar views, see Makwiranzou TH *Operational Governance in Quasi Government Organisations in Zimbabwe: A Case Study of Telecommunications Sector 2005-2013* (2014) 96.

¹⁰⁴ Wushe *et al* made similar findings (Wushe T, Shenje J and Ndlovu D “Too Many Seats Too Little Talent: An Analysis of Optimum Number of Seats for Board of Directors in State Owned Enterprises (SOEs) in Zimbabwe” (2015) 109-116).

¹⁰⁵ Reputational damage arises from the fact that, in some cases, boards of the entities in question are dissolved allegedly for incompetence and unethical dealings yet, amongst the board members, some would have been competent and professional in the discharge of their duties. Generally, directors would not want to be associated with poorly performing business entities or entities whose image has been tarnished because of business scandals (Vagliasindi M *The Effectiveness of Boards of Directors of State Owned Enterprises in Developing Countries* (2008) 7).

board members to accept appointment to the board of a particular entity; three reasons were cited by the majority of the board members. The majority (55%) indicated that they had accepted board appointments as part of “national service” and for professional development; 30% cited professional development whilst 15% indicated that they had been incentivised by the remuneration.

7.2.3.1 Comparative Analysis of the Findings to those of South Africa

Zimbabwe and South Africa have both advocated for board selection and appointment processes that are formal, transparent and based on merit.¹⁰⁶ Both jurisdictions’ frameworks also seek to ensure that public entities are run by qualified and experienced board members who are able to devote sufficient time to the operations of the entities. However, both countries have experienced almost similar challenges in trying to implement what is provided for in their frameworks. The main challenge is that there is no generic legislation or standardised rules that govern the recruitment and appointment of the board of public entities in South Africa.¹⁰⁷ The frameworks that have been put in place namely; the *Protocol* and the *Handbook for the Appointment of Persons to Boards of State and State Controlled Institutions*, being voluntary, have not been strictly adhered to.¹⁰⁸

South Africa’s *Handbook for the Appointment of Persons to Boards of State and State Controlled Institutions* was approved by Cabinet to deal with appointments of boards of public entities as well as specify the approval processes to be followed.¹⁰⁹ But, the main concerns have been that the *Handbook* “represents a stand-alone practical document which is not in any way prescribed in terms of any formal framework, regulation or legislation”.¹¹⁰ This means that the *Handbook* has not been effectively implemented and complied with due to the fact that it is not legally enforceable. In addition, the *Protocol*, which sets out an

¹⁰⁶ See Chapter 4, para 4.2.3 and Chapter 5, para 5.2.3 above.

¹⁰⁷ Gumede W *South African State-Owned Enterprises: Boards, Executives and Recruitment* (2012) 26-27.

¹⁰⁸ Arries C *Comparative Study on Specific Governance Elements in the State-Owned Entities Overseen by the Department of Public Enterprises (DPE) and the Department of Transport (DOT) in South Africa* (2014) 5 & 10.

¹⁰⁹ See Chapter 5, para 5.2.3 above.

¹¹⁰ However, according to the *Handbook*, various policies and legislative frameworks and departments should ensure compliance with these policies and frameworks (*Handbook for the Appointment of Persons to Boards of State and State Controlled Institutions* (2009)1).

appointment process that complies with good corporate governance standards and recommends the setting up of a formal Nominations Committee,¹¹¹ is hardly followed because it is not obligatory.¹¹² As a result, like in Zimbabwe, the nomination and appointment of board members in South Africa does not follow a stringent and formal system, tends not to be transparent and is politically biased.¹¹³ Moreover, when board members are being nominated, the skills, qualifications and experience of the contenders are rarely the main considerations.¹¹⁴

The other challenge is that of a limited number of qualified and experienced people willing to be appointed to boards in both countries.¹¹⁵ According to a study on South Africa conducted by Stuart Spencer, despite the pool of experienced directors being already small, it is difficult to attract good quality board members for public entities for the reason that a number of experienced people are unwilling to be appointed on boards because of legislation that makes directors personally responsible for what is defined in the PFMA as “fruitless and wasteful expenditure”.¹¹⁶ Besides the concerns on the legislative requirements, there is a general limitation of suitable board candidates who have adequate experience in the management of public entities in both countries.¹¹⁷ This has caused South Africa to continue to experience

¹¹¹ There is currently no Nominations Committee within the Department of Public Enterprises, or within any other executive authority/line ministry as set out in the *Protocol (Gumede W South African State-Owned Enterprises: Boards, Executives and Recruitment (2012) 26*).

¹¹² Ibid.

¹¹³ Corrigan T *Corporate Governance in Africa's State-owned Enterprises: Perspectives on an Evolving System* (African Peer Review Mechanism's (APRM) Country Review Report (Policy Briefing 102) of September 2014) 3 available at <http://www.saiia.org.za/.../583-corporate-governance> (accessed on 29 March 2015). See also Spencer Stuart *Board Governance in South Africa* (2009) 6-9.

¹¹⁴ In a study conducted by Spencer Stuart some board members were reported to have said that there is no transparency but “a more potent cocktail of political, social, environmental and financial imperatives in a state-owned enterprise” (Spencer Stuart *Board Governance in South Africa* (2009) 6-9). For Zimbabwe, this was confirmed by the participants. See also Robinett D *The Challenge of SOE Corporate Governance for Emerging Markets* (2006) 24-27, for similar comments.

¹¹⁵ Like in Zimbabwe, it has been argued that in South Africa there is a relatively small pool of persons possessing the requisite business acumen and experience who are available to act as non-executive directors which has resulted in the few sitting on multiple boards (Arries C *Comparative Study on Specific Governance Elements in the State-Owned Entities Overseen by the Department of Public Enterprises (DPE) and the Department of Transport (DOT) in South Africa* (2014) 14). But, the World Economic Forum ranked South Africa number 50 and 39 out of 144 countries on the country's capacity to retain talent and capacity to attract talent, respectively, whilst Zimbabwe was ranked number 120 and 102 on the same aspects (Schwab K *The Global Competitiveness Report 2014–2015* (2015) 347).

¹¹⁶ Spencer Stuart *Board Governance in South Africa* (2009) 11.

¹¹⁷ Okeahalam CC and Akinboade OA *A Review of Corporate Governance in Africa: Literature, Issues and Challenges* (2003) 17 & 25. See also Ileri E *Appointment of Board of Directors to State Owned Enterprises in Kenya: Towards A Stricter Regulatory Framework* (2009) 67.

challenges of multiple directorships in boards of its public entities thus compromising board effectiveness.¹¹⁸

Another similarity between Zimbabwe and South Africa is that they still encourage appointments of government representatives/officials in the boards of public entities.¹¹⁹ As a result, both countries experience the challenge caused by officials who end up seeking to protect the interest of their ministry and government at the expense of the entity's performance and good corporate governance.¹²⁰ As regards a director's term of office, South Africa has not strictly adhered to the provisions of its statutes or guidelines as the director's appointment is subject to withdrawal or renewal at the discretion of the shareholder Minister.¹²¹ But, unlike Zimbabwe, South Africa tries to maintain continuity and board stability by allowing boards to serve for reasonable terms and also keeping some members from the old board when coming up with a new board to enable smooth hand over take over processes.¹²²

7.2.3.2 Comparative Analysis of the Findings to those of Australia

Australia has taken greater strides than Zimbabwe in so far as improving its public entity board appointment process is concerned. First, Australia has actually been acknowledged as one of the countries which have come up with “structured and clearly skill-based nomination systems”, ranking it in a better position than Zimbabwe.¹²³ The country considers the role of the board and that of the nomination committee in the appointment of the board more seriously than Zimbabwe where the board or committee is hardly consulted in the

¹¹⁸ For example, in 2012 a Transnet Board member was reported to sit on the boards and trustees of 63 other organisations (Kgosana C *Gigaba Clamps Down on Parastatal Bosses* (*The Times* of 14 March 2012) available at www.timeslive.co.za/Politics/2012/3/14).

¹¹⁹ See Chapter 4, para 4.2.3 and Chapter 5, 5.2.3 above.

¹²⁰ This has been established to be a common problem with most public officials appointed as board members of public entities (Frederick W *Enhancing the Role of the Boards of Directors of State-Owned Enterprises* (2011) 18-19).

¹²¹ Directors' term of office can therefore be terminated before the stipulated timeframe (Gumede W *South African State-Owned Enterprises: Boards, Executives and Recruitment* (2012) 26).

¹²² The annual reports for some of its public entities indicate that the board members have served for reasonable periods and there are no incidences of completely new boards being put in place (*South African Civil Aviation Authority 2013-2014 Annual Report* 45 and *South African National Roads Agency Limited 2014 Annual Report* 104).

¹²³ See Chapter 6, para 6.2.3 above and Vagliasindi M *The Effectiveness of Boards of Directors of State Owned Enterprises in Developing Countries* (2008) 8.

appointment process.¹²⁴ Nevertheless, it has been shown that only a few Australian public entities follow a systematic process of identifying board skill gaps before informing the responsible minister of the necessary requirements.¹²⁵ Secondly, Australia, by virtue of being a developed country, has a wider pool of directors to choose from which gives the selecting authorities more opportunities to find appropriately qualified and skilled directors.¹²⁶ As a result, Australia has succeeded in discouraging numerous directorships hence has not experienced the challenge of multiple directorships as much as Zimbabwe.¹²⁷

Australia has also tried to widen the pool from which to identify and select potential directors by encouraging supplementary processes such as public advertising or the use of executive search processes which have not yet been introduced in Zimbabwe where directors are mostly head hunted.¹²⁸ Australia, unlike Zimbabwe,¹²⁹ has further implemented a policy that

¹²⁴ More often than not, the responsible Minister just selects and recommends possible candidates to the President without consulting the board. In any event, most of the time there won't be any board to consult as boards are dissolved before another one is put in place. For example, in January 2009 the MMCZ board was dissolved and in June of the same year another board was formed. In June 2011 the board was completely dissolved and another one only appointed in September 2011 and the later board was dissolved in December 2012 to be replaced by one that went into office in February 2013. The board appointed in December 2012 was dissolved in December 2013 (MMCZ 2011 Annual Report, *The Herald* of 3 January 2013 and *Newsday* of 12 December 2013). This just confirms the excessive rate at which boards of public entities are changed in Zimbabwe.

¹²⁵ In some cases, even if a formal process was used the overriding role played by the minister made the process worthless (Meredith E *et al Public Sector Governance in Australia* (2012) 206-207).

¹²⁶ According to the research by Uhrig, the government has been able to attract a variety of skilled and professional people in its public entities boards. However, it is important to note that, although Australia may be better than Zimbabwe, it also has, to some extent, a limited pool from which potential directors may be drawn because government is competing with the private sector for suitable candidates (Uhrig J *Review of the Corporate Governance of Statutory Authorities and Office Holders* (2003) 43-44).

¹²⁷ According to a study conducted by Competitive Dynamics for the Australian Institute of Company Directors (AICD), Australia has low prevalence of numerous directorships. The study indicated that eighty-one per cent of top 100 companies' directors held only one directorship, while thirteen per cent held two and four per cent held three (AICD *Too many Directorships?* (AICD 2005) available at <http://www.companydirectors.com.au/.../Media+Releases/2005> (accessed on 15 October 2014)). See also Siladi B *The Role of Non-Executive Directors in Corporate Governance: An Evaluation* Unpublished Thesis (Swinburne University of Technology 2006) 104.

¹²⁸ See Chapter 6, para 6.2.3 above. Although Australia has tried to use a more professional approach by using the services of external consultants and head hunters and a Nomination Committee in the directors' nomination process, the domination by personal connections in the nomination process may not be ruled out (Siladi B *The Role of Non-Executive Directors in Corporate Governance: An Evaluation* (2006) 101-102).

¹²⁹ To confirm that in Zimbabwe the government is represented on the board by civil servants from the relevant ministry or other part of the government, the newly appointed board for ZMDC's subsidiary, Mining Promotion Corporation, is headed by the Secretary for Mines and Mining Development as the Board Chairman and the Minister's Personal Assistant was appointed a board member of ZMDC (*Newsday* of 1 April 2014 5 and *The Herald* of 1 April 2014 1). More so, the Secretary for Mines and Mining Development was appointed the Acting Board Chairman for MMCZ with effect from 1 January 2014 to 31 December 2014 (Chinyangare A *Mines Minister Fires Three Boards* (*Business Around the Clock* (BH24) of 12 December 2013) available at <http://www.bh24.co.zw/mines-minister-fires-three-boards/> and *Zimbabwe's Mines Minister Fires Boards of Directors of Three State-Owned Enterprises* (*Nams News Network* (NNN) of 12 December 2013) available at <http://www.namnewsnetwork.org/v3/read.php?id=MjUyNzU5> (accessed on 15 January 2015).

prohibits the appointment of public servants to the boards of public entities, except in exceptional circumstances.¹³⁰ Australia has, therefore, tried to avoid challenges created by government officials who, when appointed to boards, seek to defend the shareholder's position at the expense of the entity's growth and success. There also appears to be more board stability in Australia than in Zimbabwe where boards hardly complete their terms of office.¹³¹ Despite the major achievements, Australia has not been able to completely eliminate political interference in the board appointment processes.¹³² The interference, like in Zimbabwe, has adversely affected the effectiveness of public entity boards in Australia as some board members appointed for their political patronage may not be competent enough to undertake their fiduciary duties.¹³³

7.2.4 Composition of the Board

A balanced board in terms of skills mix, personalities, independence and diversity is necessary in building a team that will effectively contribute to issues and challenge viewpoints to ensure decisions are made in the interest of the organisation.¹³⁴ Results obtained from the survey indicated that compliance with board structures as prescribed by the Zimbabwean corporate governance instruments and other internationally recognised corporate governance codes is a serious challenge for public entities in Zimbabwe. Of

¹³⁰ In Australia the great majority of public entity board members are independent and excludes government or political board members (see Chapter 6, para 6.2.3 above). The *Uhrig Review* discouraged any representational appointments to boards because they "can fail to produce independent and objective views". Representational boards are likely to be primarily concerned with the interests of those they represent, rather than the success of the entity they are responsible for governing (Urig J *Review of the Corporate Governance of Statutory Authorities and Office Holders* (2003) 43).

¹³¹ In Australia, the government tries to ensure that boards of public entities complete their terms of office except in exceptional circumstances of poor performance or gross misconduct (McLellan J G *All above Board: Great Governance for the Government Sector* 2nd ed. (Australian Institute of Company Directors 2011) 78). Visit <http://auspost.com.au/annualreport2014/board-and-leadership-team.html> for information on periods served by board members of Australian Postal Corporation which appear reasonable.

¹³² In a public entities directors' survey conducted by Cameron, questions were raised about the selection process and the capabilities, skills and experience of some chosen directors and two thirds of the directors surveyed thought that the process for appointing board members was "...too politically influenced..." (Cameron R *Governance of SOEs: Is the Current Design of the SOE Model a Recipe for Failure?* (A Presentation to the Centre of Accounting Governance and Taxation Research Conference in November 2008) 21 available at https://www.victoria.ac.nz/sacl/centres-and-institutes/cagtr/pdf/Rob_Cameron_291108.pdf (accessed on 6 March 2015).

¹³³ *Ibid.*

¹³⁴ The various corporate governance Codes, for example, the *King III Report*, *OECD Principles of Corporate Governance*, *UK Corporate Governance Code* and the *Manual* recommend that boards should comprise a balance of executive and non-executive directors. Furthermore, the board should be properly mixed in terms of diversity, qualifications and experience to be able to make effective strategic decisions and objectively judge management's performance (see Chapter 2, para 2.6.3 above).

particular concern is the way in which board members are elected which is not based on merit as indicated above.¹³⁵ Consequently, boards created are not properly composed as required by good corporate governance standards.

In all four entities, the participants indicated that there were no approved minimum qualifications for directorship. The survey indicated that some board members neither possessed relevant qualifications nor appropriate industry knowledge as prescribed in the legislation establishing the public entities. According to one participant, “the authorities are not conducting any due diligence and background checks when appointing some of these so-called board members at our public institutions”. This was said to compromise the efficiency of the board. The survey results also revealed that the maximum board size is ten (including the chief executive officer) for ZMDC, GMB and MMCZ and eight for NRZ, the maximum years of tenure are three years but subject to renewal, there is no age limit for directors and no stipulated years of experience in specific areas. Although the maximum number of board membership each director may hold is one according to the *CGF* and two according to the draft *Corporate Governance and Remuneration Policy Framework*,¹³⁶ it appeared this was not seriously implemented. One of the participating board members was a member on four boards, two sat on three boards, the majority had two directorships whilst only two had a single directorship.

Despite the acknowledgement of the importance of gender equality, there is an evident low women representation on the boards in all the four entities as confirmed by the entities’ annual reports and participants.¹³⁷ Out of nine non-executive board members in MMCZ and ZMDC respectively, only two were women with indications that ZMDC had one female director during the years 2010-2012. GMB and NRZ had also one female board member each during the same period. Statistics obtained from the office of the former Ministry of State Enterprises and Parastatals for the years 2011 and 2012 illustrate the male dominance in

¹³⁵ Para 7.2.2 above.

¹³⁶ The participants highlighted that the *CGF* and *Framework* recommend different things which in itself may create challenges of which recommendation should be followed.

¹³⁷ Previous research has found that the gender balance objective has been difficult to achieve as most boards have been dominated by men (Wushe T, Shenje J and Ndlovu D “Too Many Seats Too Little Talent: An Analysis of Optimum Number of Seats for Board of Directors in State Owned Enterprises (SOEs) in Zimbabwe” (2015) 109-116). For example the MMCZ annual reports for 2009 – 2011 indicate that there were only two women out of nine board members. Similarly the 2009 and 2010 GMB annual reports show that there was only one woman out of nine board members.

boards.¹³⁸ Of the 86 public entities, the majority had a maximum of two women board members (with some not having a single woman on their board), 5 had three women and 2 had four women.¹³⁹ Although Zimbabwe provided for the establishment of a Gender Commission in its Constitution of 2013¹⁴⁰ members of the Commission were only appointed in June 2015.¹⁴¹ As at end of October 2015, the Commission was still to be allocated a budget to enable it to start operating.¹⁴² More so, judging by the efforts made so far, the country still has more work to do to comply with the provisions of international agreements on gender equality that it has acceded to.¹⁴³

The research results revealed that the public entities complied with this requirement. All the entities had the maximum prescribed number of directors in most cases except in two incidents in 2012 where MMCZ had six directors (which is the minimum prescribed number) and ZMDC had seven directors.¹⁴⁴ Of the nine board members in GMB and ZMDC, respectively, two were said to be (former or current) senior government officials whereas MMCZ had only one government official and NRZ had two government officials in its board. The appropriate board skills mix principle was not observed on a number of times as evidenced by the fact that MMCZ had no legal and finance skills in the boards in existence during the years 2011 and 2013. ZMDC also lacked legal skills in the board that presided during the period 2012 to 2013. During the period January 2014 to December 2014, MMCZ had one board member who acted as the board chairman, i.e. the Permanent Secretary of the

¹³⁸ Statistical Report obtained from Ministry of State Enterprises and Parastatals.

¹³⁹ Ibid.

¹⁴⁰ Section 12 of the Constitution.

¹⁴¹ The Gender Commission Bill was gazetted on 25th July 2014 (*Daily News* of 28 July 2014, *The Zimbabwean* of 29 July 2014 available at <http://www.thezimbabwean.co/news/zimbabwe-news/72764/zimbabwe-gender-commission-bill.html>) and *The Herald* of 30 June 2015 1).

¹⁴² *No Budget for Gender Commission* (*The Herald* of 26 October 2015 4).

¹⁴³ See Chapter 4, para 4.2.4 above. See also Chabaya O, Rembe S and Wadesango N “The Persistence of Gender Inequality in Zimbabwe: Factors that Impede the Advancement of Women into Leadership Positions in Primary Schools” (2009) 29 *South African Journal of Education* 235-251.

¹⁴⁴ This is in cases where the entities had boards in place because it was reported that there are situations when some entities had no boards at all, for example, MMCZ during the period June 2011 to November 2011 and December 2013 to December 2015.

shareholder ministry.¹⁴⁵ However, the participants indicated that, these were exceptional circumstances as in the majority of cases the responsible authorities try to have an appropriate skills mix in the board, which skills include finance, accounting, legal and relevant industry experience.

With regard to the recommendation that boards should comprise a balance of executive and non-executive directors,¹⁴⁶ the survey established that the boards of all the four entities comply with this requirement. They have a majority bias towards non-executive directors, since only the chief executive officer who is directly involved in the day-to-day running of the companies, serves on the boards. However, according to the participants, the majority of the non-executive directors “cannot be considered to be truly independent since they are representatives of the shareholders” of the public entities and are, in most cases, former or current senior government officials appointed to influence decisions taken at board level in the interest of the government.

7.2.4.1 Comparative Analysis of the Findings to those of South Africa

South Africa has tried to encourage the creation of properly composed boards that have diverse skills, good management qualities and competencies to effectively achieve public entities’ mandate as well as enforce good corporate governance.¹⁴⁷ However, similar to Zimbabwe’s experience above, South Africa has not been spared from the challenge of board members appointed for their political clout and other reasons instead of relevant skills and experience.¹⁴⁸ This has resulted in the creation of boards that are sometimes not properly composed in terms of skills mix, experience and other critical qualities.¹⁴⁹ South Africa has, to a large extent, tried to comply with its statutes and international recommendations which

¹⁴⁵ Chinyangare A *Mines Minister Fires Three Boards (Business Around the Clock (BH24) of 12 December 2013 and Zimbabwe's Mines Minister Fires Boards of Directors of Three State-Owned Enterprises (Nams News Network (NNN) of 12 December 2013. See also MMCZ 2013 Annual Report 7.*

¹⁴⁶ See Chapter 3, para 3.6.3 above.

¹⁴⁷ This is confirmed by the framework that South Africa has developed as shown in Chapter 5, para 5.2.4 above.

¹⁴⁸ Mkhwanazi D B *The Critical Evaluation of Board of Directors Composition and Their Effectiveness* Unpublished Thesis (University of Natal 2002) 22.

¹⁴⁹ The other contributing factor is that of insufficient board members with the relevant skills and experience as indicated in para 7.2.3 above.

provide for the appointment of the majority non-executive directors as a good corporate governance practice.¹⁵⁰ All public entities, for example, Eskom Holdings SOC Ltd and South African Civil Aviation Authority, have non-executive directors as the majority in their boards.¹⁵¹ South Africa has also limited the number of directors that make up public entity boards in the statutes establishing the entities and has succeeded in maintaining the standards set.¹⁵²

With regard to gender equality, South Africa has made greater advances in addressing the inequalities within its society particularly between women and men, although the percentage of working women in senior management positions is still unacceptably low and “boardrooms are still male-dominated”.¹⁵³ The 2013 Grant Thornton International Business Report (IBR) also pointed towards the lack of gender equality in South African boards.¹⁵⁴ It found that only 15 per cent of South African women were represented on boards compared to 26 per cent in BRIC (Brazil, Russia, India and China) counterparts.¹⁵⁵ However, although South Africa may not yet have reached acceptable levels, it has significantly performed better than Zimbabwe.¹⁵⁶ According to the World Economic Forum 2014 report on gender gap,

¹⁵⁰ See Chapter 5, para 5.2.4 above.

¹⁵¹ Eskom has only two executive directors (the CEO and Finance Director) whilst the rest (12) are independent non-executive directors (Eskom 2014 Integrated Report 66-67 available at <http://integratedreport.eskom.co.za/pdf/full-integrated.pdf>). South African Civil Aviation Authority had only one executive director (the CEO) whilst the rest (7) were independent non-executive directors (South African Civil Aviation Authority Annual Report 2013-2014 9 & 45).

¹⁵² The South African National Roads Agency Limited’s boards for the years 2013 and 2014 maintained the number of board members to a maximum of eight as prescribed in section 12 of the South African National Roads Agency Limited Act (The South African National Roads Agency Limited 2013-2014 Annual Report 9). See also the 2013 and 2014 annual reports for South African Civil Aviation Authority.

¹⁵³ Maharaj Z. *Gender Inequality and the Economy: Empowering Women in the New South Africa* (Keynote speech at Professional Women’s League of KwaZulu Natal in August 2009) available at <http://womensnet.org.za/news/speech.htm> (accessed on 3 February 2015). See also UNDP *Promote Gender Equality and Empower Women* (United Nations Development Programme (UNDP) 2014 Millennium Development Goals Report on South Africa available at http://www.za.undp.org/./south_africa/./mdgoverview/overview/mdg3.html (accessed on 9 February 2015).

¹⁵⁴ The report is available at [http://www.granthornton.ie/Publications/International-Business-Report-\(IBR\)-2013](http://www.granthornton.ie/Publications/International-Business-Report-(IBR)-2013) (accessed on 3 February 2015). However, in assessing diversity, the public sector was found to perform better than the private sector as the majority of public entities have good representation of both black and female directors (Research on *Governance and State-Owned Enterprises* conducted by Centre for Governance in Africa and Hans Seidel Foundation 2012) 16 available at <http://www.convivium4leaders.co.za/./Rating%20SOEs%20FinalReport2012.pdf> (accessed on 17 March 2015).

¹⁵⁵ Ibid. But, according to a study conducted by Arries, South African public entities had an average female representation of 49% on their boards (Arries C *Comparative Study on Specific Governance Elements in the State-Owned Entities Overseen by the Department of Public Enterprises (DPE) and the Department of Transport (DOT) in South Africa* (2014) 22.

¹⁵⁶ According to the United Nations Development Program (UNDP) Millennium Development Goals (MDG) 2013 Report, South Africa has “reached most gender equality targets, if not exceeded them” (UNDP MDG Report available at http://www.za.undp.org/content/south_africa/mdg3.html) (accessed on 12 March 2015)). As an example, Eskom Holdings SOC Ltd had a percentage of 57% women representation in its board as at 31 March 2014 (Eskom Holdings SOC Ltd 2014 Annual Report 66-67).

South Africa was ranked 65 out of 142 countries with a female to male ratio of 0:45 whilst Zimbabwe was ranked 96 out of 142 with a female to male ratio of 0:26.¹⁵⁷

7.2.4.2 Comparative Analysis of the Findings to those of Australia

The standards and principles set in Australia as regards board composition are similar to those recommended by the Zimbabwean framework.¹⁵⁸ But, Zimbabwe is limited in terms of the number of directors to choose from such that it has not been able to come up with appropriately composed boards and to be as strict as Australia in defining board independence.¹⁵⁹

Comparable to Zimbabwe, the majority of the board members of public entities in Australia are non-executive, with the Managing Director/Chief Executive Officer being the only executive director.¹⁶⁰ It has been shown that in Australia most, if not all, board members are independent and come from the private sector, even though they are appointed by the shareholder Minister.¹⁶¹ Moreover, the country defines independence more strictly both from the management and from business relationships in that the private sector experts are not supposed to have any business relation or be in competing business with the entity.¹⁶² According to the annual reports of some of the public entities, all the non-executive directors were appointed for their relevant skills and experience which makes Australia score better than Zimbabwe in this regard.¹⁶³ Following the Australian government's policy position that government officials should not be appointed as board members in public entities, except in exceptional conditions, most of Australia's entities do not have government officials as part

¹⁵⁷ The quoted rankings are for women employed as legislators or senior officers/managers. The *Global Gender Gap Report 2014* is available at <http://reports.weforum.org/global-gender-gap-report-2014> (accessed on 15 February 2015).

¹⁵⁸ See Chapter 4, para 4.2.4 and Chapter 6, para 6.2.4 above.

¹⁵⁹ Ncube F and Maunganidze L "Corporate Governance and Executive Compensation in Zimbabwean State Owned Enterprises: A Case of Institutionalized Predation" (2014) 4(6) *Management* 131-140. As indicated above, it has been difficult for Zimbabwe to achieve board continuity and stability given the rampant changes in boards of its public entities. See also para 6.2.4 for the comparative analysis between Australia and Zimbabwe.

¹⁶⁰ See the *APC 2014 Annual Report* 17 and *SRDC 2013-2014 Annual Report* 35.

¹⁶¹ OECD *Comparative Report on Corporate Governance of State-Owned Enterprises* (2005) 87-89. See also para 2.7 of the *GBE Guidelines*.

¹⁶² *Ibid.*

¹⁶³ See the *APC 2014 Annual Report* 16-17 and *SRDC 2013-2014 Annual Report* 33-35.

of their boards.¹⁶⁴ With regard to the board size, like in Zimbabwe, the size of Australian public entities boards is stipulated in the establishing Acts and ranges from a minimum of six and a maximum of nine.¹⁶⁵ Australia has managed to comply with the statutory requirements.¹⁶⁶

In comparison to Zimbabwe, Australia has done significantly better in terms of promoting gender equality in its board directorships although it still has to do more to meet its set targets.¹⁶⁷ According to the World Economic Forum report on gender gap, Australia was ranked 40 out of 142 countries with a female to male ratio of 0:57 whilst Zimbabwe was ranked 96 out of 142 with a female to male ratio of 0:26.¹⁶⁸ According to AICD, women accounted for 19.8% of ASX200 directorships as at 28 February 2015, up from 19.3% at the end of 2014 and with 34 boards having no women at all.¹⁶⁹ As far as Australian Government board appointments are concerned, women held 41.7% of board directorships as at 30 June 2013, an increase from 38.4% in 2012.¹⁷⁰ Thus, unlike Zimbabwe, Australia is progressively working towards achieving its set targets concerning gender equality. It can therefore, be concluded that Australia, contrary to Zimbabwe, has significantly tried to comply with its corporate governance framework with regard to proper board composition although there are still gaps to be filled.

¹⁶⁴ Ibid. The profile descriptions of the board members in the annual reports indicate that they are not government officials (*APC 2014 Annual Report* 16-17 and *SRDC 2013-2014 Annual Report* 33-35).

¹⁶⁵ See Chapter 6, para 6.2.4 above.

¹⁶⁶ SRDC has 7 directors and GRDC has 9 directors, excluding the CEO (*SRDC 2013-2014 Annual Report* 35 and *GRDC 2013-2014 Annual Report* 80-82).

¹⁶⁷ For example, APC had two female members out of eight board members in 2014, a percentage of 25% instead of the 40% target as per the *GBE Guidelines* (para 2.8 of *GBE Guidelines* and *APC 2014 Annual Report*, 45). Likewise, the *2013-2014 Annual Report* for SRDC shows that the entity had a women representation of 14%. See para 5.2.4 for the efforts Australia has made to promote gender equality.

¹⁶⁸ The *Global Gender Gap Report 2014* 104. However, according to Professor Du Plessis, “Australia is very much a male-dominated society, as far as business and politics are concerned”. Several prominent organisations and institutions in Australia have come up with “wonderful initiatives and well-intended programs” to promote gender equality on boards, “but so far, they have not resulted in any significant improvement in the gender balance on boards of listed companies. On ASX 200 boards, only 18.2 per cent of board members are women and only 3.5 per cent of CEOs are women” (Du Plessis J *Getting More Women on Board* (Deakin University (Australia) Research Communications 2014) <http://www.deakin.edu.au/research/stories/2014/09/29/getting-more-women-on-board> (accessed on 5 May 2015)).

¹⁶⁹ AICD *Statistics - Appointments to S&P/ASX 200 Boards* (AICD Statistics of March 2015) available at <http://www.companydirectors.com.au/Director-resource-Centre/Governance-and-Director-Issues/board-Diversity/Statistics> (accessed on 13 March 2015). Curtis M Schmid C and Struber M also confirm the improvement in gender diversity in their paper “*Gender Diversity and Corporate Performance*” (Credit Suisse Research Institute Paper of August 2012) 18-19 available at https://www.credit-suisse.com/newsletter/doc/gender_diversity.pdf (accessed on 17 March 2015)).

¹⁷⁰ Ibid.

7.2.5 Remuneration of the Board

Good corporate governance requires that the level of remuneration for members of the board should be sufficient to attract and retain the quality and calibre of individuals needed to run the organisation successfully.¹⁷¹ It has also been considered essential that directors' remuneration should be performance related and set in a formal and transparent manner, preferably through an appropriately composed remuneration committee.¹⁷²

According to half of the participants, although the framework provides that directors should be adequately remunerated, the directors in their entities are not adequately remunerated. The participating board members were of the view that they are “grossly underpaid” considering the increase in legal responsibilities directors are expected to carry out, the length of time required for preparation and attendance of meetings as well as the reputational risks associated with directorship in public entities. The participants from three of the loss making public entities (GMB, NRZ and ZMDC) cited financial constraints as one of the reasons for failure to pay remuneration commensurate with the required board expertise and responsibilities involved. Contrary to the above views, seventeen of the participants believed that the board members were being sufficiently rewarded. One participant commented “\$400 as sitting allowance for one meeting plus monthly fees of \$900 is appropriate remuneration in a struggling economy like Zimbabwe”. On the other hand, the rest of the participants indicated that they believed that board members were overpaid considering the time they devote to the entities with some members coming to the meetings unprepared because they would not have read the board packs.

The participants also expressed the view that the above challenges are compounded by the absence of a standard remuneration framework such that each public entity determines its own board remuneration thus creating distortions in the market.¹⁷³ In addition, the directors'

¹⁷¹ See Chapter3, para 3.6.4 above.

¹⁷² Ibid.

¹⁷³ The participants highlighted the fact that there was no commonly agreed definition of what constitutes fair remuneration. In an effort to address the disparities, Zimbabwe has come up with a draft *Corporate Governance and Remuneration Policy Framework* to govern the operations of state owned enterprises and local authorities with regard to remuneration and corporate governance practices.

remuneration was said not be linked to corporate or individual directors' performance.¹⁷⁴ As a result, the non-performance of an individual director or the public entity is not a restraining factor for directors to be accorded their remuneration. The directors may, therefore, lack the motivation to perform in the interests of the shareholders which could adversely impact on the performance of the public entities. The participants whose view was that the board remuneration is inadequate also highlighted that poor remuneration resulted in the disgruntled board members "opting to place more of their commitment in other better paying activities" and put less effort in the business of the public entities.¹⁷⁵

The participating managers indicated that, in some cases, the boards resorted to approving their fees without ministerial involvement in contradiction to the provisions of the law and corporate governance principles.¹⁷⁶ Also, the participants indicated that boards were holding unnecessary meetings as a means of increasing the board fees, for example, in one entity, instead of holding quarterly meetings as statutorily provided for, the board resolved to hold monthly meetings. One participant commented that "the rate at which some of our boards hold meetings leaves one wondering whether they consider the fact that there is need to create sufficient time to action board resolutions before holding another meeting". Some other participants also reported that they had received letters from the parent ministry seeking justification for holding more than statutorily provided for board and committee meetings.¹⁷⁷

The managers and ministry representatives added that greed and corrupt tendencies by board

¹⁷⁴ This is mostly as a result of the absence of performance contracts and performance measurement systems as indicated in para 7.2.3 above. See also Matowanyika K, Hosho N, Mabvure TJ and Dandira M "Are Directors Remunerated for Corporate Performance?" (2013) 4(15) *Research Journal of Finance and Accounting* 21-27 and Mutanda D "The Impact of the Zimbabwean Crisis on Parastatals" (2014) 1-14, for similar sentiments.

¹⁷⁵ This was said to be shown by the poor attendance at board or committee meetings and other events where the board members would have been invited to attend on behalf of the entity. Wushe *et al* similarly found that "independent directors had a high absenteeism rate in terms of attending crucial board meetings per year for the state owned enterprises" (Wushe T, Shenje J and Ndlovu D "Too Many Seats Too Little Talent: An Analysis of Optimum Number of Seats for Board of Directors in State Owned Enterprises (SOEs) in Zimbabwe" (2015) 109-116). However, a few of the participants were of the view that the level of a director's commitment and dedication should not necessarily be determined by remuneration only as there are other long term non-monetary rewards associated with being a director.

¹⁷⁶ The Minister of Information, Media and Broadcasting Services indicated that the hefty salaries paid to Zimbabwe Broadcasting Corporation (ZBC) board and senior managers since 2012 were unlawful because they were unprocedurally negotiated, adopted and implemented without Ministerial knowledge and approval (*The Zimbabwe Mail* of 30 January 2014 2). Another example is that of Premier Medical Aid Society (PSMAS) where the board approved exorbitant board fees (\$120 000 per quarter) and senior managers salaries (as high as \$230 000 per month) without the knowledge and approval of the parent ministry (*The Herald* of 23 January 2014 3). The scandalous situation was reported to have been fuelled by weak monitoring mechanisms by the parent ministries. For similar views, see Rusvingo SL "The Salarygate Scandal in the Zimbabwe Parastatals Sector: Another Darkside of the Nation (2013 – 2014)" (2014) 14(1) *Global Journal of Management and Business Research: Administration and Management* 18-29.

¹⁷⁷ According to the participants, the particular board held 10 board meetings (instead of 4 as per the Act) and 8 meetings per each committee (instead of 4) during the year 2012.

members also affected the entities' board remuneration system.¹⁷⁸ According to one participant, the other challenge is that “some people who are appointed as board members have no other source of income so they tend to want to maximise on board fees hence the reason they would call for unnecessary meetings or engage in unethical activities as a means of raising income”.¹⁷⁹

On the functions of the remuneration committee, it was established that, although all the four public entities have remuneration committees, the committees have “greater say with regard to management salaries and benefits but minimal contribution in the setting of board remuneration”. The majority of the participants indicated that the remuneration of the board is set by the Minister with “very little, if any, input from the board”.¹⁸⁰ They highlighted that the remuneration committee makes recommendations to the board which deliberates on the recommendations and subsequently forwards the recommendations to the Minister. However, in their view, the remuneration package eventually approved by the Minister does not appear to have taken into account the remuneration committee's recommendations and is neither adequate to motivate the board nor linked to performance.

With regard to disclosure of directors' remuneration, all the participants indicated that directors' remuneration is aggregately presented in the financial statements and no breakdown is given of individual director's remuneration.¹⁸¹ According to the majority of the participants, aggregate disclosure made it difficult for stakeholders to assess the level of individual directors' remuneration and could, in some instances, be deliberate to avoid transparency and public scrutiny. The above issues point to the fact that Zimbabwean public entities have not effectively implemented the existing remuneration guidelines hence poor

¹⁷⁸ To support this assertion, during the period November 2013 and February 2014, Zimbabwe was engulfed with news of company directors earning exorbitant and unauthorised salaries albeit on the back of struggling company operations. Examples of three such organisations that made headlines are ZBC, PSMAS and City of Harare. See *Zimbabwe National Chamber of Commerce Newsletter* of 6 February 2014 1 and *Newsday* of 10 February 2014 5. See also Rusvingo S L “The Rot in the State-Owned Enterprises in Zimbabwe: A Cause for Great Concern” (2014) (2014) 14(7) *Global Journal of Human-Social Science* 38-43.

¹⁷⁹ This position was confirmed by Wushe *et al* who found that directors who are nearing retirement age or have limited sources of income “may be interested much in the compensation rather than performance” (Wushe T, Shenje J and Ndlovu D “Too Many Seats Too Little Talent: An Analysis of Optimum Number of Seats for Board of Directors in State Owned Enterprises (SOEs) in Zimbabwe” (2015) 109-116). According to the quoted participant, whose view was supported by eight other participants, the appointing authorities should not appoint directors who have no stable source of income so as to minimise such challenges.

¹⁸⁰ See Chapter 3, para 3.2.5 above, for similar concerns.

¹⁸¹ See page 47 of the *MMCZ 2013 Annual Report* and page 47 of the *ZMDC 2012 Annual Report*.

board remuneration remains a major concern in discussions regarding the effectiveness of boards.

7.2.5.1 Comparative Analysis of the Findings to those of South Africa

South Africa and Zimbabwe have come up with similar provisions with regard to the need to motivate directors to effectively discharge their duties through performance related, fair and adequate remuneration.¹⁸² However, directors in both countries are still of the view that they are not sufficiently rewarded for their skills and experience and for the risks and liabilities associated with being a director.¹⁸³ This is shown by the limited number of people willing to be directors in public entities and the lack of commitment by some people who will have been appointed as directors.¹⁸⁴

Contrary to Zimbabwe which does not have any remuneration guidelines specific to public entities, South Africa has remuneration guidelines specifically targeted to directors engaged by public entities.¹⁸⁵ The South African National Treasury, in compliance with the *State-owned Enterprises Remuneration Guidelines*, publishes an annual directive which sets maximum remuneration and fees limits for non-executive board members of public entities.¹⁸⁶ However, the challenge appears to be that the remuneration guidelines are not being fully complied with, judging from some of the annual reports for certain public entities.¹⁸⁷ For example, the remuneration guidelines provide for the establishment of a remuneration committee to assist in the determination of board remuneration but this is not

¹⁸² See Chapter 4, para 4.2.5 and Chapter 5, para 5.2.5 above.

¹⁸³ This has been confirmed by the Zimbabwe research participants and Spencer Stuart *Board Governance in South Africa* (2009) 11.

¹⁸⁴ The research by Spencer Stuart revealed that “There are many potential board members who would rather paddle their own canoes than serve on the boards...” (Spencer Stuart *Board Governance in South Africa* (2009) 11).

¹⁸⁵ See Chapter 5, para 5.2.5 above and Arries C *Comparative Study on Specific Governance Elements in the State-Owned Entities Overseen by the Department of Public Enterprises (DPE) and the Department of Transport (DOT) in South Africa* (2014) 15.

¹⁸⁶ Arries C *Comparative Study on Specific Governance Elements in the State-Owned Entities Overseen by the Department of Public Enterprises (DPE) and the Department of Transport (DOT) in South Africa* (2014) 15.

¹⁸⁷ See *South African Civil Aviation Authority 2013-2014 Annual Report* 48 and *South African National Roads Agency Limited 2013-2014 Annual Report* 171.

happening on the ground.¹⁸⁸ The committee plays no significant role in the setting of board remuneration because the remuneration is determined and fixed by the National Treasury and the shareholder Minister, presumably based on the remuneration guidelines.¹⁸⁹

Another factor that distinguishes the two countries is that board remuneration in South Africa, unlike that of Zimbabwe, is not arbitrarily fixed but based on performance.¹⁹⁰ Nonetheless, concerns have been raised that there has not been a synchronised and consolidated approach to board remuneration for public entities in South Africa which “is further compounded by the mixed ownership model for SOEs with entities reporting to different sector ministries” resulting in inconsistencies and inequalities within the entities.¹⁹¹ Also, despite the existence of remuneration guidelines, the remuneration of South African public entity boards is still considered low in comparison to their private sector counterparts and also in consideration of the enormous responsibilities.¹⁹²

As regards the disclosure of directors’ remuneration, South African public entities have done greatly better than Zimbabwean entities in that, instead of aggregate presentation, they are disclosing individual directors’ fees in the annual reports, as a result enhancing transparency.¹⁹³

¹⁸⁸ Ibid. See also Arries C *Comparative Study on Specific Governance Elements in the State-Owned Entities Overseen by the Department of Public Enterprises (DPE) and the Department of Transport (DOT) in South Africa* (2014) 15.

¹⁸⁹ See *South African Civil Aviation Authority 2013-2014 Annual Report* 47-48 and *South African National Roads Agency Limited 2013-2014 Annual Report* 170-173.

¹⁹⁰ As indicated in Chapter 5, para 5.2.5 above, the guidelines suggest that remuneration for directors should be linked to the state owned enterprise size, determined by the asset base and revenue. See also Arries C *Comparative Study on Specific Governance Elements in the State-Owned Entities Overseen by the Department of Public Enterprises (DPE) and the Department of Transport (DOT) in South Africa* (2014) 26-28.

¹⁹¹ Phiyega R *Remuneration Observations SOES and Public Office Bearers* (South African Reward Association (SARA) Presentation) 11 available at <http://www.sara.co.za/sara/.../Riah%20Phiyega.pdf> (accessed on 22 March 2015).

¹⁹² Crafford D *SOE Remuneration and Wage Gap Analysis* (South African Presidential SOE Review Committee Paper of March 2012) 17 & 38 available at http://www.thepresidency.gov.za/electronicreport/downloads/volume_3/ (accessed on 27 May 2015). See also Spencer Stuart *Board Governance in South Africa* (2009) 11-12 and Frederick W *Enhancing the Role of the Boards of Directors of State-Owned Enterprises* (2011) 26-27.

¹⁹³ *South African Civil Aviation Authority 2014 Annual Report* 104 and *South African National Roads Agency Limited Annual 2013-2014 Report* 171.

7.2.5.2 Comparative Analysis of the Findings to those of Australia

In Australia, as in Zimbabwe, the board is not involved in setting its own remuneration and the remuneration committee has no significant role to play in the process.¹⁹⁴ But, Australia has performed significantly better than Zimbabwe as far as the determination of board remuneration is concerned. This is because the remuneration paid to board members is determined by a Remuneration Tribunal which is an independent body that objectively determines the remuneration after taking into account a number of critical factors.¹⁹⁵ This initiative by Australia has enabled it to achieve transparency, objectivity and uniformity as well as to set remuneration levels that are as more realistic as possible.¹⁹⁶ However, Australia's board remuneration, like Zimbabwe's, is still to approach acceptable levels in comparison with the private sector, the responsibilities involved and greater risk of directors being held legally liable.¹⁹⁷

Like Zimbabwe, the financial statements or annual reports for most Australian public entities have not fully adopted the principle of disclosing individual directors' remuneration but just indicate the total board remuneration.¹⁹⁸ Presentation of board remuneration in an aggregate manner diminishes transparency and makes public scrutiny difficult.¹⁹⁹

¹⁹⁴ See Chapter 6, para 6.2.5. See also OECD *Board of Directors of State-Owned Enterprises: An Overview of National Practices* (2012) 71 and *GRDC 2013-2014 Annual Report* 129.

¹⁹⁵ OECD *Corporate Governance of State-Owned Enterprises A Survey of OECD Countries: A Survey of OECD Countries* (2005) 154. The Remuneration Tribunal should take into account "the workload and work value of the office, fees in the private sector, wage indices, non-cash benefits provided and other economic indices and rates set for other bodies" (para 2.14 of the *GBE Guidelines*).

¹⁹⁶ *Ibid.*

¹⁹⁷ A survey by Ernst & Young and the Australian Institute of Company Directors (AICD) indicated that 63 % of respondents believed that they were underpaid (Australian Institute of Company Directors October 2003). Another public entities director survey also revealed that "...[SOE] Directors believe they are under-compensated for their roles and responsibilities, both absolutely and relative to private sector benchmarks...This adversely impacts the availability of capable Directors...". (Cameron R *Governance of SOEs: Is the current design of the SOE Model a Recipe for Failure?* (A Presentation to the Centre of Accounting Governance and Taxation Research Conference in November 2008) 22-23 available at https://www.victoria.ac.nz/sacl/centres-and-institutes/cagtr/pdf/Rob_Cameron_291108.pdf (accessed on 6 February 2015)). See also Siladi B *The Role of Non-Executive Directors in Corporate Governance: An Evaluation* (2006) 102-103.

¹⁹⁸ See *APC 2013-2014 Annual Report* 10 and *GRDC 2013-2014 Annual Report* 129.

¹⁹⁹ See Chapter 3, para 3.6.4 above.

7.2.6 Evaluation of Board Performance

Good corporate governance requires that there be accountability and measurement of performance in the management of companies.²⁰⁰ The issue of whether board evaluation actually leads to improved board performance was put to all the participants as a direct question and they unanimously agreed that board evaluation is an essential ingredient in corporate governance that can motivate and also compel board members to effectively undertake their responsibilities.

According to the majority of the participants, Zimbabwean public entities have encountered numerous challenges in conducting evaluations of board performances. First, the initial step of appointing public entity directors was said to defeat the whole objective of coming up with performance contracts to improve the effectiveness of boards. This is because some of the directors who are expected to meet the targets agreed upon with the government “lack the capacity to perform efficiently, as they are appointed on the basis of their close political or other relationships with public officials rather than on merit”.²⁰¹ The so appointed directors enjoy political protection and it might thus be difficult to evaluate their performance and remove them from office even when they do not meet the targets set under performance contracts.²⁰²

Secondly, all participants indicated that the *CGF* and other key instruments had not impacted significantly in their entities as there was no implementation of the recommendations with regard to written job descriptions or performance contracts for all the four boards.²⁰³ They added that, in practice, there were no established processes for setting performance objectives and indicators as well as reviewing performance against the targets, for the board as a whole

²⁰⁰ See Chapter 3, para 3.6.5 above on the benefits of board evaluations.

²⁰¹ This position was also confirmed in Mwaura K “The Failure of Corporate Governance in State Owned Enterprises and the Need for Restructured Governance in Fully and Partially Privatized Enterprises: The Case of Kenya” (2007) 34-75.

²⁰² See Chapter 3, para 3.6.5, for similar sentiments.

²⁰³ All three public entities do not have performance contracts and formal evaluation of board performance procedures as required by the *CGF*.

and for individual directors.²⁰⁴ Where an attempt to set performance objectives and indicators has been made, like in the case of GMB, the performance contracts were said to be “unclear and to lack sufficient detail”.²⁰⁵ The participants further added that the parent ministries lacked the capacity and sufficient commitment to effectively monitor the operations of the boards “making the whole exercise a worthless process”.

To further complicate matters, the majority of the participants highlighted the fact that the government has no objective and standardised board performance evaluation tool in place which makes it difficult to conduct effective performance assessments.²⁰⁶ They highlighted the fact that there had been no significant effort to implement the recently introduced Results Based Management system.²⁰⁷ As a result, there are no formal board performance evaluations making it difficult to hold directors accountable for poor performance. This, according to eleven of the participants, also presents challenges in assessing the board’s needs for specific skills and knowledge and for individual directors to further develop themselves since there is no basis on which to recommend improvements. On the other hand, the participating board members indicated that they are not adequately equipped to perform their duties and evaluate their performance “due to the absence of sufficient guidance from the parent ministry”.

Nevertheless, the majority of the participants expressed great concern at the way boards are normally dismissed allegedly based on incompetence despite the absence of comprehensive laid down procedures to enable the shareholder Minister to give feedback on performance. The participants highlighted the fact that in some cases the dismissal of boards is announced in the press by the Minister before the individual board members are formally notified of the dismissal. They also cited this as one of the factors that discourage a number of people from

²⁰⁴ Matowanyika *et al* made similar findings (Matowanyika K, Hosho N, Mabvure TJ and Dandira M “Are Directors Remunerated for Corporate Performance?” (2013) 21-27).

²⁰⁵ PwC and IoDSA *State-Owned Enterprises: Governance Responsibility and Accountability* (Public Sector Working Group: Position Paper 3 of 2011 (PricewaterhouseCoopers (PwC) & Institute of Directors in Southern Africa (IoDSA)) available at www.iodsa.co.za (accessed on 28 February 2015)).

²⁰⁶ The majority of the participants attributed the causes of some of the inefficiencies and corruption in the public entities to poor monitoring by the parent ministry and absence of criteria for measurement of board performance.

²⁰⁷ See Chapter 4, para 4.2.6 above. The participants indicated that “whilst there has been substantial appreciation of the RBM program in general, there is still need to institute change management initiatives that will help transform the mindset” of everyone concerned so that they begin to “understand and appreciate the importance of implementing the programme for the purpose of managing for results and improving service delivery to the public”. The other challenge noted was that of resource constraints which hamper training initiatives to educate all key players so that they become conversant with the concept before its full implementation. See also Madhekeni A “Implementing Results-Based Management Systems in Zimbabwe: Context and Implications for the Public Sector” (2012) 122-129, for similar observations.

accepting appointments to boards of public entities because of the reputational damage associated with being unjustly published for incompetence in the newspapers.

The third challenge, according to the majority of the participants, is too much intrusion by the parent ministry in operational issues in the form of directives and approvals as highlighted above.²⁰⁸ The various approvals that have to be undertaken by the Minister delay the boards from implementing strategic plans on a timely basis. In addition, the participants also expressed concern at government directives that require their entities to provide goods and services at unprofitable prices or to undertake certain activities that are not commercially viable.²⁰⁹ The major risk with this kind of arrangement was said to be that boards end up focusing on accomplishing directives of the parent ministry at the expense of performance related issues.²¹⁰ Accordingly, measuring the board's performance and effectiveness becomes a challenge as the board is not in control of most of the issues that are crucial for the success of the entity.²¹¹

The fourth challenge highlighted by the participants was the numerous changes in boards which result in too many uncompleted projects and significantly compromises the board's performance.²¹² They argued that boards are sometimes prematurely dismissed without proper justification. They gave an example of the rampant changes in boards which occurred when new Ministers came into office in 2013 as a clear indication of this fact.²¹³ Also, the managers of MMCZ and ZMDC indicated that their entities have sometimes gone for long

²⁰⁸ Para 7.2.1 and Chapter 4, para 4.2.5 above.

²⁰⁹ Examples are GMB and NRZ where it was indicated that sometimes the entities are directed to sell grain and charge fares, respectively, at subsidised prices which are less than the cost or to even donate the grain or render services for free. See also Ashipala S M *An Analysis of Corporate Governance within the Framework of State Owned Enterprises Governance Act in Namibia with Specific Focus on Namwater, Nampower And Transnamib* (2012) 3.

²¹⁰ This is a common phenomena in public entities (Indreswari M *Corporate Governance in the Indonesian State Owned Enterprises* (2006) 121 and Chapter 3, para 3.6.5 above).

²¹¹ *Ibid.*

²¹² The boards are changed when new Ministers come into office without considering the need for continuity. MMCZ had 3 different boards in a space of three years from 2010 to 2013 which resulted in the Corporation going without a substantive general manager for more than five years since the boards were fired before completing the recruitment process. Similarly, ZMDC had three different boards during the same period. This is a common trend in most developing countries (see Vagliasindi M *The Effectiveness of Boards of Directors of State Owned Enterprises in Developing Countries* (2008) 3-4).

²¹³ The country's newspapers for the period November 2013 to February 2014 (when a new government came into place) reported vast dissolutions of boards, for example five boards under the Ministry of Transport and Infrastructural Development were all dissolved on 11 February 2014 (*The Zimbabwe Mail* of 12 February 2014 2 and *Newsday* of 12 February 2014 1). In the same vein, the Energy and Power Development Minister dissolved the boards of eight public entities under the supervision of his ministry (*Newsday* of 5 February 2014 1 and *The Herald* of 6 February 2014 1).

periods without boards which negatively impacts on the effectiveness of the boards and efficiency of the entities.²¹⁴ The premature dismissal and complete absence of a board makes it difficult for “a new board to pick up from scratch and still effectively discharge its duties”.

As a final point, all the participating shareholder representatives indicated that the boards do not provide the parent ministry with sufficient information about the public entities’ operations and financial position of the public entities.²¹⁵ Although the four public entities produce annual reports, ZMDC, NRZ and GMB were not compliant with the PFMA requirements as they were not up to date with the publishing of their annual reports.²¹⁶ The participants thus argued that such practice makes the annual reports irrelevant for current decision making. In further violation of the PFMA, all four public entities were reported not to be holding Annual General Meetings which are considered as important channels of informing shareholders on company performance. The majority of the participants agreed that these challenges make it complicated to evaluate and conclude whether or not a board has effectively performed its duties. Therefore, according to the participants, the framework that has been put in place to ensure that boards are properly evaluated has not been implemented and has not assisted the boards to effectively discharge their duties.

7.2.6.1 Comparative Analysis of the Findings to those of South Africa

In South Africa, there is currently no legislative requirement to carry out evaluation of board performances.²¹⁷ The *Protocol* and the *King III Report* that provide for evaluation of board performances are not legally binding instruments. As a result, a significant number of the South African public entities have not been conducting board performance evaluations but

²¹⁴ ZMDC had no board for close to one year during the period 2009 and 2010 (*The Financial Gazette* of 30 August 2012 3). Similarly MMCZ had no board for a period of seven months during the year 2011 and a one man board for the period 1 January 2014 to 31 December 2015 (*MMCZ 2014 Annual Report* 4). GMB had no board for part of 2006 and 2007 for a period of nine months (*GMB 2007 Annual Report*).

²¹⁵ Best corporate governance practice requires that public entities should report annually to inform the public of their activities and performance. Similarly the establishing Acts, PFMA, *CGF* and *National Code* require public entities to produce annual reports. But, the annual reports have not yet complied with some aspects of international best practice, for example, providing an individualised breakdown of directors’ remuneration (see *MMCZ 2013 Annual Report* and *GMB 2012 Annual Report*).

²¹⁶ At the time of interviewing the participants, GMB, NRZ and ZMDC had last published their annual reports in 2012.

²¹⁷ Gumede W *South African State-Owned Enterprises: Boards, Executives and Recruitment* (2012) 42-43.

started doing so recently.²¹⁸ Thomas found that 40% of the public entities surveyed were not conducting board performance appraisals in 2012.²¹⁹

According to research conducted by Business Unity South Africa (BUSA), in South Africa, “there is weak accountability for poor performance, including ineffective monitoring and evaluation”.²²⁰ The research also established that performance contracts for boards of public entities are often poorly drafted and not effectively or consistently monitored resulting in weak evaluation frameworks.²²¹ Thus, performance evaluation has been made difficult by the fact that there is uncertainty as to what should be measured and how it should be measured.²²² In addition, the BUSA research found that lack of accountability for poor performance is sometimes worsened by political interference in the operations of boards, protection of incompetent and underperforming directors and executives, lack of independent boards and imposition of too many conflicting political, social and economic objectives.²²³ The delays in approvals of urgent strategic issues by the government were also found to be a challenge that adversely affects the board’s effectiveness and hence its objective evaluation.²²⁴

²¹⁸ According to their annual reports, board evaluations commenced in 2013 in South African Civil Aviation Authority whereas in South African National Roads Agency Limited evaluations commenced in 2014 (*South African Civil Aviation Authority 2013-2014 Annual Report* 44 and *South African National Roads Agency Limited 2014 Annual Report* 105).

²¹⁹ Thomas A “Governance at South African State-Owned Enterprises: What Do Annual Reports and the Print Media Tell Us?” (2012) 448 – 470. However, unlike Zimbabwe which is still to implement the provisions of its *CGF* with regard to board performance contracts, a significant number of South Africa’s public entities boards have signed performance contracts with their shareholder Ministers (*South African Civil Aviation Authority 2013-2014 Annual Report* 44 and *South African National Roads Agency Limited 2014 Annual Report* 110).

²²⁰ BUSA *The Role of State Owned Entities in South Africa* (A Submission Prepared By Business Unity South Africa to the Presidential Review Committee on State Owned Entities in September 2011) available at www.gov.za/documents/download.php?f=190834 (Accessed on 8 February 2015) 22-23.

²²¹ According to the BUSA report, there is no clarity in the governance framework between long-term mandates, strategic plans, indicators, targets and related incentives. In the absence of clarity on the purpose of a public entity and the board’s mandate, it has become difficult to formulate a clear operating mandate, draft a clear strategic plan and, in turn, effective performance contracts.

²²² Mkhwanazi D B *The Critical Evaluation of Board of Directors Composition and Their Effectiveness* (2002) 28.

²²³ Ibid. In practice, public entities are often compelled to pursue multiple, changing and often conflicting objectives (e.g. job creation, training, social goods versus cost-effective service delivery). In some instances (e.g. Eskom prior to the supply crisis in 2008), public entities have been used as instruments of macro-economic stabilisation policy, adhering to price controls and investment targets, without due regard for their long term performance or sustainability (BUSA *The Role of State Owned Entities in South Africa* (2011) 22-23).

²²⁴ Gumede W *South African State-Owned Enterprises: Boards, Executives and Recruitment* (2012) 9-12.

In contrast to Zimbabwe, the majority of South African public entities have been able to publish their annual reports within the confines of the PFMA.²²⁵ The annual reports are detailed enough to enable stakeholders to make sound opinions about the performance of the boards, for example, they indicate the roles and responsibilities of the board, qualifications and experience of directors and number of meetings attended by individual board members, among others.²²⁶ More so, the South African public entities, unlike in Zimbabwe, hold annual general meetings as per statutory requirements.²²⁷ South Africa appears to be employing commendable efforts to enforce board evaluations contrary to Zimbabwe which is still to exhibit commitment to the implementation of board evaluations in its public entities.²²⁸

7.2.6.2 Comparative Analysis of the Findings to those of Australia

Australia, unlike Zimbabwe, has not left the issue of board evaluations exclusively to voluntary compliance as provided in its instruments like the *GBE Guidelines* and *ASX CGC Corporate Governance Principles and Recommendations*, but has gone a step further and legislated for it.²²⁹ Public entities are, therefore, expected to conduct board evaluations in terms of the Public Governance, Performance and Accountability (PGPA) Act. Judging from the published annual reports for some of Australia's public entities, the Australian entities have started implementing board evaluations at a greater scale than Zimbabwe.²³⁰ Australia has tried to minimise the appointment of incompetent and inexperienced directors and that of public servants in a better way than Zimbabwe by providing for an objective and transparent

²²⁵ The majority of public entities are up to date with the publication of their annual reports. For example, the South African Civil Aviation Authority, Eskom Holdings SOC Ltd. and South African National Roads Agency Limited have already published their 2014 annual reports in compliance with the statutes.

²²⁶ *Eskom Holdings SOC Ltd 2014 Annual Report* 66-71, *South African Civil Aviation Authority 2013-2014 Annual Report* 44-49 and *South African National Roads Agency Limited 2014 Annual Report* 104-109.

²²⁷ Ibid.

²²⁸ The annual reports for the selected entities exhibit that South African public entities have realised the value of board evaluations in enhancing board effectiveness. As an example, Eskom reported that an independent evaluation of the performance and effectiveness of the board, individual directors and the company secretary had been conducted as per its practice whereas South African National Roads Agency Limited reported that it held its first board evaluation in 2014 (*Eskom Holdings SOC Ltd 2014 Annual Report* 68 and *South African Civil Aviation Authority 2013-2014 Annual Report* 109).

²²⁹ See Chapter 6, para 6.2.6 above and sections 37-40 of the PGPA Act.

²³⁰ The APC reported that it undertakes board evaluations with the assistance of an external consultant in every two years (*APC 2013-2014 Annual Report* 45). The GRDC reported that its board periodically commissions an external review of its performance (*GRDC 2013-2014 Annual Report* 84). See also *ASRC 2013-2014 Annual Report* 33.

way of appointing directors.²³¹ The annual reports for public entities in Australia are published timeously and are more informative than those of Zimbabwean entities.²³² The public entities hold annual general meetings which further assist stakeholders to assess and comment on the performance of the board and the entity at large.²³³

From the above, Australia appears to have done significantly more than Zimbabwe in trying to promote the evaluation of public entity boards' performance in a standardised manner. To confirm that Australia's framework has been effective, the survey conducted by KPMG in 2004 concluded that there was a significant change in board behaviour as companies were progressively conducting "comprehensive performance evaluations of the board, committees and individual directors" with the assistance of external facilitators.²³⁴ However, concern was expressed that boards were becoming over-involved with compliance issues due to the increased reporting obligations at the expense of real performance required to achieve the objectives of the entities.²³⁵ In addition, the review by Uhrig revealed that, despite the measures put in place, several factors continued to cloud the assessment of the effectiveness of boards and these include issues about clarity of purpose, the extent of the delegation of power to the board by the relevant authorities and the gap in skills and experience of the directors.²³⁶

7.2.7 Enforcement of Corporate Governance Compliance

The continued corporate collapses as a result of poor corporate governance practices have caused a number of jurisdictions to acknowledge that it is important to create a balance

²³¹ See Chapter 6, para 6.2.6 above.

²³² The annual reports indicate the roles and responsibilities of the board, qualifications and experience of directors as well as number of meetings attended by individual board members, among others (*ASRC 2013-2014 Annual Report* 32-36, *GRDC 2013-2014 Annual Report* 84-85 and *APC 2013-2014 Annual Report* 44-52).

²³³ Ibid.

²³⁴ Siladi B *The Role of Non-Executive Directors in Corporate Governance: An Evaluation* (2006) 22. Furthermore, a research conducted by The Australian Council of Superannuation Investors confirmed that although the ASX Principles do not recommend any particular frequency for board evaluations, 70% of a sample of 30 companies listed on the ASX conducted evaluations annually (Clarke T and Klettner A *The State of Play on Board Evaluation in Corporate Australia and Abroad* (2010) 23).

²³⁵ Ibid.

²³⁶ Uhrig J *Review of the Corporate Governance of Statutory Authorities and Office Holders* (2003) 43-44.

between voluntary and mandatory mechanisms to achieve significant transformation in corporate governance practices.²³⁷ As a result, Zimbabwe has come up with a legislative and regulatory framework to instill discipline and enforce compliance with good corporate governance practices.²³⁸ The statutory instruments provide for disciplinary action in the form of fines, imprisonment and dismissal for failure by boards to observe the terms and conditions of their appointment.²³⁹ The challenge, however, is that, like in many other African countries, the capacity to support the implementation of good corporate governance principles in Zimbabwe is undermined by the existence of poor enforcement mechanisms and weak monitoring and regulatory organisations.²⁴⁰ The lack of enforcement of existing legislative and regulatory measures has thus significantly contributed to poor corporate governance practices in the public entities.²⁴¹ A number of issues were raised by the participants with regard to level of enforcement of compliance with good corporate governance.

There were mixed reactions on the issue of whether corporate governance should be mandatory or voluntary.²⁴² 28% of the participants preferred that corporate governance should be mandatory given the continued occurrences of corporate collapses as a result of

²³⁷ See Chapter 3, para 3.6.6 above. In Zimbabwe the collapse of a number of financial institutions (e.g. Genesis Investment Bank Ltd in June 2012 and Royal Bank in July 2012) and the poor performance of public entities (e.g. National Railways of Zimbabwe, GMB, Air Zimbabwe, ZMDC and ZUPCO) are clear examples of the continued practice of poor corporate governance despite the existence of a corporate governance framework. See First Report of The Portfolio Committee on Transport and Infrastructural Development on the Operations of National Railways of Zimbabwe Presented to Parliament in March 2012, available at http://www.parlzim.gov.zw/.../article/54/...NRZ_March_2012.pdf (accessed on 17 February 2015). See also Moyo G *The State of Corporate Governance in Zimbabwe's State Enterprises: Can the Situation be Rescued?* (2012).

²³⁸ See Chapter 4, para 4.2.7 above. However, it is important to note that some of the legislation Zimbabwe has relied on, for example the Companies Act, is outdated and several calls have been made to amend it to bring it in line with best international practices and standards (Botha T *Amend Companies Act* (*Daily News* of 21 November 2012 and *The Zimbabwe Mail* of 16 June 2014)).

²³⁹ *Ibid.*

²⁴⁰ Mambondiani L, Zhang Y and Arun T *Corporate Governance and Bank Performance: Evidence from Zimbabwe* (2013) 8-10. This is supported by Botha who found that, in many African countries, the capacity to support the implementation of good corporate governance is undermined by the existence of weak monitoring and watchdog organisations (Okeahalam CC and Akinboade OA *A Review of Corporate Governance in Africa: Literature, Issues and Challenges* (2003) 23).

²⁴¹ Johnson *et al* have argued that whilst the majority of countries have developed guidelines, standards, and codes of corporate governance, the enforcement of the measures put in place has not been given sufficient attention to hold public entities accountable for complying with the corporate governance provisions of these guidelines, codes and standards (Johnson CC, Beiman I and Thompson K *Balance Scorecard for State Owned Enterprises: Driving Performance and Corporate Governance* (Asian Development Bank 2007) available at <http://www.adb.org/Documents/Books/Balanced-Scorecard-for-SOEs.pdf> (accessed on 10 March 2015)).

²⁴² Zimbabwe has relied on a self regulation environment in its approach to corporate governance as shown in Chapter 4, para 4.1 above.

poor corporate governance practices.²⁴³ 51% of the participants were of the view that there is need to balance between mandatory and voluntary corporate governance provisions so as to encourage compliance given the fact that if corporate governance is left exclusively to voluntary compliance some managers and boards may not feel obliged to comply. These participants argued that although self-regulation would be desirable, the continued corporate governance failures seem to point to the fact that there are some aspects of directors' responsibilities that require certain legislative and regulatory controls. The rest (21%) preferred that compliance with good corporate governance should be voluntary since it is mostly about ethical behaviour which is difficult to force someone to observe.²⁴⁴ The last group believed that directors and managers need to be educated more on the importance of corporate governance so that they fully appreciate the need to comply without having to be compelled to do so.

Participants were asked whether or not they believed that the current corporate governance framework was sufficient to instill good corporate governance practices in public entities. In response, the majority of the participants (60%) believed that it was conducive and sufficient to enhance the effectiveness of public entities boards but what was lacking was the commitment by the relevant authorities to implement and enforce compliance with the framework in place.²⁴⁵ The remaining (40%) participants felt that more enforcement mechanisms needed to be created to achieve full compliance. Overall, the participants agreed that the existing procedures, policies and regulations are based on international corporate governance standards and, if implemented properly, should serve as a strategic road map for public entities. The second challenge highlighted was that only a few public entities comply with the corporate governance principles as enshrined in the instruments but the rest comply only with the letter and not the spirit of the principles.²⁴⁶ This has the tendency of

²⁴³ These participants cited the voluntary nature of corporate governance as one of the contributing factors to directors' reluctance to comply with recommended principles.

²⁴⁴ This view is supported by Mallin when he says that at "the heart of many corporate governance issues lies the question of ethics" (Mallin *CA Handbook on International Corporate Governance: Country Analyses* (Edward Elgar Publishing 2006) 227).

²⁴⁵ A similar view was expressed in Chavunduka MD and Sikwila NM "Corporate Governance in Zimbabwe: The ZIMCODE and State Owned Enterprises Connection" (2015) III(11) *International Journal of Economics, Commerce and Management* 651-661 and Sifile O *et al* "Corporate Board Failure in Zimbabwe: Have Non – Executive Directors Gone to Sleep?" (2014) 78-86.

²⁴⁶ This is a common challenge in many countries (see Chapter 3, para 3.6.6 above and Anand AI "An Analysis of Enabling vs. Mandatory Corporate Governance Structures Post Sarbanes-Oxley" (2006) 229-252).

diminishing the benefits of good corporate governance as corporate governance is much more than just ticking boxes.

A third concern raised by the majority of the participants was that, government ministries responsible for actively monitoring public entities and the boards in particular, and other mechanisms such as independent regulators,²⁴⁷ do not adequately fulfil their oversight role.²⁴⁸ Many were said to be generally inefficient and subject to external influence by politicians and other external factors like less supportive legislative or regulatory frameworks and inadequate resources.²⁴⁹ On the other hand, the Ministry of State Enterprises and Parastatals which, in consultation with the responsible Ministers, was responsible for monitoring compliance with corporate governance principles by public entities was said not to be effective in discharging its mandate due to lack of adequate resources (human and capital) and the absence of a standardised board performance evaluation system. The participants wondered how boards continue to be dissolved or dismissed allegedly based on misconduct and incompetence when there is no performance evaluation carried out. One participant believed that the only “logical reason was that the boards were fired for refusing or failing to comply with directives they believed were dubious, unethical or some other such reason that may be contrary to public policy”.

The participants indicated that, although the PFMA provides for the auditing of public entities’ financial statements, there are challenges in fully implementing the provisions. This is because the bulk of public entities (e.g. GMB and ZMDC) do not timeously produce financial statements which means that the auditors may experience challenges in conducting the audits. In addition, it was shown that the Office of the Comptroller and Auditor General (OCAG) which is mandated to audit the majority of the public entities is inadequately resourced in terms of finances and staff members who are few in terms of numbers and

²⁴⁷ The participants cited the line ministries, Office of the Comptroller and Auditor General, Anti-Corruption Commission and the judicial system as the main enforcers of compliance with good corporate governance.

²⁴⁸ Okeahalam and Akinboade found that the monitoring organisations may not be legally empowered to ensure that certain principles of good corporate governance such as transparency and accountability are effectively implemented or enforced (Okeahalam CC and Akinboade OA *A Review of Corporate Governance in Africa: Literature, Issues and Challenges* (2003) 23). See also Okpara JO “Corporate Governance in a Developing Economy: Barriers, Issues, And Implications for Firms” (2011) 11 (2) *Corporate Governance* 184–199.

²⁴⁹ According to Cooper, these challenges are prevalent in the majority, if not all, of the developing countries (Cooper M S *Corporate Governance In Developing Countries: Shortcomings, Challenges & Impact on Credit* (Paper presented at the Congress to celebrate the fortieth annual session of UNCITRAL Vienna, July 2007) 3-4 available at www.uncitral.org/pdf/english/congress/Cooper_S_rev.pdf (accessed on 6 January 2015)).

expertise.²⁵⁰ In addition, the Comptroller and Auditor General (OCAG)'s audit findings are hardly seriously considered and acted upon even if they highlight pertinent issues and major irregularities.²⁵¹ This is mostly because the legislative framework²⁵² does not give the OCAG "sufficient independence and any authoritative powers to coerce ministers, departments and other public agencies to observe and comply with the Treasury Instructions"²⁵³ and corporate governance standards as well as to enforce implementation of its audit findings.²⁵⁴ Also, according to the participants, in other cases there is cover up on OCAG's findings and recommendations by some associated senior public officials, obstructing the course of justice in the process. This, therefore, makes the auditors an ineffective enforcement tool of the government.

The fourth contributing factor to the poor enforcement of compliance with good corporate governance cited by the participants is the high rate of corruption in Zimbabwe.²⁵⁵ The main argument was that corruption has the effect that corporate governance-related laws and regulations may not be enforced (or may be enforced selectively) and the reliability of the judicial system may be compromised. Therefore, directors who are incompetent, ineffective in discharging their duties or "guilty of any form of misconduct may go unpunished". The participants expressed concern that there are no consequences for ineffective boards as "in

²⁵⁰ See Zhou G and Zinyama T "Auditing Government Institutions in Zimbabwe Frameworks, Processes and Practices" (2012) 2(2) *International Journal of Accounting and Financial Reporting* 218-237, for similar sentiments.

²⁵¹ The participants' assertions were confirmed by a number of press reports and researchers (Langa V *Audit Reports: A Sad Cycle of Inaction* (The Standard of 5 July 2015 3), Gumbo L *Government Urged to Act on Audit Reports* (The Herald of 29 June 2015 1), Zinyama T "Efficiency and Effectiveness in Public Sector Auditing: An Evaluation of the Comptroller and Auditor General's Performance in Zimbabwe from 1999 to 2012" (2013) 3(7) *International Journal of Humanities and Social Science* 267-282 and Zhou G and Zinyama T "Auditing Government Institutions in Zimbabwe Frameworks, Processes and Practices" (2012) 218-237).

²⁵² Some of the relevant statutes are the Constitution of Zimbabwe, the Public Finance Management Act and Audit Office Act (Chapter 22:18).

²⁵³ For example, recent reports of the OCAG have shown that ministries, departments and public entities have delayed submitting and in other instances failed totally to produce certain returns and statements required for audit. This "impacted negatively on the ability of the Audit Office in producing the annual reports as well as meeting the statutory deadlines for tabling of such reports in Parliament" (Zhou G and Zinyama T "Auditing Government Institutions in Zimbabwe Frameworks, Processes and Practices" (2012) 218-237).

²⁵⁴ For similar sentiments, see Zinyama T "Efficiency and Effectiveness in Public Sector Auditing: An Evaluation of the Comptroller and Auditor General's Performance in Zimbabwe from 1999 to 2012" (2013) 267-282.

²⁵⁵ To show the high level of corruption, the Transparency International 2014 Corruption Perceptions Index ranked Zimbabwe 156 out of 175 countries. The report is available at www.transparency.org/cpi2014/results (accessed on 18 March 2015). Furthermore, it has been reported that "mismanagement, corruption and fraud in state owned firms have become corrosive, grossly undermining the country's economy" (Makoshori S *Parastatals Bled Broke Govt* (The Financial Gazette of 11-17 June 2015) 7).

instances where the board has performed so poorly that the entity goes bankrupt, the government has bailed out the entity by injecting money” and even reassigned the board members in question to other public entity boards.²⁵⁶

Above half (63%) of the participants expressed the view that Zimbabwe’s Anti-Corruption Commission (ZACC), established to combat corruption, has not been as effective as it should be in investigating and curbing corrupt activities by board members.²⁵⁷ This, according to the participants, is mostly because the legislative framework in place does not sufficiently empower the Commission to execute its duties independently and to enforce compliance.²⁵⁸ The other reason cited was that the Commission is underfunded, making it difficult to achieve its intended goals and objectives.²⁵⁹ Some participants indicated that where criminal charges are being preferred and the matters are referred to the police, the police do not urgently and effectively handle the matter.²⁶⁰ In some situations, the police were said to be bribed resulting “in matters being irregularly struck off the register or no action being pursued on the matter at all”.²⁶¹ In some cases it was reported that, where corruption is involved, court files disappear

²⁵⁶ This observation was supported by a number of press reports. Examples of some of the entities assisted by the government to recover are GMB, Air Zimbabwe and National Railways of Zimbabwe (Mugari S *Govt Does Out Money It Doesn’t Have* (Zimbabwe Independent of 6 October 2006 3) and Mafirakureva M *Govt Props up AirZim* (NewsDay of 23 October 2013). See also G Zhou “From Interventionism To Market-Based Management Approaches: The Zimbabwean Experience” (2001), XXVIII (ii) *Zambezia* 229-261 and Mutanda D “The Impact of The Zimbabwean Crisis on Parastatals” (2014) 1-14.

²⁵⁷ For similar comments, see Moyo S *Corruption in Zimbabwe: An Examination of the Roles of the State and Civil Society in Combating Corruption* Unpublished Thesis (University of Central Lancashire 2014) 221-242. Some commentators reported that the Zimbabwe Anti-Corruption Commission (ZACC) is a “toothless bulldog and lacks independence from political interferences”. Of 147 cases reported to ZACC in 2006, only 4 were completed (*Newsday* of 4 March 2014 and *Financial Gazette* of 22 September 2012). Transparency International Zimbabwe has called for the overhaul of the Zimbabwe Anti-Corruption Commission following concerns that it is ineffective at dealing with corruption (*Mail & Guardian* of 7 March 2014 available at <http://mg.co.za/article/2014-03-07-zim-corruption-watchdog-toothless>).

²⁵⁸ This challenge was confirmed in Moyo S *Corruption in Zimbabwe: An Examination of the Roles of the State and Civil Society in Combating Corruption* (2014) 241. The Commission can only exercise its powers concurrently with those of the police and in the event of any conflict arising in the exercise of their powers, the Attorney-General is empowered to intervene and direct the parties to act as he considers fit (section 13 of the Anti-Corruption Commission Act 13 of 2004).

²⁵⁹ See also Zvavahera P “Corporate Governance and Ethical Behaviour: The case of the Zimbabwe Broadcasting Corporation” (2014) 1-8.

²⁶⁰ For similar views, see Hlatywayo L and Mukono A “Corruption in Zimbabwe, the Causes” (2014) 2 (9) *International Journal of Humanities and Social Studies* 266-271. See also Shana G *The State of Corruption in Zimbabwe* (Paper presented at the Mass Public Opinion Institute Seminar in Harare in 2006) 5-8 available at <http://www.mpoi.net/...Public+Seminar+Speeches-The+State+of+Corruption+in+Zimbabwe.pdf> (accessed on 8 March 2015).

²⁶¹ Ibid. This is supported by the poor ranking (122 out of 144 countries) Zimbabwe obtained with regard reliability of police services (Schwab K *The Global Competitiveness Report 2014 – 2015* (World Economic Forum Geneva, Switzerland 2014-2015) 391 available at <http://www.weforum.org/reports/global-competitiveness-report-2014-2015>) (accessed on 3 June 2015). A report by the Anti-Corruption Trust (ACT) of Southern Africa also indicated that Zimbabwe local police were the most corrupt in the region (*Newsday* of 6 December 2012). The Anti-Corruption Trust report “Zimbabwe: Corruption Cases” is available at <https://actsouthernafrica.wordpress.com/> (accessed on 17 March 2015).

unexplainably, matters take unnecessarily too long to be heard and judgements are reserved indefinitely or where they are given they raise questions as to their reasonableness.

Lastly, it is universally accepted that at the foundation of good governance “is a predictable, equitable, effective, and efficient legal and judicial system”.²⁶² Consequently, a deficit in the Rule of Law directly affects good corporate governance. Zimbabwe’s legal and judicial system has not been spared the criticism that it is unreliable, unpredictable and ineffective, mostly because the law as written and the law as enforced in the courts can differ considerably.²⁶³ According to Moyo, “corruption has thrived in Zimbabwe partly because the state was unable to develop and sustain independent law enforcement and judicial institutions that are germane to the maintenance of the rule of law”.²⁶⁴

From investors’ and other interested stakeholders’ viewpoint, the main problem has been the time that it takes to investigate and prosecute cases of corporate mismanagement.²⁶⁵ According to the participants, the very few directors who have been punished for mismanaging companies and paying themselves exorbitant remuneration which resulted in corporate collapses have not been subjected to punishments commensurate with the gravity of the offences committed.²⁶⁶ The poor enforcement and implementation mechanisms thus undermine the usefulness of legal provisions and “reduce the confidence of everyone that relies on the legal system”.²⁶⁷

²⁶² Cooper MS *Corporate Governance In Developing Countries: Shortcomings, Challenges & Impact on Credit* (2007) 3.

²⁶³ Hlatywayo L and Mukono A “Corruption in Zimbabwe, the Causes” (2014) 266-271 and Moyo S *Corruption in Zimbabwe: An Examination of the Roles of the State and Civil Society in Combating Corruption* (2014) 35-40. See also Cahn N *Corporate Governance Divergence and Sub-Saharan Africa: Lessons from out Here in the Fields* (Paper presented at the Comparative Corporate Governance Symposium in 2004) available at justice.law.stetson.edu/lawrev/abstracts/PDF/33-3Cahn.pdf (accessed on 12 March 2015).

²⁶⁴ Moyo S *Corruption in Zimbabwe: An Examination of the Roles of the State and Civil Society in Combating Corruption* (2014) 308. This viewpoint was echoed by Zenda C in his article titled “Judiciary Weak on Enforcing Rule of Law” (*The Financial Gazette* of 10-16 March 2015 6-7).

²⁶⁵ Ibid. The country was ranked poorly (105 out of 144 countries) as far as investors’ interests protection is concerned (Schwab K *The Global Competitiveness Report 2014 – 2015* (World Economic Forum Geneva, Switzerland 2014-2015) 391.

²⁶⁶ For similar observations, see Moyo S *Corruption in Zimbabwe: An Examination of the Roles of the State and Civil Society in Combating Corruption* (2014) 35-40 for similar sentiments.

²⁶⁷ Ibid. See also La Porta R *et al* “Investor Protection and Corporate Valuation” (2002) 1147-1170.

In addition, efforts to prosecute directors for mismanagement of parastatals were said to have proved fruitless. For example, in the case of *S v Chikumba*²⁶⁸ where directors were alleged to have committed acts of misconduct involving criminal abuse of duty, fraud and corruption, the accused directors ended up being freed because the state could not prove its case to the satisfaction of the courts.²⁶⁹ In the majority of cases, it was reported that the matters do not even reach the courts because the prosecutors would have disqualified the cases for lack of substance. In addition to the above, Zimbabwe's judicial system was said to be inundated with backlogs and to be often unable to timeously conclude matters because of inadequate physical infrastructure, poor terms and conditions of service for judicial personnel, malfunctioning judicial systems and obsolete laws.²⁷⁰ More so, the judicial system was reported to lack sufficient independence and transparency.²⁷¹ The participants also cited high litigation costs as another prohibitive factor to shareholders and other interested parties who may wish to institute legal action against incompetent directors.²⁷²

7.2.7.1 Comparative Analysis of the Findings to those of South Africa

South Africa, like Zimbabwe, has encountered challenges in the enforcement of compliance with good corporate governance standards thus still has much work to do to be fully corporate governance compliant.²⁷³ South Africa's enforcement mechanisms have generally

²⁶⁸ *S v Chikumba* CA 344/15 (2015) ZWHHC 724. This case involved Air Zimbabwe (Pvt) Ltd, a public entity responsible for providing national air services.

²⁶⁹ However, in one civil case (*Savanhu V Hwange Colliery Co* SC 473/13), the court ruled in favour of the public entity. In this case a former non-executive chairman of the plaintiff company was refusing to return a motor vehicle allocated to him during his term of office arguing that his predecessors had been allowed to purchase their vehicles after leaving the company. The court dismissed his appeal and ruled that he was not entitled to keep or purchase the vehicle hence should return the vehicle to the company.

²⁷⁰ Hodzi O *Reforming the Criminal Justice System in Zimbabwe: Lessons from Kenya* (Study published in March 2011) 113-14 & 21-22 available at http://archive.kubatana.net/docs/legal/hodzi_reforming_criminal_justice_110315.pdf (accessed on 27 May 2015). This scenario has been found to be a common feature in most developing countries (Cooper M S *Corporate Governance in Developing Countries: Shortcomings, Challenges & Impact on Credit* (2007) 3).

²⁷¹ These observations were confirmed by Chiduzo L "Towards the Protection of Human Rights: Do the New Zimbabwean Constitutional Provisions on Judicial Independence Suffice?" (2014) 17(1) *Potchefstroom Electronic Law Journal* 368-412 available at <http://www.saflii.org/za/journals/PER/2014/17.html> (accessed on 27 May 2015). The country was rated at position 120 out of 144 countries in the 2014-2015 *Global Competitiveness Report* on judicial independence which confirms the poor state of the system (Schwab K *The Global Competitiveness Report 2014 – 2015* (2015) 391).

²⁷² Ibid.

²⁷³ Mallin CA *Handbook on International Corporate Governance: Country Analyses* (2006) 222-223 and Horn R F *The Legal Regulation of Corporate Governance with Reference to International Trends* (2005) 49-60. The corporate scandals involving the Fidentia Group and LeisureNet indicate that, despite the existence of *King Report* and other regulatory measures, problems are still evident in terms of implementing the legislation and regulations adequately.

been labeled as weak and unreliable given the high increase in unethical behaviour by directors and corporate collapses.²⁷⁴

Although weak enforcement of rules and regulations has been sighted as a major problem in discussions concerning South Africa, the main reason for the negative perception is not so much a general lack of enforcement, as might be the case in Zimbabwe, but erratic enforcement in that in some areas it is of a high standard, but in others it is almost absent.²⁷⁵ An assessment of the current levels of corporate governance compliance in South Africa showed that the responsible ministries have not fulfilled their oversight role of ensuring that the public entities comply with best good governance practices.²⁷⁶ One of the reasons cited as exacerbating the ineffectiveness of government oversight role in public entities is the existence of too many institutions that carry out this role resulting in numerous and disjointed oversight practices.²⁷⁷ Also, because these institutions play these roles simultaneously, their ability to do so effectively is “limited as the resources are spread and stretched and straddle these many roles”.²⁷⁸ On the other hand, institutions that have been tasked to check on compliance of public entities, like the Auditor General, have not been as effective as expected because they have encountered challenges namely; insufficient independence, lack of enforcement powers and inadequate operational resources to undertake their duties.²⁷⁹

²⁷⁴ Ibid. It has been argued that boards tend to comply with the requirements without necessarily buying into the spirit of good corporate governance. According to King, even with the “comply or explain” regime, directors just tick the boxes to avoid having to go through the cumbersome process of explaining non-compliance (King ME *The Corporate Citizen: Governance for All Entities* (Penguin Books 2006) 12).

²⁷⁵ Armstrong *et al Corporate Governance: South Africa, a Pioneer in Africa* (2005) 26-28.

²⁷⁶ Thomas argues that, while the state-owned enterprises appear to observe external governance demands, compliance to internal, self regulated governance appears to be lacking (Thomas A “Governance at South African State-Owned Enterprises: What Do Annual Reports and the Print Media Tell Us?” (2012) 448 – 470). According to Falkena and others, the rate at which institutional change has taken place in South Africa has been so fast that the regulatory and supervisory authorities at times had challenges in keeping pace with appropriate regulatory changes (Falkena H *et al Financial Regulation in South Africa* (SA Financial Sector Forum 2001) available at <http://www.finforum.co.za/publications/fregall.pdf> (accessed on 12 January 2015).

²⁷⁷ PRC *Shareholder Oversight and Governance of SOEs* (Paper prepared by Presidential SOE Review Committee (PRC) on 22 March 2012) 5-6 available at http://www.thepresidency.gov.za/./vol.3/governance_and_ownership/...SOEs.doc. (accessed on 20 March 2015).

²⁷⁸ Ibid.

²⁷⁹ The 2010 Public Service Commission report noted that departments persistently received qualified audits in annual audits conducted by the Auditor-General, with some departments getting such qualified audits at least four years in a row, without any disciplinary steps by the Executive Authorities (The report entitled ‘*State of the Public Service Report 2010*’ is available at <http://www.psc.gov.za/./2010/State.of.the.Public.Service.Report.pdf> (accessed on 12 February 2015).

Comparable to Zimbabwe, the too insignificant number of directors who have been prosecuted for poorly managing organisations and the length of time that it takes to investigate and prosecute cases of corporate mismanagement have been areas of concern in South Africa.²⁸⁰ The existence of enforcement and implementation gaps is believed to weaken the usefulness of lawful provisions and to lessen the confidence of local and foreign investors in the legal system as a whole.²⁸¹ The other concern in South Africa is not of non-compliance as such, but rather that a number of government officers are not capable or are reluctant to penalise those directors who purposely neglect their fiduciary duties.²⁸²

As an example, the South African Public Service Commission reported a 48% compliance rate among senior managers in the public service in 2008 and recommended that non-complying members be charged with misconduct but this was not implemented.²⁸³ Also, resembling Zimbabwe, the South African judicial system is clogged with backlogs and is often unable to timeously finalise court cases mainly because of lack of financial resources to address inadequate physical infrastructure, malfunctioning judicial systems and poor employment conditions for judicial personnel, among others.²⁸⁴ But, South Africa's judiciary has been considered more independent and efficient than that of Zimbabwe.²⁸⁵

In addition, while the legislation in place is stronger and more updated (e.g. the Companies Act) when compared to Zimbabwe, some of the reasons for the fragmented nature of South

²⁸⁰ Armstrong P, Segal N and Davis B *Corporate Governance: South Africa, a Pioneer in Africa* (2005) 26-28 and Davies D *et al Companies and Other Business Structures in South Africa* (2009) 185-191. According to the Department of Trade Industry's general notice, the most noteworthy weakness in the law before the new Companies Act was that South African company law did not offer efficient methods for the enforcement of directors' duties prescribed under the 1973 Companies Act. This resulted in directors and senior management of large companies being "effectively immune from legal control, except perhaps in regard to the more outrageous criminal offences". The general notice titled "*South African Company Law for the 21st Century: Guidelines for Corporate Law Reform*" is available at www.gov.za/documents/ (accessed on 23 March 2015).

²⁸¹ La Porta R *et al* "Investor Protection and Corporate Valuation" (2002) 1147-1170.

²⁸² Schulz-Herzenberg C *Why Ethics Regulations Continue to Fail SA* (Institute for Security Studies (ISS) 2009) available at <http://www.polity.org.za/article/why-ethics-regulations-continue-to-fail-sa-2009-09-02>, (accessed on January 2015)).

²⁸³ *Ibid.*

²⁸⁴ Hendricks E *Towards Good Corporate Governance in South Africa: Private Enforcement versus Public Enforcement* (2010) 14. See also Afolabi AA "Examining Corporate Governance Practices in Nigerian and South African Firms" (2015) 10-29.

²⁸⁵ South Africa was ranked 24 and 16 out of 144 countries yet Zimbabwe was ranked 120 and 93 out of 144 countries on judicial independence and efficiency of the legal system respectively (Schwab K *The Global Competitiveness Report 2014 – 2015* (World Economic Forum Geneva, Switzerland 2014-2015) 341 & 391).

Africa's regulatory system are the high costs that effective regulation entails and the need for government to meet other crucial national and international obligations.²⁸⁶ Though not at Zimbabwe's levels, another contributing factor to the continued ineffectiveness of public entity boards in promoting good corporate governance is the high rate of corruption in South Africa.²⁸⁷ According to the annual Transparency International Global Corruption Barometer released in July 2013, of the 740 South Africans interviewed, 36 percent had paid a bribe to a policeman and 30 percent had paid bribes to officials in the judicial system.²⁸⁸ To make matters worse, the South African Anti-Corruption Commission has not been as effective in undertaking its mandate as required of it because of a number of challenges.²⁸⁹ The challenges arise from factors relating to independence, investigational capacity, "extent of prosecutorial power; effectiveness of international collaborative efforts; efficiency of the judicial process; the observance of the rule of law; and respect for the rights of suspects".²⁹⁰

Although Zimbabwe and South Africa have put in place similar corporate governance frameworks, the level of implementation of the frameworks is different in the two countries. South Africa appears to have made greater strides than Zimbabwe in implementing good corporate governance standards because its corporate governance reforms have significantly improved the country's standard of corporate governance to the extent of placing it in the top rank of emerging market economies, and in some cases even at par with some of the more developed markets.²⁹¹ The high level of compliance with good corporate governance

²⁸⁶ Mallin CA *Handbook on International Corporate Governance: Country Analyses* (2006) 222. See also Armstrong P *Corporate Governance in South Africa – A Perspective from an Emerging Market* (2004) 23.

²⁸⁷ To show the high level of corruption in Zimbabwe and South Africa, the Transparency International 2014 Corruption Perceptions Index gave Zimbabwe a score of 156 out of 175 and South Africa a score 67 out of 175. The Index is available at www.transparency.org/cpi2014/results (accessed on 18 February 2015).

²⁸⁸ The report is available at http://www.transparency.org/./publication/global_corruption_barometer_2013 (accessed on 15 March 2015).

²⁸⁹ Fraser-Moleketi G J and Boone R *Country Corruption Assessment Report - South Africa* (Department of Public Service and Administration and United Nations Office on Drugs and Crime Report of April 2003) 4-6 available at www.westerncape.gov.za/text/.../4/sacorruptionassessmentreport2003.pdf (accessed on 12 January 2015).

²⁹⁰ Ibid. See also Economic Commission for Africa *Assessing the Efficiency and Impact of National Anti-Corruption Institutions in Africa* (Study conducted by Economic Commission for Africa (ECA) in December 2010) 46 available at http://www.uneca.org/sites/default/files/publications/anti-corruption_document.pdf (accessed on 12 February 2015). In this regard, independence centres on matters to do with the appointment and removal procedures, tenure, mode of funding and independent powers of prosecution.

²⁹¹ Armstrong P, Segal N and Davis B *Corporate Governance: South Africa, a Pioneer in Africa* (2005) 14-15. South African listed companies are at present ranked by "foreign institutional investors as among the best governed in the world's emerging economies in terms of genuinely practicing good corporate governance" ("Introduction and Background" to the *King III Report*).

practices by a significant number of South African companies has resulted in an increase in the number of companies shifting their stock exchange listings to foreign bourses, mostly London and New York.²⁹²

To confirm the efforts put by South African public entities in observing good corporate governance, Eskom won, for the second year running in 2013, a corporate governance award granted by Nkonki Incorporated (a South African audit firm) for integrated reporting by state-owned companies whilst Transnet Limited and Denel SOC Limited took second and third place respectively.²⁹³ According to Armstrong, South Africa has put so much emphasis on corporate governance within the public entities to the extent of pressurising the private sector, to some extent, to match the set standards.²⁹⁴ South Africa has also been ranked higher than Zimbabwe internationally on the strength of auditing and reporting standards, efficiency of its legal framework, corporate boards' efficacy and ethical behavior of firms.²⁹⁵ This really provides evidence to the fact that corporate governance practices in South Africa seem to be better than those in Zimbabwe.²⁹⁶

7.2.7.2 Comparative Analysis of the Findings to those of Australia

Australia has been more aggressive than Zimbabwe in so far as the implementation and enforcement of the corporate governance standards is concerned.²⁹⁷ Unlike in Zimbabwe, in

²⁹² Armstrong P *Corporate Governance in South Africa – a Perspective from an Emerging Market* (2004) 23.

²⁹³ These three entities were also said to rank among the largest of their kind globally (*Eskom Wins Corporate Governance Award* (News.24.com of 19 June 2013) available at <http://www.fin24.com/Companies/Industrial/Eskom-wins-corporate-governance-award-20130619> (accessed on 25 January 2015)).

²⁹⁴ Armstrong P *Corporate Governance in South Africa – a Perspective from an Emerging Market* (2004) 6, 26.

²⁹⁵ According to the World Economic Forum *Global Competitiveness Report*, South Africa was ranked number number 1 out of 144 countries on the strength of auditing and reporting standards, 15 out of 144 countries with regard to efficiency of its legal framework, 3 out of 144 countries on efficacy of corporate boards and 35 out of 144 on ethical behaviour of firms whilst Zimbabwe was ranked 38 out of 144, 93 out of 144, 88 out of 144 and 106 out of 144 respectively. Efficacy has been assessed by the extent to which survey respondents considered that investors and boards exert strong supervision of management decisions (Schwab K *The Global Competitiveness Report 2014–2015* (World Economic Forum Geneva, Switzerland 2014–2015) 347 available at http://www3.weforum.org/docs/WEF_GlobalCompetitivenessReport_2014-15.pdf (accessed on 26 February 2016).

²⁹⁶ However, despite the poor ranking, it is important to note that some of Zimbabwe's public entities have tried to comply with a significant number of corporate principles, where the board was capacitated to do so, and performed profitably to the extent of declaring dividends to the government (MMCZ 2010–2013 annual reports).

²⁹⁷ The number of reviews done by Australia, for example the *Bosch Report*, *Uhrig Review* and *Ahead of the Game* that came up with extensive recommendations for the betterment of corporate governance in public entities, are an indication of its aggressiveness. The *Ahead of the Game: Blueprint for the Reform of Australian Government Administration* (AGRAGA

Australia collapses of high profile entities have frequently resulted in the creation of commissions of inquiry tasked to come up with reform recommendations aimed at improving enforcement of corporate and securities laws.²⁹⁸ Its regulators and enforcing agents have been more forceful, independent and resourced than those in Zimbabwe.²⁹⁹ For example, ASIC, following a spate of several corporate collapses from 2000, has successfully enforced compliance with good corporate governance practices as the Australian corporate regulator, with several actions instituted against directors.³⁰⁰

ASIC's success rate in actions against directors in the cases of HIH Insurance Ltd, Harris Scarfe, One.Tel and Macdonald & Others, among others, sent the right signal to directors on the consequences of not complying with good corporate governance and improved investor confidence in the Australian market.³⁰¹ However, ASIC's major problem has not been that of failure to prosecute cases per se, but the complications of fulfilling the high evidentiary burdens of proof in criminal cases and the high "costs of protracted court proceedings against high profile individuals and corporations".³⁰² Thus, despite ASIC's success in high profile prosecutions, there have been concerns about the overall efficacy of the enforcement

2010) is available at http://www.dpnc.gov.au/publications/aga_reform/aga_reform_blueprint/ (accessed on 18 January 2015).

²⁹⁸ In 1990, in an effort to improve corporate accountability of directors, auditors and directors, a Working Group was formed under the auspices of the former Australian National Companies and Securities Commission (now ASIC). The group published a discussion paper entitled *Corporate Practices and Conduct* (or CPC) dealing with corporate codes of conduct. In 2001, the Australian government set up a commissioning of an inquiry to investigate on auditor independence and the commission produced the Ramsay (2001) Report, '*Independence of Australian Company Auditors: Review of Current Australian Requirements and Proposals for Reform*' (Sarre R "Responding to Corporate Collapses: Is There a Role for Corporate Social Responsibility?" (2002) 7(1) *Deakin Law Review* 1-9 available at <http://www.austlii.edu.au/au/journals/DeakinLawRw/2002/1.html> (accessed on 13 May 2015). Another example is the HIH Royal Commission that reported, in 2003, on Australia's largest insurance corporate collapse (Tomasic R "The Challenge of Corporate Law Enforcement: Future Directions for Corporations Law in Australia" (2006) 10(1) *University of Western Sydney Law Review* 1-9 available at <http://www.austlii.edu.au/au/journals/UWSLawRw/2006/1.html> (accessed on 29 March 2015)).

²⁹⁹ OECD *Corporate Governance of State-Owned Enterprises: A Survey of OECD Countries* (2005) 111. Australia's regulatory environment has also been rated as one of the world's most transparent, efficient and open to foreign investors (US Department of State *2014 Investment Climate Statement - Australia* (US Department of State - Bureau of Economic and Business Affairs 2014) available at <http://www.state.gov/e/eb/rls/othr/ics/2014/226594.htm> (accessed on 29 March 2015)). However, it is acknowledged that it is impossible for any regulator to completely prevent corporate collapses as some failures are simply a result of competitiveness and economic factors (Du Plessis JJ, Hargovan A and Bagaric M *Principles of Contemporary Corporate Governance* (2010) 182-184).

³⁰⁰ Du Plessis JJ, Hargovan A and Bagaric M *Principles of Contemporary Corporate Governance* (2010) 182-184.

³⁰¹ Ibid.

³⁰² Tomasic R "The Challenge of Corporate Law Enforcement: Future Directions for Corporations Law in Australia" (2006) 1-9

measures of corporate criminal law.³⁰³ As a result, civil and administrative proceedings have frequently been favoured and have often been more successful, particularly when trivial breaches have been under consideration.³⁰⁴

Another advantage Australia has over Zimbabwe is that it has an effective auditing system led by the office of the Auditor General. The Australian National Audit Office (ANAO), unlike Zimbabwe's OCAG, experiences less challenges in enforcing compliance with its audit findings and implementation of its recommendations by audited public entities. This is because the public entities are required to provide regular reports on action taken on matters raised by the Auditor General in ANAO audit reports and the ANAO is also sufficiently resourced to conduct its own follow-up audits to monitor the implementation of its recommendations.³⁰⁵ To assist the ANAO, a committee (Joint Committee of Public Accounts and Audit (JCPAA)) holds quarterly public hearings on selected audit reports and any JCPAA inquiry conducted as a result of these reports.³⁰⁶ The JCPAA thus assists the ANAO and the government generally in ensuring that audit findings are acted upon with the urgency they deserve.

Zimbabwe has no committee similar to Australia's JCPAA and does not have such public hearings. The more important thing is that Australia appears to take more seriously the ANAO's audit findings unlike in Zimbabwe where the parliamentary committees appear not to effectively follow through audit findings from OCAG.³⁰⁷ In addition, the ASX, Government Business and Private Financing Advice Unit (GBPFAU) and the Commonwealth Ombudsman have also effectively carried out their oversight role of overseeing and ensuring that public entities operate efficiently and adhere to best corporate

³⁰³ Ibid.

³⁰⁴ Ibid.

³⁰⁵ Barrett P *Auditing in a Changing Governance Environment* (Paper on Parliament No. 39 of December 2002) available at <http://www.aph.gov.au/senate/~/~link.aspx?id> (accessed on 29 March 2015).

³⁰⁶ Ibid.

³⁰⁷ To show Australia's commitment to addressing issues arising from audits, it was ranked number 14 out of 148 countries with regard to strength of auditing and reporting standards whilst Zimbabwe was ranked 39 out of 148 on the same aspect (Schwab K *The Global Competitiveness Report 2013-2014* (2014) 111 & 395). The ranking Zimbabwe got shows that it has not performed so badly on this aspect although it has not performed to Australia's standards.

governance practices.³⁰⁸ As indicated above, Zimbabwe's regulatory and enforcement bodies are not capacitated to the extent of Australia's levels hence they may not be as effective.³⁰⁹

Although Australia has not performed so well against its developed counterparts,³¹⁰ in comparison to Zimbabwe, Australia's judicial system appears to be more independent, reliable and efficient.³¹¹ This is because in a study conducted by the World Economic Forum, Australia was ranked 30 and 16 out of 148 countries with regard to judicial independence and efficiency of its legal system, respectively, whilst Zimbabwe was ranked 78 and 83 out of 148 countries on the same aspects.³¹² In addition, Australia has managed to maintain a comprehensive system of laws and regulations designed to counter corruption which has resulted in it being perceived internationally as having low levels of corruption and thus also not experiencing as high corruption levels as Zimbabwe.³¹³ In 2014, Australia ranked 11 out of 175 countries whereas Zimbabwe was rated 156 out of 175 countries.³¹⁴ Australia was also said to have managed to control corruption at the rate of 96% in 2013 whereas Zimbabwe only managed to achieve a rate of 2%.³¹⁵ But, presumably at a lesser scale than Zimbabwe,

³⁰⁸ See Chapter 6, para 6.2.7 above. See also Meredith E *et al Public Sector Governance in Australia* (2012) 121-122.

³⁰⁹ See Chapter 4, para 4.2.7 and para 7.2.7 above. Berglöf and Claessens have found that the regulatory and enforcement mechanisms in developed countries are stronger than those of developing and transition countries (Berglöf E and Claessens S *Corporate Governance and Enforcement* (2004) 2-4).

³¹⁰ A study conducted by Roberts (2007) provided an international comparison of confidence levels in the criminal justice system with Australia recording a rating of 35 percent of citizens expressing a lot of confidence in the system, comparing unfavourably with similar western countries. Overall, Australia was ranked 27 out of the 36 countries included in the survey (Roberts J "Public Confidence in Criminal Justice in Canada: A Comparative and Contextual Analysis" (2007) 49 *Canadian Journal of Criminology and Criminal Justice* 153-184 available at <https://www.ccja-acjp.ca/en/cjc/cjc49a2.html> (accessed on 22 April 2015)). In a similar study conducted by Australian Survey of Social Attitudes (AuSSA) in 2007 it was found that 29% of the respondents had confidence in the courts and the legal system whilst less than 22% had great confidence in criminal courts to deal with matters quickly (Australian Government *Confidence in the Criminal Justice System* (Trends & Issues in Crime and Criminal Justice, Issue No.387 of 2009) 2 available at <http://aic.gov.au/documents/D/6/8/> (accessed on 22 March 2015)).

³¹¹ According to Berglöf and Claessens, more developed countries generally score higher on an index on the efficiency of their judicial systems than many developing and transition countries because the general enforcement environment of the later is weak and specific enforcement mechanisms perform poorly (Berglöf E and Claessens S *Corporate Governance and Enforcement* (2004) 2-4).

³¹² Schwab K *The Global Competitiveness Report 2013-2014* (2014) 111 & 395.

³¹³ Australia has a strong record of global, regional and domestic action to prevent and expose corrupt activity and is consistently ranked as one of the least corrupt nations in the world in the Transparency International Corruption Perceptions Index. Research has established that the Australian government's procurement system is generally transparent and well regulated which minimises opportunities for corrupt dealings (US Department of State *2014 Investment Climate Statement - Australia* (2014).

³¹⁴ Transparency International 2014 Corruption Perceptions Index.

³¹⁵ See country profile report on <http://www.transparency.org/country/> (accessed on 26 February 2015).

Australia also has challenges of court cases backlogs,³¹⁶ malfunctioning judicial systems and uncompetitive employment conditions for personnel involved in the judicial system.³¹⁷

The above is a clear indication that Australia's enforcement mechanisms are way better than Zimbabwe's mechanisms. This assertion is confirmed by the high ranking profile that Australia has created globally in so far as good corporate governance is concerned. According to the World Economic Forum report of 2008-2009,³¹⁸ Australia's corporate governance framework ranked highly internationally and has constantly been amongst the top three countries for the efficacy of its corporate boards.³¹⁹ Furthermore, in 2014, Australia was ranked 19 out of 148 for ethical behaviour of firms and 51 out of 148 for transparency of government policymaking.³²⁰ In comparison, Zimbabwe was ranked 83 out of 148 for ethical behaviour of firms and 88 out of 148 for transparency of government policymaking. However, considering the differences in the levels of development of the two countries, Zimbabwe's efforts to enforce compliance with good corporate governance standards is commendable though they are still to reach expected levels.

7.3 PRELIMINARY CONCLUSIONS

Case studies were conducted specifically on four public entities (MMCZ, ZMDC, NRZ and GMB) which were selected on a random basis. Survey results from literature analysis, completed questionnaires and interviews were analysed and discussed. The collected data

³¹⁶ Colebatch T *Criminal Court Backlog Worsening, Report Finds* (The Age of 7 February 2003) available at <http://www.theage.com.au/articles/2003/02/06/1044498920534.html> (accessed on 27 May 2015). According to research, the majority (75%) of Australian "Magistrates' Court initiations are finalised within 13 weeks, while the same proportion of higher court (District and Supreme) trials are finalised within one year" (Payne J *Criminal Trial Delays in Australia: Trial Listing Outcomes* (Australian Institute of Criminology Research and Public Policy Series No. 74) viii available at http://www.aic.gov.au/media_library/publications/rpp/74/rpp074.pdf (accessed on 27 May 2015)). See also Low H *Victoria Supreme Court Backlog Soars* (The Australian Financial Review of 28 January 2011) available at <http://www.afr.com/news/victoria-supreme-court-backlog-soars-20110127-j4un3> (accessed on 29 March 2015).

³¹⁷ Beqiraj J and McNamara L *International Access to Justice: Barriers and Solutions* (International Bar Association, Bingham Centre for the Rule of Law Report 02/2014) 21-22 available at <http://www.ibanet.org/.../Default.aspx?...id=7FCF610E-BEA8-4E06-99B1-B89C34A87BCD> (accessed on 26 February 2015).

³¹⁸ Schwab K and Porter M E *The Global Competitiveness Report 2008-2009* (World Economic Forum Geneva, Switzerland 2008) 93 available at <http://www.weforum.org/pdf/GCR08/GCR08.pdf> (accessed on 26 February 2015).

³¹⁹ Australia has consistently maintained a good standard although the latest report (2014-2015) shows that the country has declined to number 7 out of 148 countries (Schwab K *The Global Competitiveness Report 2014-2015* (2015) 115).

³²⁰ Ibid.

provided a range of personal opinions based on the participants' experiences on a number of issues. Overall, the participants agreed that public entities were performing below expectations hence continued to be a drain to the fiscus. The participants supported the view that boards have a significant role to play in the good governance and success of public entities. However, the research results indicate a number of concerns that the participants have with the board's role, appointment, composition, remuneration and evaluation.

While Zimbabwe has an apparently adequate legislative and regulatory framework to enable the practice of good corporate governance, the challenge in creating a fully working corporate governance environment still lies in the implementation of these guidelines and legislative provisions and enforcement of the corporate governance principles. This is primarily due to lack of will power, institutional capacity constraints and the slow recovery in the country's socio-political and economic fortunes. The country's public entities have not been spared from these challenges as they have performed poorly due to a number of factors, one of which is the ineffective discharge of duties by boards. The poor board performance has been attributed to obscure roles of boards, multiple and contracting objectives, subjective board appointment processes, limited director expertise, poor composition of boards, too much ministerial involvement in operational issues, inadequate director remuneration, absence of proper board performance measurement tools and poor enforcement mechanisms.³²¹

The research also established that Zimbabwe, South Africa and Australia share common features in terms of the frameworks they have put in place to promote good corporate governance in public entities. All three countries have continued to experience high-profile corporate collapses despite the existence of corporate governance codes, stringent statutes, rigorous *Listings Requirements* and government regulation.³²² The common challenges experienced by the countries in respect of public entity boards include, among others, lack of board role clarity, insufficient experienced and dedicated human resources especially in the running of public entities, poorly composed boards, the undue meddling in the execution of board duties by the responsible ministries which incapacitates the board to objectively

³²¹ See paras 7.2.1-7.2.7 above.

³²² Ibid.

exercise its judgment and come up with sound strategies and decisions, poor regulatory oversight by the responsible authorities and poor enforcement mechanisms.³²³

Regardless of the similarities, the results of the survey show that South Africa and Australia have significantly performed better than Zimbabwe as regards the development of corporate governance codes and guidelines, implementation of good corporate governance principles and enforcement of compliance. Australia and South Africa have therefore, been internationally ranked higher than Zimbabwe in so far as promotion and observance of good corporate governance standards are concerned.³²⁴

The next, final, chapter consists of an overall summary of the research, concluding remarks and makes recommendations based on the above findings.

³²³ Ibid.

³²⁴ See paras 7.2.2.1-7.2.7.2 above, for examples of international rankings which prove that Zimbabwe has been ranked lowly in comparison to South Africa and Australia.

CHAPTER 8

SUMMARY, CONCLUSION AND RECOMMENDATIONS

8.1 INTRODUCTION

The increase in corporate collapses and amplified attention on transparency and accountability in corporate accounting and reporting has led Zimbabwe, like many other countries, to put in place corporate governance guidelines and regulations. However, questions have been raised on the effectiveness of these guidelines and regulations in actually assisting the corporate governance issues in general and with particular reference to public entities. With regard to public entities, the main concern has been whether or not the guidelines and regulations have assisted the boards of public entities to effectively discharge their duties.

Given the important contribution of public entities to the economic and social development of all countries, it has been universally accepted that the entities require good corporate governance if they are to effectively contribute to these goals. A number of factors have been found to significantly contribute to the achievement of good corporate governance in public entities.³²⁵ Of these many factors, the present study focused on the board of directors and the role they play in the successful achievement of organisational goals and promotion of good corporate governance in public entities. In particular, the research focused on the role of the board, its selection and appointment, composition, remuneration and evaluation. The main objective of this research was to establish whether or not boards of public entities have been able to effectively discharge their duties and how supportive the existing Zimbabwean corporate governance framework has been in enabling the board to carry out its mandate.

³²⁵ Some of the factors include management responsibilities, rights of shareholders and key ownership functions, relations with stakeholders, risk management and internal controls (see paras 4-5 of the South African *Protocol*, Part 2-5 of the Australian *GBE Guidelines*, sections 2-6 of the Zimbabwe *CGF* and the OECD *Guidelines on Corporate Governance of State-owned Enterprises* (2005) 12-17).

The extensive spectrum of instruments that have been put in place to improve board effectiveness in Zimbabwe is clear evidence that the country has unquestionably recognised the crucial role boards of public entities play in the promotion of good corporate governance and achievement of the entities' objectives. The country maintains a plausibly good legal and institutional infrastructure for corporate governance consisting of statutes, a wide-ranging set of corporate governance codes and regulations as well as regulatory agencies and private sector bodies committed to improving corporate governance.³²⁶

This chapter summarises the research findings based on the literature analysis and views and experiences of directors, chief executive officers, company secretaries, senior managers and shareholder representatives chosen from four public entities namely; GMB, MMCZ, NRZ and ZMDC. Conclusions are drawn on the basis of the research results. Recommendations on how best corporate governance and the effectiveness of boards in public entities can be improved are made. The chapter concludes by making suggestions for further research.

8.2 SUMMARY OF FINDINGS

In order to answer the research questions above,³²⁷ the study entailed the following:

Chapter 1 was an introductory chapter which gave the background as to why the study was considered necessary and what it sought to achieve.³²⁸ First, the study was motivated by the allegations that poor corporate governance resulting from the ineffectiveness of public entity boards was one of the major causes of inefficiencies in these entities. Secondly, the absence of meaningful research on the effectiveness of the framework put in place by Zimbabwe to enable boards of public entities to successfully discharge their responsibilities inspired the research.³²⁹ The third aim was to, based on findings, recommend to the policymakers and other interested parties, how best they can get public entities to effectively discharge their

³²⁶ See Chapter 4, para 4.2.7 of Chapter 4 above.

³²⁷ Chapter 1, para 1.2 above.

³²⁸ Ibid.

³²⁹ The research's main objective was to determine whether the Zimbabwe corporate governance instruments, namely; the *Manual, CGF, National Code*, enabling Acts, Companies Act and PFMA provide appropriate and adequate mechanisms to improve the effectiveness of boards and ensure that good corporate governance is practised within public entities.

obligations of promoting social and economic development without unnecessarily burdening the taxpayers. This chapter, therefore, outlined the research questions, significance of the study, scope of the research and overview of Zimbabwe's corporate governance legal and regulatory framework.³³⁰ It also briefly highlighted the researcher's assumptions and limitations of the research.³³¹

Chapter 2 discussed the research methodology employed in the study. The research involved literature analysis³³² as well as interviewing participants and circulating questionnaires. The participants were randomly selected from board members, chief executive officers, company secretaries, senior management and shareholder representatives of four selected public entities namely; MMCZ, ZMDC, NRZ and GMB. The participants were considered appropriate because of their positions, experience and sound understanding of corporate governance and their significant involvement in the operations of the entities. The thesis set out to investigate the perceptions of the selected participants and the questionnaires were designed to find answers to pertinent questions targeted at achieving the research objective.

This investigation also sought to measure the level of progress made in improving the corporate governance practices in the public entities since Zimbabwe introduced the different guidelines and regulatory framework. It was also the aim of this study to identify the challenges encountered in establishing boards that are effective and able to achieve organisational goals as well as to establish the challenges experienced by the boards in undertaking their obligations. In particular, the research sought to find out how corporate governance is implemented and the challenges faced by boards based on previous research and from the experience and perspectives of the chosen participants whose views were considered representative of the majority of the public entities. The study proposed that the effectiveness of boards of public entities has to be improved extensively if these entities are to efficiently achieve their objective of socio-economic development.

³³⁰ Chapter 1, paras 1.3-1.5 above.

³³¹ Chapter 1, paras 1.6-1.7 above.

³³² A literature analysis was carried out on the nature and determinants of board effectiveness (see Chapter 3, paras 3.6.1-3.6.6 above).

In chapter 3, an analysis of literature was conducted. The chapter began by defining corporate governance and its importance.³³³ In summary, corporate governance was defined to mean, systems by which companies are directed and controlled, with major prominence being placed on transparency, independence, fairness and accountability. Corporate governance was considered essential in, *inter alia*, attracting investment both locally and internationally, improving organisational performance and improving the overall management of the entity or country. The chapter gave an overview of international corporate governance developments that are spearheaded by worldwide organisations that include the World Bank, OECD, CACG, UN and ICGN, among others.³³⁴ It also showed that a significant number of countries, for example, South Africa, the United Kingdom, Malawi and Australia, have developed specific codes and guidelines to promote good corporate governance in their respective countries.³³⁵

The analysis showed that public entities in all countries were formed to drive socio-economic development through the provision of social goods such as electricity, education, health and water as well as to create jobs, among other things.³³⁶ But, a significant number of public entities have not been able to effectively provide these goods and services but have instead continued to be a burden to governments, requiring subsidies in some cases and operating at huge losses. The poor performance of the public entities was attributed to many factors, among which, poor corporate governance and board ineffectiveness featured most.³³⁷ Five aspects were considered vital for an effective board namely; role, selection and appointment, composition, remuneration and evaluation. These aspects were examined to establish their impact on the effectiveness of the board.

With regard to the role of the board, the analysis showed that the board's main roles are to monitor management, to provide advice and links to external resources and to set overall corporate strategy.³³⁸ It was found that the boards have not effectively discharged their roles

³³³ Chapter 3, paras 3.2-3.3 above.

³³⁴ Chapter 3, para 3.4 above.

³³⁵ Ibid.

³³⁶ Chapter 3, para 3.1 above.

³³⁷ Ibid.

³³⁸ Chapter 3, para 3.6.1 above.

mostly as a result of lack of clarity on the roles due to intricate regulatory and supervisory frameworks, multiple and conflicting objectives, highly controlled and bureaucratic decision making systems, weak formulation and implementation of strategies and excessive shareholder interference.³³⁹ Concerning board selection and appointment, the review revealed that good corporate governance requires that boards should be transparently and objectively appointed for their relevant skills, experience and other personal attributes.³⁴⁰ However, it was found that, in most countries, the selection and appointment process is not transparent and objective due to the absence of specific guidelines to guide the process, political interference and lack of sufficient numbers of skilled and experienced persons to be appointed to the boards.³⁴¹

The chapter also showed that it is good practice, when it comes to board composition, to establish boards that are properly composed in terms of, *inter alia*, independence, skills and experience, size, age, race and gender.³⁴² But, the literature interrogated showed that there are challenges in meeting the requirements due to the limited number of professional and experienced people from which to select appropriately qualified directors and due to political interference in the appointment of boards.³⁴³ As far as board remuneration is concerned, it was shown that, in terms of good corporate governance standards, the remuneration should be linked to performance and should be adequate to draw and retain properly qualified and dedicated individuals capable of running the organisation effectively.³⁴⁴ It was, however, found that difficulties have been encountered to match public entities' board remuneration to that of the private sector and to the responsibilities and liability risks associated with being a public entity board member. The main reason for the poor remuneration were found to be financial constraints, absence of remuneration guidelines that take into account market developments and failure to link the remuneration to board or individual board member performance.³⁴⁵

³³⁹ Ibid.

³⁴⁰ Chapter 3, para 3.6.2 above.

³⁴¹ Ibid.

³⁴² Chapter 3, para 3.6.3 above.

³⁴³ Ibid.

³⁴⁴ Chapter 3, para 3.6.4 above.

³⁴⁵ Ibid.

The research results also showed that, due to the increased focus on the need for board accountability and effectiveness, it has been globally acknowledged that the performance of the board has to be monitored and evaluated on a regular basis.³⁴⁶ The performance evaluation is necessary to enable the responsible authorities and other interested stakeholders to assess whether the board is effectively undertaking its obligations. It also assists boards to identify their strengths and weaknesses so as to address these issues accordingly. But, implementing board evaluations has been shown to have its share of challenges namely; lack of formal and standardised performance indicators and board evaluation systems, lack of capacity to conduct performance assessments by the responsible authorities, existence of numerous and contradictory objectives to be achieved by the same entity, failure by the public entities to timely and accurately disclose critical information essential for decision making by the relevant authorities and excessive involvement of the parent ministries in the operations of the public entities.³⁴⁷

As a result of the continued increase in poor corporate governance practices and their devastating consequences, many countries have found it essential to complement self-regulation with mandatory mechanisms so as to encourage organisations to comply with good corporate governance principles.³⁴⁸ Although some countries have combined voluntary and compulsory mechanisms, others have actually adopted a more prescriptive approach like the Sarbanes-Oxley Act which makes compliance with good corporate governance principles mandatory.³⁴⁹ Relating to the evaluation of the enforcement mechanisms, the literature analysed indicated that efforts to enforce compliance have encountered challenges such as inadequate courts, judiciary and public enforcement institutions and weak enforcement of rules and regulations especially in developing and transitional countries.³⁵⁰

³⁴⁶ Chapter 3, para 3.6.5 above.

³⁴⁷ Ibid.

³⁴⁸ Chapter 3, para 3.6.6 above.

³⁴⁹ Ibid.

³⁵⁰ Ibid.

Chapter 4 discussed Zimbabwe's corporate governance framework. The Institute of Directors of Zimbabwe has been in the forefront of promoting good corporate governance in Zimbabwe. On the whole, the country's corporate governance is determined by a legislative framework consisting of the Constitution, various Acts of Parliament, common law and the *ZSE Listings Requirements* and a voluntary system that consists of the *Manual*, *National Code* and *CGF*.³⁵¹ In coming up with its own framework, the country has also significantly borrowed from other codes on corporate governance, for example, the *King Reports*, *Combined Code*, *OECD Principles of Corporate Governance* and *CAGG Guidelines*. To enhance compliance with good corporate governance standards, the country also enacted a number of laws and institutions to enforce compliance.³⁵²

Pertaining to the role of the board, the Zimbabwean framework requires that there should be clarity through, for example, the statutes establishing public entities, individual appointment letters, board charters, comprehensive performance agreements as well as through proper induction and training. It is also required that the board should be equipped and independent enough to implement the entity's strategies, have easy access to information on the entity and to the services of external professional consultants, be assisted by a competent board secretary and properly constituted board committees. As far as the board appointment process is concerned, the framework seeks to achieve transparency and objectivity in the selection and appointment process so that only appropriately qualified and skilled persons are appointed as board members.³⁵³ In addition, the framework limits the term of office of directors to promote new and sound perspectives into discussions and decision making and limits the number of directorships one can hold to enable directors to devote sufficient time to the business of the entities they are appointed to lead.

With regard to board composition, the Zimbabwean framework targets to achieve properly diversified boards in terms of a suitable combination of skills, knowledge and experience, independence, size, nationality, age, race and gender, among others.³⁵⁴ These factors, if properly balanced, are considered important in enhancing board effectiveness which may lead

³⁵¹ Chapter 4, para 4.2.1 above.

³⁵² Ibid.

³⁵³ Chapter 4, para 4.2.3 above.

³⁵⁴ Chapter 4, para 4.2.4 above.

to improvements in the performance of public entities. The framework also aims to achieve levels of remuneration that are performance-related and sufficient to attract, motivate and retain appropriately qualified people who are capable of effectively achieving the entities' mandates.³⁵⁵ To assist the process of setting up and administering remuneration policies that comply with good corporate governance, the framework provides for the establishment of a remuneration committee and requires that board remuneration should be linked to the performance of the board and the individual director as well as to prevailing market conditions.³⁵⁶

Concerning board performance evaluation, the framework aims to encourage assessment of the board's performance regularly so that any performance and board skills gaps may be addressed promptly before they get out of hand.³⁵⁷ Some of the measures instituted to enable the evaluation of board performance include the requirements to produce comprehensive performance agreements, various informative reports, annual audited financial accounts and reports and carrying out of regular evaluations of board performances.³⁵⁸ Lastly, the enforcement mechanisms put in place target to increase the rate of compliance with good corporate governance by boards and the public entities so that they can efficiently promote economic and social development.³⁵⁹ The enforcement mechanisms include penalties such as fines, imprisonment and dismissal for noncompliance. The institutions created to enhance compliance consist of the Zimbabwe Stock Exchange, judiciary, Comptroller and Auditor General, Anti-Corruption Commission and Corporate Governance and Delivery Agency, among others.³⁶⁰

However, very minimal evaluation of the successes of these interventions has been done in Zimbabwe. This was the reason why the present study was carried out to examine whether

³⁵⁵ Chapter 4, para 4.2.5 above.

³⁵⁶ Ibid.

³⁵⁷ Chapter 4, para 4.2.6 above.

³⁵⁸ Ibid.

³⁵⁹ Chapter 4, para 4.2.7 above.

³⁶⁰ Ibid.

these interventions are yielding positive results and to identify the factors mostly contributing to the achievement or non-achievement thereof.

In chapter 5, the Zimbabwean corporate governance legal and regulatory mechanisms were compared and contrasted with those of South Africa with a view to assess Zimbabwe's standing relative to other regional African countries. The comparative analysis with South Africa's framework revealed that Zimbabwe has kept up to date with regional and international developments, the changing business environment and competes favourably with some developing countries.³⁶¹ The analysis also confirmed that the two countries have emulated the United Kingdom corporate governance framework which comprises of legal sources and a system of non-binding codes of best practice.³⁶² They have also extensively borrowed from other international corporate governance codes like the OECD *Principles of Corporate Governance* and CAGG *Guidelines*.

The legal sources for both countries are similar and include the Constitution, Acts of Parliament, Stock Exchange *Listings Requirements* and common law. Similarly, both countries have voluntary codes namely the *Manual, National Code* and *CGF* for Zimbabwe and the *King Report* and *Protocol* for South Africa. Nevertheless, Zimbabwe and South Africa differ in that whilst South Africa considered corporate governance issues much earlier and introduced a national code in 1994, Zimbabwe only adopted its *National Code* in 2015, eleven years later. In addition, South Africa, unlike Zimbabwe, has developed additional guidelines for specific items pertaining to public entities, for example, the *State-owned Enterprises Remuneration Guidelines* and *Handbook for the Appointment of Persons to Boards of State and State Controlled Institutions*.

In summary, Zimbabwe and South Africa's corporate governance frameworks seek to ensure that, first, the role of the board is clear and detailed formally and the boards are fully empowered to perform their duties with minimum government intrusion.³⁶³ As a second measure, the frameworks require that the boards should be appointed in a transparent and

³⁶¹ Chapter 5, para 5.2.1 above.

³⁶² Ibid.

³⁶³ The summary of Chapter 4 above states how this is anticipated to be achieved. To avoid too much repetition the summaries for chapter 5 and 6 are not giving as much detail as the summary for Chapter 4 given the similarities in the mechanisms and the objectives for both countries. Emphasis is only given where there are significant differences.

objective manner so that properly qualified and experienced persons are appointed as board members.³⁶⁴ To this end, a *Handbook for the Appointment of Persons to Boards of State and State Controlled Institutions* was published in South Africa to enhance the board appointment process whereas Zimbabwe does not have such a guiding document.³⁶⁵ Thirdly, the frameworks provide for mechanisms that should result in creation of boards that are appropriately composed in terms of independence and diversity. To demonstrate the importance it places towards gender equality, South Africa has published a Women Empowerment and Gender Equality Bill which Zimbabwe is still to do. However, both countries have established Gender Commissions in terms of their Constitutions. Also, to motivate directors to effectively discharge their duties, both countries provide for fair, adequate and performance related remuneration. In the fifth instance they require that the board's performance be evaluated regularly and that appropriate action be taken if there is poor performance.

Although South Africa and Zimbabwe have chosen to maintain a voluntary approach to corporate governance, they have relied on their legislative framework and *Listing Requirements* to enforce corporate governance compliance.³⁶⁶ Both countries have also created regulatory bodies tasked to ensure that public entities and their boards comply with corporate governance requirements as well as other laws and regulations.³⁶⁷ Examples of such bodies are the Auditor General, Anti-Corruption Commission and the judicial system. It is important to note that although they do not have enforcement powers, the Institute of Directors in both countries have contributed greatly to the promotion of good corporate governance. But, South Africa has outperformed Zimbabwe in that it has created more supervisory and regulatory institutions to enforce compliance.

Chapter 6 makes a comparative analysis of Zimbabwe's corporate governance framework to that of Australia with a view to assess Zimbabwe's position internationally. The analysis revealed that Zimbabwe has kept up to date with international developments and competes

³⁶⁴ See Chapter 4, para 4.2.3 and Chapter 5, para 5.2.3 above.

³⁶⁵ However, the *Corporate Governance and Remuneration Policy Framework*, if enacted into law, may serve a similar purpose.

³⁶⁶ Chapter 5, para 5.2.7 above.

³⁶⁷ *Ibid.*

positively with some developed countries.³⁶⁸ The analysis also confirmed that the two countries share a significant number of issues in common generally preferring voluntary compliance with corporate governance principles to compulsory enforcement by statutory and regulatory agents. In both countries, the Institute of Directors have spearheaded efforts to promote good corporate governance through disseminating information on international corporate governance developments and providing technical training on directorship and board effectiveness. In addition, Australia and Zimbabwe have both formulated their frameworks guided by globally recognised corporate governance instruments like OECD *Principles of Corporate Governance*, CAGG *Guidelines* and ICGN *Guidelines*.

As far as the self-regulatory framework is concerned, both countries have published codes, among which there are guidelines particularly meant to guide public entities namely, *GBE Guidelines*, the *ASX CGC Corporate Governance Principles and Recommendations* and *ANAO Better Practice Guides* for Australia and the *CGF, Manual and National Code* for Zimbabwe.³⁶⁹ Nonetheless, Australia has done more than Zimbabwe with regard to this aspect judging by the wide-ranging programs it has undertaken like the *Bosch Report* and *Uhrig Review* as well as the number of institutions that seek to promote good corporate governance in the country, for example, the AIMA and IFSA. As far as the legal framework is concerned, both countries are guided by the Acts of Parliament, Stock Exchange *Listings Requirements* and common law. But, Australia has gone to the extent of coming up with a corporate governance specific Act (PGPA Act) relating to public entities which Zimbabwe has not done.³⁷⁰

Generally, the frameworks for both Zimbabwe and Australia are designed to ensure that the effectiveness of the public entities boards is enhanced. This is achieved through empowering boards to discharge their duties depth with minimum government interference and clearly laying out their roles, transparent and objective appointment of directors, formation of properly composed boards, regular assessment of the performance of boards and adequately

³⁶⁸ Chapter 6, para 6.2.1 above.

³⁶⁹ Chapter 6, para 6.2 above.

³⁷⁰ As indicated in Chapter 7, para 7.2.7 above, Australia's PGPA Act may be equated to Zimbabwe's PFMA although the Acts differ in terms of the depth at which corporate governance issues are addressed.

remunerating the board members to motivate them to exert their best efforts.³⁷¹ All the same, Zimbabwe still has to do more and create institutions like the Australian Nomination Panel and Remuneration Tribunal to improve its board appointment and remuneration processes. Zimbabwe also still to establish a framework to promote gender equality that is equivalent to that of Australia. Australia has further performed better than Zimbabwe by coming up with a standard way of evaluating boards of public entities in the form of a *Director's Checklist* and legislating for board evaluations to enhance compliance. With regard to enforcement of compliance, although Australia has more regulatory and enforcement mechanisms than Zimbabwe, both countries maintain a combination of self-regulatory codes and legal instruments.³⁷²

In Chapter 7, the results obtained from the literature analysis, interviews and questionnaires are presented and analysed.³⁷³ Generally, the research results show that the participants fully appreciate what corporate governance is, the level of corporate governance compliance in the public entities and the challenges encountered by boards in effectively discharging their duties.³⁷⁴ The research focused on the board's role, selection and appointment, composition, remuneration and evaluation as well as compliance enforcement mechanisms.

The role of the board was articulated in Zimbabwe's instruments as to set overall strategic plans, manage risk, monitor the performance of the organisation and give guidance to management.³⁷⁵ Despite the acknowledgement of the board's role, the research established that a number of challenges had been encountered by the boards to effectively undertake these responsibilities. These challenges include lack of commitment by poorly inducted and trained directors, absence of a proper working framework, limited board independence, lack of performance feedback from the appointing authority, too much interference by the responsible Minister in the operations of the entity, lack of clear policy objectives, poorly composed board committees and delayed government approvals which delay implementation

³⁷¹ Chapter 6, paras 6.2.2-6.2.6 above. As indicated before, given the similarities in the mechanisms and the objectives for Zimbabwe and Australia this chapter's summary focuses mostly on areas of differences.

³⁷² Chapter 4, para 4.2.7 and Chapter 6, para 6.2.7 above.

³⁷³ Chapter 7, paras 7.2.2-7.2.7 above.

³⁷⁴ Chapter 7, para 7.2.2 above.

³⁷⁵ Ibid.

of projects.³⁷⁶ The research found that the mechanisms put in place by Zimbabwe to enable boards to effectively perform their roles were similar in many respects to those put in place by South Africa and Australia. The three countries also experienced similar challenges but at different magnitudes with Australia experiencing the least challenges, followed by South Africa and finally Zimbabwe.³⁷⁷

It was found that good corporate governance requires that the nomination of directors should be based on merit and conducted in a transparent, professional and objective manner.³⁷⁸ In addition, the potential board members should be properly qualified and experienced, possess relevant expertise and be capable of devoting sufficient time to the tasks assigned to them. But, a number of challenges were experienced in trying to fully comply with these good corporate governance standards.³⁷⁹ The main challenge was found to be the absence of specific guidelines for the identification and selection of directors which resulted in boards appointed based on favouritism and political allegiance. The other challenges were the limited number of experienced and qualified individuals to serve as directors resulting in multiple directorships, poor director remuneration to attract qualified directors, appointments of public servants as board members which fuel government interference in the functions of the board and the frequent turnaround of boards without proper hand over take over processes.

In the comparative analysis between South Africa and Zimbabwe, the study established that South Africa has developed the *Handbook for the Appointment of Persons to Boards of State and State Controlled Institutions* so as to enable the appointment of boards in a transparent and objective manner which Zimbabwe has not done. The research further revealed that South Africa has performed better in terms of avoiding numerous board turnarounds and promoting board continuity as shown by the stability of boards of some of the entities. However, South Africa still experiences similar challenges to those of Zimbabwe although in some instances at lesser rates.³⁸⁰

³⁷⁶ Chapter 7, para 7.2.3 above.

³⁷⁷ See Chapter 7, paras 7.2.2-7.2.7.2 for the comparative analysis which confirms this position.

³⁷⁸ Chapter 7, para 7.2.3 above.

³⁷⁹ Ibid.

³⁸⁰ Chapter 7, para 7.2.3 above.

Compared to Australia, Zimbabwe still has a number of issues to attend to match the level of compliance exhibited in Australia.³⁸¹ Australia has come up with a transparent and structured way of selecting directors which includes public advertising or the use of executive search processes. Also, Australia has moved towards legislating for board appointments, for example, the National Broadcasting Legislation Amendment Act which formalises a merit-based and independent board appointment process to be conducted through an Independent Nomination Panel. The country also has a wider pool of directors to select from which has enabled it to minimise on numerous directorships. On the other hand, despite the major achievements, it was found that Australia, like Zimbabwe, still encounters some challenges of political interference in the board appointment processes.

On board composition,³⁸² it was found that it is good corporate governance practice to create properly diversified boards in terms of skills mix, personalities, independence, and other demographic aspects such as gender, age and race. This enables the board to effectively discharge its roles especially if the directors are able to appropriately combine their expertise and viewpoints in the interests of the public entity. The research has shown that Zimbabwe has successfully managed to create boards with a majority of non-executive directors and to separate the role of the board chairman from that of the chief executive officer. Nevertheless the country has experienced challenges such as appointment of unqualified and non-experienced board members, poor women representation on the boards and poorly composed boards in terms of skills mix.

When Zimbabwe's situation was generally compared to that of South Africa, it was found that although South Africa may not yet have reached acceptable levels, it has significantly performed better than Zimbabwe in terms of promoting gender equality in its boards. But, South Africa has also experienced the same challenges as those experienced by Zimbabwe especially that of a limited number of potential directors and of failing to fully complying with best practice in terms of board composition.

³⁸¹ Ibid.

³⁸² Chapter 7, para 7.2.4 above.

Like Australia, Zimbabwe has managed to create boards with a majority of non-executive directors and to separate the role of the board chairman from that of the chief executive officer. Zimbabwe has similarly tried to promote gender equality although it is still to match the standards set and achievements made by Australia. Given the existence of a larger pool of directors, Australia has been able to compose more balanced boards in terms of skills mix than Zimbabwe as well to limit the appointment of government officials to exceptional situations whereas Zimbabwe still appoints these officials to boards of its entities. In this regard, although the comparison showed that Australia has performed better, Zimbabwe has performed relatively well considering that the former is a developed country.

In respect of board remuneration,³⁸³ the framework that Zimbabwe has put in place requires that the level of remuneration for members of the board should be performance related and enough to attract and retain properly qualified and experienced individuals required to run the organisation effectively. Despite the acknowledgement, the country has failed to fully implement its framework such that it has been unable to link board remuneration to performance and to adequately remunerate the directors. This has mainly been caused by the absence of a standard remuneration framework that takes into account the directors' skills, responsibilities, performance and the prevailing market conditions. The challenges have been compounded by financial constraints experienced by the public entities as shown in the case of GMB, NRZ and ZMDC. The poor remuneration has resulted in lack of commitment from the directors, poor performance of their duties and engagement in unethical activities as a means of raising income. Furthermore, contrary to good practice, the remuneration committee has no significant role in the determination of board remuneration as the shareholder Minister is responsible for fixing remuneration for public entities.

In the comparison carried out between Zimbabwe and South Africa, the research results showed that both countries have put in place similar frameworks to fairly remunerate board members.³⁸⁴ But, the two countries have not fully achieved the objective of ensuring that board members are adequately rewarded in recognition of their expertise, responsibilities and performance. Despite the similarities, South Africa has achieved greater strides than Zimbabwe in that it has developed the *State-owned Enterprises Remuneration Guidelines*

³⁸³ Chapter 7, para 7.2.5 above.

³⁸⁴ Ibid.

specifically to guide the determination of board remuneration in public entities. More so, South Africa has tried to link the board remuneration to company performance which may be a motivational tool to the board members to ensure that the public entities operate successfully.

A comparison of Zimbabwe's position to that of Australia was also conducted.³⁸⁵ The results showed that the two countries have more or less similar frameworks that seek to ensure that boards are sufficiently rewarded for their skills and performance. However, Australia has outperformed Zimbabwe in that it has set up a Remuneration Tribunal which is an independent body that objectively determines the board's remuneration in public entities. In determining the remuneration the Tribunal takes into account factors such as "workload and work value of the office, fees in the private sector, wage indices, non-cash benefits provided and other economic indices and rates set for other bodies".³⁸⁶ Although Australia has not yet reached the acceptable levels of board remuneration, with the assistance of the Remuneration Tribunal, it has significantly performed better than Zimbabwe in terms of fairly remunerating directors of public entities.

With regard to board evaluation, Zimbabwe acknowledges that board evaluation is a vital tool in motivating and also compelling board members to effectively undertake their responsibilities.³⁸⁷ The country has thus come up with a voluntary framework aimed at promoting board evaluations. However, according to the research results, Zimbabwean public entities have encountered several challenges in conducting evaluations of board performances.³⁸⁸ The challenges include appointment of unqualified directors, incomprehensive and unclear performance contracts, lack of appropriate and standardised performance measurement tools, lack of capacity and sufficient commitment by the responsible authorities to effectively monitor the operations of the boards, too much interference by the parent ministry in operational issues and too frequent changes in

³⁸⁵ Chapter 7, para 7.2.5 above.

³⁸⁶ Ibid.

³⁸⁷ Chapter 4, para 4.2.5 and Chapter 7, para 7.2.6 above.

³⁸⁸ Chapter 7, para 7.2.6 above.

boards.³⁸⁹ This has made it difficult to hold directors accountable for poor performance and to assess the board's needs for specific skills and knowledge.

Zimbabwe's board evaluation framework was compared to that of South Africa and the results showed that both countries have created voluntary mechanisms to encourage board evaluations.³⁹⁰ The difference lies in that public entities in South Africa have moved towards implementing board evaluation initiatives at a much larger scale than Zimbabwe as shown by some of the public entities' annual reports and survey results of studies conducted on this aspect.³⁹¹ However, South Africa has also encountered similar challenges to those experienced by Zimbabwe especially on the issues of poorly crafted performance contracts, ineffective monitoring and evaluation by shareholder ministries and political interference in the operations of boards.³⁹²

In comparison to Australia, the research results showed that Zimbabwe's framework matches that of Australia save for the fact that Australia has made board evaluations obligatory in terms of its PGPA Act.³⁹³ Australia has, therefore, seen more of its public entities performing board evaluations resulting in considerable changes in board behaviour.³⁹⁴ Despite the significant success rate, Australia has experienced challenges of lack of clarity of board purpose, over involvement in the entities' operation by the relevant authorities and boards becoming bogged down with compliance issues at the expense of performance.³⁹⁵

Finally, Chapter 7 evaluates the enforcement mechanisms of Zimbabwe, South Africa and Australia. The results showed that Zimbabwe has established sufficient voluntary and prescriptive mechanisms to enforce compliance with good corporate governance standards.³⁹⁶

³⁸⁹ Ibid.

³⁹⁰ Chapter 5, para 5.2.5 above.

³⁹¹ Chapter 7, para 7.2.6 above.

³⁹² Ibid.

³⁹³ Chapter 6, para 6.2.5 above.

³⁹⁴ Chapter 7, para 7.2.5 above.

³⁹⁵ Ibid.

³⁹⁶ Chapter 4, para 4.2.6 above.

Though, the achievement of full compliance has been undermined by the existence of poor enforcement mechanisms, weak monitoring and regulatory organisations and absence of a standardised board performance evaluation system to enhance the effectiveness of boards of the public entities.³⁹⁷ The other challenges included lack of adequate enforcement powers by Office of the Comptroller and Auditor General and lack of appropriate follow ups on external audit observations, high level of corruption in the country and absence of a proper framework to capacitate and empower the Anti-Corruption Commission to execute its duties competently and independently as well as to enforce compliance.³⁹⁸ To further complicate the enforcement process is the presence of an unreliable, unpredictable and ineffective judicial system and the prohibitive high costs of instituting legal action.

In comparison to Zimbabwe, it was found that South Africa's enforcement is similar to that of Zimbabwe in a number of aspects.³⁹⁹ The South African mechanisms have also generally been labelled as weak and unreliable given the increase in unethical behaviour by directors and corporate collapses.⁴⁰⁰ The main causes of South Africa's challenges were found to be poor performance of oversight roles and disjointed oversight practices by relevant authorities as a result of the existence of too many institutions that carry out this role and the absence of ample resources to undertake the roles.⁴⁰¹ In addition, enforcement bodies like the Auditor General and Anti-Corruption Commission have not been empowered with sufficient independence, enforcement powers and adequate operational resources to effectively undertake their enforcement roles. Lastly, like Zimbabwe, South Africa's enforcement drive has been adversely affected by high corruption levels and unreliable and ineffective judicial systems.

A comparative analysis of Zimbabwe's enforcement level to that of Australia showed that Australia has been more aggressive than Zimbabwe in so far as the implementation and

³⁹⁷ Chapter 7, para 7.2.6 above.

³⁹⁸ Ibid.

³⁹⁹ Chapter 7, para 7.2.7 above. Despite the similarities, South Africa has been ranked better than Zimbabwe internationally in so far as enforcement of and compliance with good corporate governance standards is concerned.

⁴⁰⁰ Ibid.

⁴⁰¹ Ibid.

enforcement of the corporate governance standards is concerned.⁴⁰² Australia's enforcement agents have been more equipped and independent than those of Zimbabwe.⁴⁰³ As an example, ASIC, as the Australian corporate regulator, has successfully instituted numerous actions against directors and enforced compliance with good corporate governance practices. As well, the country's office of the Auditor General has been sufficiently empowered to implement an effective auditing system with the assistance of the JCPAA which conducts quarterly public hearings on selected audit reports. Another important difference is that Australia, unlike Zimbabwe, has lower levels of corruption and its judicial system appears to be more reliable and efficient basing on the higher ranking given to Australia globally.⁴⁰⁴

8.3 CONCLUSIONS

This research was motivated by the poor performance of public entities in Zimbabwe which has resulted in them being a heavy burden on taxpayers. The study sought to establish how effective public entity boards have been in performing their duties in the existing corporate governance framework.

The following conclusions are made based on the analysis of literature and the results from the interviews conducted and questionnaires circulated. Despite the existence of a comprehensive corporate governance framework, Zimbabwe's public entities have not been spared from the challenges that have been universally experienced by public entities in other countries.⁴⁰⁵ In essence, the research findings revealed that efforts to enhance the effectiveness of boards of public entities and promote good corporate governance within the entities are adversely affected by a number of issues. First, in practice, boards are not fully empowered to perform their responsibilities due to multiple and conflicting organisational objectives, excessive interference by the government, lack of autonomous powers by the board, lack of director training and development and absence of a proper working framework to guide the boards. As a result, directors lack the powers and commitment that is required to make meaningful and constructive contributions to the running of the business.

⁴⁰² Chapter 7, para 7.2.6 above.

⁴⁰³ Ibid.

⁴⁰⁴ Chapter 7, para 7.2.6 above.

⁴⁰⁵ See Chapter 3, para 3.6 above, for general challenges.

Secondly, the legal and regulatory framework governing the appointment of board members has loopholes that have adversely impacted on the effectiveness of boards. Board members are appointed for the wrong reasons and therefore lack the necessary skills and expertise to effectively direct the respective entities towards achieving their goals. The main challenge is that the framework in place defines the person responsible for appointing the boards (“the Responsible Minister in consultation with the President”) but there are no clear guidelines on academic and professional qualifications and the framework does not specify the process that has to be followed.

The criteria used in the appointment and dismissal of directors of public entities have therefore not been disclosed to the public. This gives the appointing authorities the opportunity to flout the rules and regulations by appointing board members for their political allegiance and other improper reasons which in turn deprive the public entities of appropriate autonomy. Another challenge is the limited number of persons with adequate and relevant skills in the management of public entities which has resulted in multiple directorships that incapacitate directors to exert their best efforts. The framework guiding the appointment of public entities boards has therefore not significantly assisted the boards to effectively carry out their responsibilities.

In the third instance, due to the irregular appointment of directors, achieving board diversity appears not to be always possible in Zimbabwe especially with regard to relevant expertise and gender. In some cases, the people who are appointed as directors are usually not well versed with the complexities of the public entity and the industry in which it operates as well as the applicable laws and regulations. The absence of expertise and relevant skills makes it difficult for public entity boards to effectively discharge their duties. Also gender equality has not been given the prominence it deserves in the selection and appointment of board members. Fourthly, judging from the research results, the directors’ remuneration is not yet commensurate with the level of responsibility and potential reputational risks associated with being a board member in public entities. As a result, the pool from which to choose directors is small because not many people are willing to be directors of public entities as they would rather concentrate on more rewarding businesses. The remuneration framework has thus not been implemented in such a way that it is able to motivate board members to effectively discharge their duties.

The fifth challenge is that there is neither implementation of performance contracts nor is there a systematic way of evaluating board performance. The absence of appropriate performance measurement tools to regularly assess the board's performance has significantly contributed to the ineffectiveness of boards and the poor performance of public entities. Given the fact that the responsible authorities are not regularly monitoring and evaluating the boards' performance, the boards may not have the motivation to effectively discharge their mandate especially if they believe that the shareholders are not interested in the outcome of their actions be it failures or achievements. The absence of monitoring and evaluating the performance of the board compromises its efficiency.⁴⁰⁶ It can therefore be concluded that although Zimbabwe has created a framework to promote public entity board effectiveness, there has not been sufficient effort to put in place an appropriate implementation framework with regard to board performance evaluation.

It has been universally acknowledged that regulation and legislation is not enough without proper enforcement.⁴⁰⁷ An evaluation of the findings on Zimbabwe's enforcement mechanism shows that the country has failed to effectively enforce corporate governance compliance in its public entities. The country has not put sufficient measures to ensure that the framework it has put in place achieves the desired results. For example, the implementation of performance contracts on their own has not yielded meaningful results in Zimbabwe because the contracts are not properly designed, the government has not shown much commitment in enforcing the contracts and the boards have not been given adequate autonomy to achieve the performance targets. More so, the research results point to the fact that Zimbabwe's relevant authorities have done very little towards empowering the enforcement agents in terms of investigative skills, independence, resources and the legal powers to enforce compliance.

⁴⁰⁶ According to Swanson and Wolde-Semait, performance monitoring "provides useful economic and financial information to policymakers and analysts alike, acts as a tool for measuring the strengths and weaknesses of enterprises, and serves as a guide in decision-making for resource allocation and for the design of reform programs". Monitoring the performance of public entities is also an essential tool of measuring the effectiveness of the boards, rewarding good performance and punishing poor performers as well as reinforcing reform programs (Swanson D and Wolde-Semait T *Africa's Public Enterprise Sector and Evidence of Reforms* (World Bank Technical Paper Number 95, Washington, D.C 1989) 2).

⁴⁰⁷ Chapter 3, para 3.6.6 above.

Another major challenge that appears to have weakened the enforcement mechanisms developed by the country to enhance board effectiveness is the high rate of corruption in Zimbabwe. The relevant authorities have not exhibited much political will to eliminate corruption as they have mostly concentrated on the symptoms and not root causes of corruption. As a result, the government needs to establish ways of eliminating corruption, create an adequate legal and judicial framework and be committed and more consistent in the implementation of good corporate governance standards and enforcement of compliance.

8.3.1 Concluding Remarks

It is clear from the above that Zimbabwe has put in place a credible corporate governance framework to improve the effectiveness of boards and encourage public entities to fulfil the goals of efficient and affordable service provision. But, the framework has not fully assisted the boards to effectively carry out their mandate. The recent highly publicised corporate governance scandals by boards of public entities, as highlighted above,⁴⁰⁸ indicate a disconnection between the country's corporate governance framework and actual practices. The main area Zimbabwe needs to focus on is the implementation and enforcement of the corporate governance standards as establishing a good framework on paper without implementation will not help the country much.

Overall, the results of the study show that, regardless of Zimbabwe's commendable efforts to promote good corporate governance in its public entities, it has not been in a position to match the standards of South Africa and Australia in so far as development of corporate governance guidelines and regulations, implementation of good corporate governance principles and enforcement of compliance are concerned. The country, therefore, has to put more effort to improve the standard of corporate governance in its entities and may learn from other developing countries like South Africa and developed countries similar to Australia. This is more so with regard to the quality of enforcement especially in empowering the directors of public entities, transparently and objectively appointing directors, creating appropriately composed boards, adequately remunerating the board members and conducting effective board performance evaluations.

⁴⁰⁸ Chapter 7, paras 7.22-7.25 above.

Therefore, what the research results show is that boards of public entities have not considerably benefited from the existing corporate governance framework due to absence of total commitment from all relevant stakeholders to observe the standards set and also due to a multiple and conflicting objectives, economic challenges, poor enforcement mechanisms and unethical practices, among others.

8.4 RECOMMENDATIONS

The research highlights a number of crucial aspects of non-conformance to best practice by Zimbabwe's public entities. Based on the above research findings, this section lays down some recommendations that could enhance the effectiveness of the boards of Zimbabwean public entities and alleviate some of the problems being encountered by the entities. These recommendations may be useful to the Zimbabwean government officials, leaders and public entity directors to improve the corporate governance framework in public entities. Policymakers, leaders and public entity directors from other regional and developing countries may also benefit from these recommendations.

8.4.1 Empowerment of Boards

Whilst it is acknowledged that some form of government intervention is necessary for the successful achievement of the objectives of public entities, it is universally accepted that the intervention based on public policy, political or national interest should not clash with commercial interests to the extent of compromising the efficient performance of the entities. It is therefore recommended that, to improve the effectiveness of the boards, the government should minimise its interference in the operations of the public entities and restrict its intervention only to strategic and essential issues. Essentially, the role of the government should be to develop the policy framework, set the long term mandates and develop performance contracts with specified economic, financial and performance requirements. Thereafter, the board and management should be afforded the opportunity to exercise their own independent judgment in the management of the public entity and to function in a professional manner.

However, this is only achievable when government is fully committed to a system of autonomous control by boards and when the state and board have a clear and common understanding of their roles, in an environment of frequent communication and trust. Zimbabwe can learn from Australia's centralised system (monitoring and advisory unit)⁴⁰⁹ which has assisted the later in minimising interference by the responsible ministries in the operations of public entities. An independent public entity monitoring and advisory unit is essential in enabling government to provide arm's length management and oversight of public entities.

To achieve board role clarity and efficiency, it is important that the government should implement performance agreements which are free from ambiguities and conflicting objectives. It is also recommended that standard performance agreements should be developed to achieve uniformity in the public sector. However, the standard performance agreements should take into account the specific features of the entities and communicate clear priorities and objectives, based on which citizens and political leaders can evaluate the performance of the boards and management. The government, through the relevant parent ministry, should play an oversight role by systematically monitoring and reporting on the public entity's performance against the set objectives, hence promoting transparency and accountability.

It is further recommended that, to minimise excessive government interference, all relevant stakeholders (e.g. policymakers and shareholder representatives) should be subjected to training on corporate governance and be regularly updated on latest developments.⁴¹⁰ Also, where civil servants are appointed to boards of public entities training is vital to educate them on the importance of not allowing their role in the public service to compromise their independent judgment with respect to the public entity. Similarly, the boards have to be trained on how to balance government or national interests with the interests of the public entities as well on good corporate governance in general. But, it is important to note that training may not be sufficient as a solution on its own hence the need for the trained people to

⁴⁰⁹ Chapter 6, para 6.2.2 above.

⁴¹⁰ Whilst training may not be enough to promote good corporate governance practices, it is a critical step in educating and equipping the relevant stakeholders with the benefits of observing good corporate governance standards.

implement what they would have been trained to do and also for follow up mechanisms to establish whether the training is achieving the desired results.

8.4.2 Establishment of Transparent and Structured Board Nomination Systems

The best way of restricting governmental or political interference in the nomination of public entity boards and increasing their independence and professionalism is to put in place structured and clearly skill-based nomination systems, making sure that the ultimate selection criterion is transparent and based on competency and proven professionalism. Zimbabwe can consider learning from Australia's structured and skill-based nomination system and South Africa's *Handbook for the Appointment of Persons to Boards of State and State Controlled Institutions* which specifically deal with appointments of boards of public entities as well as specify the approval procedures to be followed.⁴¹¹

It is also recommended that the policy makers should create an independent tribunal (e.g. parliamentary committee or committee comprised of qualified experts) that is charged with the responsibility of selecting and appointing board members based on a transparent and objective criteria approved by the government. The tribunal should be responsible for development of the selection criteria, identification of the needs of the public entity, creating a database of potential nonexecutive board candidates, assessing and vetting potential candidates, monitoring boards' composition for appropriateness and making suitable recommendations to the designated office.

To further enhance transparency, appointments should be advertised and a shortlist compiled by the independent or impartial panel even if the final decision on appointment still lies with the relevant parent minister, President of the country or any other designated office. In addition, to preserve the independence and job security of board members, it is recommended that the board should not be dismissed by the parent minister without the parliamentary committee's consideration of the circumstances surrounding the dismissal. Appropriate policy and statutory changes on public entity board appointments may be required if this is to be achieved. This will avoid circumstances where boards are unjustifiably dismissed

⁴¹¹ See Chapter 5, para 5.2.3 and Chapter 6, para 6.2.3 above.

especially whenever a new minister is appointed as has been the case in Zimbabwe.⁴¹² It will also limit the influence and abuse of power over the boards by the respective ministers.

However, it is important to note that although a structured nomination system may depoliticise the nomination process, no technique is full proof and all can be subverted by individuals who may be determined to impose their candidate on the board. It is, therefore, of paramount importance that the government should genuinely be supportive of the objective of appointing appropriately qualified and experienced individuals as board members of public entities. The government can also consider seeking the services of professional bodies like accounting and legal institutions to assist in the nomination of persons to be appointed as directors to the boards of public entities. The advantage of using professional organisations is that they have access to a wider pool of potential directors with more diverse backgrounds, an important characteristic of boards. Zimbabwe may borrow from Australia's framework which provides for a similar process wherein supplementary processes such as public advertising or the use of executive search processes are used.⁴¹³

In undertaking board appointments, it is further recommended that, in addition to relevant qualifications and expertise, the persons to be appointed as board members should be of good financial standing. This is to ensure that the appointees do not end up seeking to benefit from the entity as if they were employees and engaging in unethical activities for financial gain as is the current state in the public entities. Prospective board members should be asked to declare assets before appointment. The country should also robustly implement the provisions that discourage multiple board memberships so that board members can have sufficient time to effectively discharge their duties. With regard to promotion of gender equality, it is recommended that Zimbabwe should borrow from South Africa and Australia which have developed specific legislation and created institutions targeted towards achieving gender equality in boards of public entities.⁴¹⁴ The country should also put sufficient measures to ensure that public entities comply with the promotion of a gender equality framework that it would have put in place.

⁴¹² See Chapter 7, para 7.2.3 above.

⁴¹³ See Chapter 6, para 6.2.3 above.

⁴¹⁴ See Chapter 5, para 5.2.4 above and Chapter 6, para 6.2.4 above.

8.4.3 Induction and Development of Directors

From the research findings, it would appear that it is the quality of the individual directors that play a significant role in the effectiveness of public entity boards. Yet, despite the importance of their role as directors, there seems to be a general lack of adequate attention to the proper induction and development of these directors to make them competent to the tasks. It is therefore, recommended that more effort should be directed towards professionally developing individuals that are engaged as directors through comprehensive formal induction and training so that they become competent to act as such. It is also imperative that adequate resources should be channeled towards training facilities and programs for corporate directors. In addition, all potential directors should be enlightened on the necessity for training and continual development as well as encouraged to attend the induction and training sessions so that they are capacitated to effectively discharge their duties. This would also ensure that the country has a reasonable pool of appropriately qualified and independent directors especially in cases where directors are required to have specialist knowledge such as those who serve on the audit committee of a board.

8.4.4 Improvement of Board Remuneration

Recruiting qualified non-executive board members requires more than just offering a nominal fee but adequate compensation that matches the skills, expertise and the responsibilities of the directors. Board remuneration should therefore be sufficient to attract and retain high quality skill, experience and expertise as well as loyalty and commitment to the public entity. To enable public entities to adequately remunerate their directors, it is recommended that board remuneration should be set and reviewed by, preferably, an independent remuneration committee similar to the Australian Remuneration Tribunal.⁴¹⁵ The Committee should be tasked to come up with a standard remuneration framework which takes into account, *inter alia*, market developments, the entity's financial status, required skills and expertise, entity's objectives and strategic importance, director's responsibilities, international best practices and director's performance and contribution to the performance and success of the entity. The proposed committee and framework should be approved by Parliament before implementation and should be subjected to regular review to take into account current

⁴¹⁵ See Chapter 6, para 6.2.5 above.

developments. Zimbabwe can also learn from South Africa's *State-owned Enterprises Remuneration Guidelines* and adjust it to suit its own specific requirements.⁴¹⁶

8.4.5 Introduction of Systematic Board Evaluation Tools

The research indicated that Zimbabwe has not seriously implemented board evaluations for its public entities. Implementing a strong and successful board and director evaluation system is one important way to ensure that a board can avert organisational failure as well as evaluate the existing mix of competences and skills and specify new profiling for new board positions. Board performance should not just focus on achievements in terms of profits and dividends contributed to Treasury but on the provision of high quality goods and services, employment creation and general economic and social development. It is therefore recommended that public entities should introduce robust regular board evaluations and feedback systems as a matter of urgency.

First, the board, with the assistance of a competent company secretary, can undertake internal board and individual director's performance evaluations. Thereafter, there should be an introduction of an independent or third-party review mechanism of board performance which functions independently to advise and make recommendations to the relevant ministries, parliamentary committee or the presidency. The evaluation criteria should focus on important issues for the specific public entity and should be linked to the kinds of decisions and processes necessary for the effective performance of the entity. To be effective the evaluation should be performed at board and individual director levels, be benchmarked to international standards and linked to the criteria for appointing directors.

In the second instance, the government should clarify the respective roles of parent ministries and other relevant regulators through formal means. This would ensure that the key participants have distinct areas of responsibility, which are aligned with their objectives and mandates and enhance the effective monitoring of the public entities. Clear performance expectations should be set in a shareholder's agreement and performance assessments for the board members should be formalised in individual performance agreements and linked to the shareholder's agreement. For successful results, the members of parliament and parent

⁴¹⁶ See Chapter 5, para 5.2.5 above.

ministries should be continuously trained and capacitated to monitor the entities' performance with respect to the shareholder's agreement.

It is also recommended that public entities' mandates, performance contracts and performance achievements or failures should be publicly available to enable the public to hold the public entities accountable for delivery. The public entities' annual reports should also provide as much information as possible on the board's performance levels. Disclosure has been found to be one of the key mechanisms for regulation and monitoring hence its enforcement should greatly assist in achieving compliance with good corporate governance.⁴¹⁷ But, measures should be put in place to guarantee that directors do not manipulate publicised information in order to show positive performance of public entities and, accordingly, avoid removal from their offices. An example of such measures is creating a system whereby independent verification of the information by a third party is conducted before the information is publicised.

The research also showed that boards of public entities are too frequently changed which compromises the effectiveness of the boards. It is recommended that boards should be allowed to serve for reasonable periods (preferably the periods stipulated in the enabling Acts) and not be frequently changed as is the case now. The government should come up with a guiding framework linked to the appointment framework that protects directors from malicious dismissals and guarantees security of tenure even if there is a change in government or minister. If boards serve for reasonable periods they are able to demonstrate their capabilities and accomplish set targets. Where the circumstances demand that the boards be changed, it is recommended that some of the board members from the old board be retained for continuity purposes.

8.4.6 Improvement of Enforcement Mechanisms

The corporate governance framework put in place by Zimbabwe can only be effective if properly implemented and enforced. Having considered the enforcement challenges

⁴¹⁷ In this regard, it would be ideal if a system is put in place to encourage formal and regular interaction between public entities and their stakeholders. The board should oversee the establishment of mechanisms and processes that support stakeholder interactions on the performance and strategic issues facing the public entity. This will assist the board to obtain diverse ideas from the stakeholders and to improve cooperation between the parties.

experienced by the country,⁴¹⁸ a number of recommendations may be useful. First, it is recommended that the regulatory bodies tasked with the monitoring of public entities, e.g. parent ministries, should be equipped with appropriate financial and competent human resources to ensure that the monitoring system is effective. As a second measure, it is important that the audit observations that are presented by the Comptroller and Auditor General on the performance of the public entities should be seriously pursued and actioned.⁴¹⁹ It is thus, recommended that Zimbabwe should create a committee similar to the Australian Joint Committee of Public Accounts and Audit which will be responsible for ensuring that the audit observations are attended to and for following up on the implementation of the same.⁴²⁰

Thirdly, given the vast developments in the business world, it is imperative for Zimbabwe's outdated company law to be reviewed and revised in line with changing business needs and circumstances and to keep pace with international developments. The Companies Acts in the United Kingdom and South Africa could be of comparative value.⁴²¹ It is also recommended that the country should consider developing prescriptive law specific to some corporate governance issues like the Australian PGPA Act⁴²² and enhance the enforcement of the existing laws to improve the levels of corporate governance compliance. For example, there should be legal provisions that subject members of public entity boards to liability for neglectful decisions. In the fourth instance, it is recommended that Zimbabwe should put vigorous efforts towards the elimination of corruption which has significantly compromised the country's enforcement system. To this end, it is proposed that institutions like the Anti-Corruption Commission should be vested with sufficient independence, investigational capacity and authoritative powers to enforce compliance. The institutions should also be adequately resourced in terms of financial and human resources.

⁴¹⁸ Chapter 7, para 7.2.6 above.

⁴¹⁹ This recommendation is based on the fact that the majority of public entities are audited by the Comptroller and Auditor General and the research findings (Chapter 7, para 7.2.7 above) are that, in most cases, the audit findings are not considered seriously, not acted upon with the urgency they deserve or followed up to check whether they have been adequately addressed.

⁴²⁰ See Chapter 6, para 6.2.7 above.

⁴²¹ To align their company legislation with international developments, the United Kingdom promulgated a new Companies Acts in 2006 and South Africa published a new Companies Act in 2008.

⁴²² See Chapter 6, paras 6.2.1.6 and 6.2.7 above.

Similarly, the country should adopt appropriate measures to strengthen the rule of law and transform the judiciary into a transparent, independent, legitimate and impartial institution. The judicial system should therefore be reinforced with autonomous powers as well as adequately resourced in terms of skilled human and financial resources so that they are able to effectively enforce compliance with good corporate governance standards.⁴²³ Furthermore, punitive measures should be transparently and consistently imposed on those who violate corporate governance regulations irrespective of the social or official status of the person involved. To assist the transformation process, the political leadership should obey the decisions of the judiciary and minimise political interference. It is also recommended that consideration should be given to enactment of legislation that prohibits politicians and officials, for example, ministers and members of parliament from giving directives or interfering in the operations of public entities otherwise they should be subjected to potential personal legal liability for the entities' failures.

However, it is important to note that stringent requirements may fail to achieve full corporate governance compliance as research has shown that there is more to corporate governance than just laws and regulations; directors have to be committed to practice good corporate governance.⁴²⁴ It is therefore imperative to educate and encourage the boards and management of public entities to voluntarily implement good corporate governance out of conviction and not because of fear of punishment as too harsh and inappropriate sanctions may not only be unnecessary, but outright counterproductive.⁴²⁵ This is because directors who believe in corporate governance do not require rules like the Sarbanes-Oxley to conduct themselves diligently and professionally as they consider fulfilment of regulations as a minimum criterion for performance and go far beyond just meeting the requirements on a checklist. Considering this, it is recommended that policymakers and other relevant

⁴²³ Whilst adequately resourcing and equipping all its judicial system and regulatory authorities might not be possible in the immediate future because of the need to address other social and economic obligations, gradual attention to addressing the current challenges should see the country significantly improving the quality of its enforcement to match international standards.

⁴²⁴ Even though regulatory systems and enforcement schemes may encourage directors to follow the law, there are limits to which they can do so as ultimately the decision to act responsibly must come from within the individuals as no law or regulations are adequate to guide directors' behavior (Vaughn M *et al Corporate Governance in South Africa: A Bellwether for the Continent?* (2006) 504-512). See also Zvavahera P "Corporate Governance and Ethical Behaviour: The case of the Zimbabwe Broadcasting Corporation" (2014) 1-8.

⁴²⁵ But, it is important to bear in mind that, in certain circumstances, incentives may not be enough on their own but need to be complemented by legal sanctions to achieve the desired improvements in compliance with good corporate standards especially if one considers the poor state of corporate governance in the country's public entities.

stakeholders should consider coming up with non-legal incentives rather than negative consequences in case of violation of the provisions of the codes of corporate governance. The individual directors thus have to be incentivised to be committed to practice good corporate governance.

The incentives can take the form of awards for best implementers of good corporate governance standards and incentive contracts for board members. Zimbabwe can learn from South Africa and Australia's systems where annual corporate governance awards are granted to the best public entities in terms of complying with good corporate governance standards.⁴²⁶ The corporate governance reports and explanations of the entities could be evaluated, praised and even rewarded by the financial press, supervisory agencies, shareholder associations and possibly by external auditors. Also, public entities should be encouraged to list on the Zimbabwe Stock Exchange and even other international stock exchanges as by so doing they will be compelled to comply with certain minimum corporate governance standards as required by the respective *Listing Rules*.

Furthermore, whistle blowing as well as naming and shaming defaulters could be used to motivate compliance. Zimbabwe could consider developing a framework similar to South Africa's Companies Act and the *JSE Listing Requirements* which provide for the publication of delinquent directors' details.⁴²⁷ The fear of reputational damage associated with bad publicity may be deterrent in that directors are less likely to risk financial harm or to compromise their reputations by engaging in unethical and unprofessional conduct. Lastly, public entities should be encouraged to establish a corporate governance board committee whose main responsibility should be to ensure that the board complies with good corporate governance standards at all times. The company secretary will have a vital role to play in this regard.

8.4.7 Privatisation of Some Public Entities

It is recommended that the country selects from its many public entities those entities that can be converted into private entities. Privatisation is advantageous because it improves

⁴²⁶ See Chapter 5, para 5.2.7 and Chapter 6, para 6.2.7 above.

⁴²⁷ See Chapter 5, para 5.2.3 above.

efficiency and profitability, increases competition, prevents political interference, prevents the bureaucracy that is associated with public entities and eliminates corruption because managers of private companies are more accountable to shareholders. In addition, private companies are able to more easily raise investment capital than public entities because the government's budget has to be spread over several areas of the economy.

However, in selecting the entities for privatisation it is critical for the responsible authorities to take into account the nature of goods or services in question. This is because there are some social obligations such as water supply, healthcare, education and public transport which the government may still need to regulate for the good of the general public.⁴²⁸ It is also important to note that the issue of privatisation of public entities as an alternative to address some of the established challenges can only yield fruitful results if properly managed and if the relevant authorities are committed to empowering boards and respecting their independence.

In conclusion, it is clear that, despite the existence of a credible corporate governance framework, public entity boards have not been able to effectively discharge their duties due to several constraints.⁴²⁹ To enjoy the benefits of its corporate governance framework, Zimbabwe should focus more on improving the quality of enforcement of the existing guidelines, laws and regulations. The country should also strive to eliminate corruption, minimise political interference in the public entities' affairs and strengthen its regulatory and judicial systems.

⁴²⁸ It is imperative to consider that private companies may provide inferior goods or services since they are driven by the profit making objectives rather than public interest in the delivery of essential services. The public may also not be guaranteed of the benefits of privatisation because there is limited government oversight or control over private companies. The other disadvantages to consider are the potential loss of dividends to the government, abuse of monopoly power by the private entities, investing in short term profits at the expense of long term projects. For more information on the pros and cons of privatisation, see Kousadikar A and Singh T K "Advantages and Disadvantages of Privatisation in India" (2013) 3(1) *International Journal of Advanced System and Social Engineering Research* 18-22 available at <http://bipublication.com/files/ijaser-v3i1-2013-04.pdf> (accessed on 29 June 2015) and Kalejaiye PO, Adebayo K and Lawal O "Deregulation and Privatization in Nigeria: The Advantages and Disadvantages So Far" (2013) 7(25) *African Journal of Business Management* 2403-2409.

⁴²⁹ The constraints include excessive government interference, a lack of structured and transparent board appointment processes, improperly constituted boards, poor board remuneration, absence of effective board evaluation tools and poor enforcement mechanisms (see Chapter 7 above).

8.5 FURTHER RESEARCH

The present study alerts government and all other stakeholders to areas of corporate governance practices in Zimbabwean public entities that warrant attention. The study contributes to the scarce academic literature on public sector corporate governance in Africa in general, and in Zimbabwe's public sector in particular. It is therefore hoped that this research can assist other researchers to further investigate other complexities faced by public entities' boards in effectively discharging their duties. The research can also assist policy makers to develop laws and regulations which will improve the performance of the entities as well as the directors and their advisers to develop and maintain effective boards.

A number of areas are suggested for further research. The research can be extended to assess the contribution and effectiveness of other crucial stakeholders (e.g. management, employees, investors and politicians) whose conduct is key in promoting good corporate governance and in enabling public entities to achieve national economic and social goals. Further research can examine the perceptions of various stakeholders on the rate of compliance with good corporate governance in Zimbabwe. Another possible area of research would be establishing the impact of political intervention in the operations of the board and the public entities. Finally, future research can also be targeted at examining the relationships between the chair and the rest of the board and management to establish the effect of the relationships on the success or failure of public entities.

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NEWSPAPERS

South Africa

The Times available at <http://www.timeslive.co.za/thetimes/>

Zimbabwe

The Daily News available at www.dailynews.co.zw/

The Financial Gazette available at www.financialgazette.co.zw/

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The Standard available at www.thestandard.co.zw/

The Zimbabwe Mail available at www.thezimmail.co.zw

Zimbabwe Independent available at www.theindependent.co.zw/

INFORMED CONSENT FORM

Dear Participant,

My name is Nomusa Jane Moyo. I am a student at the University of South Africa undertaking a Doctoral degree. I am conducting a research study entitled “**Corporate Governance - A Critical Analysis of the Effectiveness of Boards of Directors in Public Entities in Zimbabwe.**”

The purpose of the research study is to critically analyse the effectiveness of boards of Zimbabwean public entities (State-owned Enterprises) in discharging their duties and to identify the major constraints faced by the directors in effectively performing their mandates within the existing corporate governance framework. In addition, the research seeks to establish the extent to which the legislatures and policy makers in Zimbabwe have intervened to enhance the effectiveness of public entities’ boards of directors and promote good corporate governance. Finally, the research also recommends how best the boards may be assisted so that they are able to perform their duties diligently and promote good corporate governance. The results of the study may assist in improving the effectiveness of boards of public entities and promoting good corporate governance in the entities

This is an invitation to participate in a research study conducted by the researcher. Your cooperation is sought to complete the questionnaire to gather information on the research study. Your participation will involve completing a questionnaire or answering questions in a face to face interview which should not exceed 1 hour of your time. The survey requests your honest responses to questions on current corporate governance practises in your public entity and your opinion on the effectiveness of the practices in promoting board effectiveness and good corporate governance in general. The interview and questionnaire focus on 5 main aspects of public entity boards namely, role of board, appointment of boards/directors, composition of the board, remuneration of the board and evaluation of the board’s performance.

Please note that your participation in this study is voluntary. If you choose not to participate or to withdraw from the study at any time, you can do so without penalty or loss of benefit to yourself. The results of the research study may be published but your identity will remain confidential and your name will not be disclosed to any outside party. In this research, there are no foreseeable risks to you. Furthermore, no information gained from this survey will be identified with the name of the organisation and the results will be presented in aggregate in the research report

I thank you in advance for your support with this study.

In confirmation of your agreement to participate in this study please sign and return the attached consent form.

N J Moyo

INFORMED CONSENT FORM

The researcher has thoroughly explained the parameters of the research study and all of my questions and concerns have been addressed. All parts of the research study are clear to me.

I, _____(print name in full) hereby consent to participate in the study.

I understand that:

- Participation is voluntary
- That I may refuse to participate in any aspect of the study
- I may request to be withdrawn from the study and any time without consequences
- No information that may identify me will be included in the research report, and my responses and participation will remain confidential
- There are no direct risks or benefits involved in my participation

Signed _____

Date _____

QUESTIONNAIRE FOR PUBLIC ENTITY DIRECTORS

This questionnaire is part of an academic research in pursuance of a Doctor of Laws Degree (LLD) on **“Corporate Governance: Effectiveness of Boards in Zimbabwe Public Entities.”** It is prepared only for the purpose of gathering information to ascertain the effectiveness of boards of public entities/parastatals in Zimbabwe. Respondents are requested to provide honest answers to the questions below. The data furnished and the identity of the respondents will be kept strictly confidential.

SECTION A – PERSONAL INFORMATION

1. Gender

Male

Female

2. Years of relevant experience

Less than 5 years

Between 5 and 10 years

Over 10 years

SECTION B – CORPORATE GOVERNANCE

1. What is your understanding of corporate governance?

.....

2. In your view, does a company’s performance improve by adopting good corporate governance practices?

Yes

No

3. Do you think that corporate governance should be made mandatory or voluntary in Zimbabwe’s public entities? Please explain your answer

.....

4. Does your board comply with Corporate Governance Framework for State Enterprises and Parastatals introduced in Zimbabwe in 2010?

Yes

No

5. Did the Corporate Governance Framework for State Enterprises and Parastatals impact on the performance of the board in your organisation? Please state reasons for your answer

.....
.....

6. Is the current legal and regulatory framework conducive and sufficient to enhance the effectiveness of your board in promoting good corporate governance? Please explain

.....
.....

7. How would you rate your organisation's corporate governance systems and level of compliance?

Poor Fair Good

.....

SECTION C – ROLE OF THE BOARD

1. Does your organisation's board of directors have a charter to guide its operations?

.....
.....

2. Does your organisation have a written policy for induction and professional development of directors to ensure that they have a proper understanding of their role and the organisation's operations and business?

Yes No

3. Were you, as a board member, given clear guidance on what is expected of you and do you get regular feedback on whether you are meeting expectations?

.....
.....

4. Does the board have a role in strategy formulation and implementation?

Yes No

Please explain your answer

.....
.....

5. How often does your board meet to review the implementation of the strategy?

.....

6. How soon are decisions taken at board meetings communicated to the concerned departments for implementation?

.....

7. Does the board establish and monitor policies directed at ensuring that the Corporation complies with the law and conforms to the highest standards of good corporate governance?

Yes

No

If so please briefly explain the process involved.

.....
.....

8. What system has been put in place to ensure that the board and the individual members are accountable with respect to their duties and responsibilities?

.....
.....

9. In your view, is the board adequately empowered to undertake its functions?

Yes

No

10. How do you rate the level of government/ministry involvement in the performance of duties by the board?

Excessive

Sufficient

Inadequate

Please justify your answer

.....
.....

11. How would you rate your general understanding of the business of the organisation?

Very Good

Good

Poor

12. How many board committees does your board have? Please name them

.....
.....

13. Are all committees appropriately comprised in terms of experience and qualifications? Please explain your answer

.....
.....

14. Do board committees have clear terms of reference setting out their scope of work, role and responsibilities to enable them to perform their functions properly?

.....
.....

15. How would you rate the effectiveness of your board committees?

Very Good

Good

Poor

16. Does your organisation have a competent corporate secretary?

Yes

No

17. How, in your view, can your board best be supported to effectively perform its role?

.....
.....

SECTION D: BOARD SELECTION AND APPOINTMENT

1. Does the Corporation have a transparent procedure for the appointment and retirement of directors?
.....
.....
2. Who was responsible for appointing you to the board?
.....
.....
3. What criterion was used to select and appoint you?
.....
.....
4. What attracted you to board service at this organisation in the first place and what keeps you interested as a director?
.....
.....
5. For how long have you served as a board member in the organisation?
.....
6. In how many other organisations do you serve as a board member?
.....
7. In your opinion, does Zimbabwe have sufficient numbers of skilled and experienced directors to meet the needs of its public entities? Please state reasons for your answer
.....
.....

SECTION E: COMPOSITION OF THE BOARD

1. What are the specific mandatory requirements for the compositions of members of your board of directors in terms of:
minimum qualifications,
board size,
maximum years of tenure,
maximum age of directors,
minimum or maximum years of experience in specific areas,
maximum number of board membership each director may hold
2. How may directors constitute your present board and what are their professional backgrounds?
.....
.....
3. How many of the directors are government officials?
.....
4. How many of the directors are women?
.....

5. Does your board have the right blend of skills, expertise and personalities, and the appropriate degree of diversity, to enable it effectively discharge its duties?
Please justify your answer

.....
.....

SECTION F: BOARD REMUNERATION

1. Does your board have a Remuneration Committee?

Yes No

2. Who is responsible for the final approval of your remuneration as the board members?

Board CEO Responsible Minister

3. Is directors' remuneration linked to corporate and individual performance?

Yes No

4. What is the composition of your board's remuneration (for example, sitting allowances, fuel, etc)?

.....
.....

5. What do you think about the financial compensation for non-executive directors in your organisation?

Probably overpaid Adequate Inadequate

6. What systems would you recommend as a way of rewarding directors to motivate them to effectively discharge their duties?

.....
.....

SECTION G: EVALUATION OF BOARD PERFORMANCE

1. Are directors able to seek independent professional advice at the organisation's expense?

Yes No

2. Does the board have adequate access to key staff and information to enable it to discharge its monitoring and oversight role effectively? Please explain your answer

.....
.....

3. What processes are in place for setting objectives and reviewing performance against those objectives, for the board as a whole and for individual directors?

.....
.....

4.

How do you rate the Board's performance in the following key areas?	Score From 5 (excellent) to 1 (poor)
(a) Setting strategy and objectives	
(b) Monitoring implementation of agreed plans	
(c) Monitoring performance	
(d) Financial control	
(e) Taking key decisions	
(f) Managing risk	
(g) compliance with the law and corporate governance	
(h) Appraising the Chief Executive/Director	
(i) Maintaining a productive relationship with senior management	

5. How do you rate the performance of your board as a whole?

Very good Good Poor

6. How often does your board review progress against its performance appraisal action plan?

.....

7. Who is responsible for evaluating board performance?

Independent Consultant appointed by Shareholders
 The Individual directors (self-evaluation)
 Board Chairperson and nominations committee
 The Parent Ministry
 Other (specify)

.....

8. Is the board evaluated as a group or as individual directors?

Individual Group

9. What tools are used to evaluate board performance?

Financial performance tools
 Non-financial performance tools
 Performance Management Scheme e.g. Balanced Scorecard
 Other (specify)

.....

10. In your opinion, how effective is the performance evaluation system in assessing directors' and board performance? Please support your answer

.....

11. What are the main challenges encountered in evaluating board performance?

Lack of evaluation tools

Reluctance by the board to conduct evaluations

Weak supervision by the parent Ministry

Other (specify)

.....
.....

12. Do you think that, as a board member you are adequately equipped to evaluate your performance?

Please support your answer

.....
.....

13. Are you as directors held accountable for your performance and if so what penal provisions are there to punish poor performance?

.....
.....

14. Did the Corporate Governance Framework for State Enterprises and Parastatals impact on the evaluation of board performance in your organisation? Please support your answer

.....
.....

15. Is Evaluation of Board Performance regarded as essential in your organisation? Please give reasons for you answer

.....
.....

16. How do you rate shareholder participation in assessing the performance of the board and holding them accountable for non-performance of the organisation? Please explain

Very Good

Good

Poor

.....
.....

1. How do you rate your own personal performance in the following areas?	Score From 5 (excellent) to 1 (poor)
(a) Attendance at Board meetings	
(b) Attendance at Committee meetings (where applicable)	
(c) Understanding the organisation's objectives and strategy	
(d) Understanding the role of a Board member	
(e) Working cohesively with your Board colleagues	
(f) Probing issues or proposals that are not clear to you	
(g) Using your experience and skills to enhance Board decisions	
(h) Working productively with senior managers	

17. How does the effectiveness of this organisation's board compare to that of other boards on which you serve?

.....
.....

SECTION H- ENFORCEMENT OF COMPLIANCE WITH GOOD CORPORATE GOVERNANCE PRACTICES

1. Do you think that corporate governance should be made mandatory or voluntary in Zimbabwe's public entities? Please state reasons for your answer

.....
.....

2. In your view, is the current legal and regulatory framework conducive and sufficient to enhance the effectiveness of public entities boards in promoting good corporate governance?

.....
.....

3. Which organisations or authorities are responsible for enforcing corporate governance compliance in public entities?

.....
.....

4. How do you rate the effectiveness of the corporate governance enforcement mechanisms?

Very good Good Poor

5. If you believe the enforcement mechanisms are poor, please list the factors you believe contribute to the poor enforcement?

.....
.....

6. How do you rate the overall performance of Zimbabwe's judicial system?

Very good Good Poor

7. If you believe the judicial system is poor, please list the factors you believe contribute to the ineffectiveness judicial system?

.....
.....

8. In your view, are the penal provisions for misconduct and poor performance being effectively implemented?

.....
.....

SECTION I- OVERALL COMMENTS/ RECOMMENDATIONS

What other comments or recommendations (if any) would you make to assist in improving the effectiveness of board of directors in promoting good corporate governance in your organisation?

.....
.....
.....

QUESTIONNAIRE FOR SENIOR MANAGERS & OTHERS

This questionnaire is part of an academic research in pursuance of a Doctor of Laws Degree (LLD) on “Corporate Governance: Effectiveness of Boards in Zimbabwe Public Entities.” It is prepared only for the purpose of gathering information to ascertain the effectiveness of boards of public entities/parastatals in Zimbabwe. Respondents are requested to provide honest answers to the questions below. The data furnished and the identity of the respondents will be kept strictly confidential.

SECTION A – PERSONAL INFORMATION

3. Gender

Male Female

4. Position held in the Organisation

CEO Corporate Secretary
Senior Management Other

5. Years of relevant experience

Less than 5 years Between 5 and 10 years
Over 10 years

SECTION B – CORPORATE GOVERNANCE

8. What is your understanding of corporate governance?

.....
.....

9. Does your organisation comply with Corporate Governance Framework for State Enterprises and Parastatals introduced in Zimbabwe in 2010?

Yes No

10. Did the Corporate Governance Framework for State Enterprises and Parastatals impact on the performance of the board in your organisation? Please explain your answer

.....
.....

11. Do you believe the Framework for State Enterprises and Parastatals adequately covers the needs of State-owned Enterprises and Parastatals? Please give reasons for your answer.

.....
.....

12. Does your organisation have a corporate governance committee?

Yes No

13. How would you rate your organisation's corporate governance systems and level of compliance?

Poor Fair Good

SECTION C – ROLE OF THE BOARD

18. Does your organisation have a written policy for formal briefing and professional development of directors to ensure that they have a proper understanding of their role and the organisation's operations and business?

Yes No

19. Does your organisation's board of directors have a charter to guide its operations?

Yes No

20. Does the board have a role in strategy formulation and implementation?

Yes No

Please explain your answer

.....
.....

21. How often does your organisation's board meet to review the implementation of the strategy?

.....

22. How soon are decisions taken at board meetings communicated to the concerned departments for implementation?

.....

23. What system has been put in place to ensure that the board and the individual members are accountable with respect to their duties and responsibilities?

.....
.....

24. Does the board establish and monitor policies directed at ensuring that the Corporation complies with the law and conforms to the highest standards of good corporate governance?

Yes

No

If so please briefly explain the process involved.

.....
.....

25. Are directors able to seek independent professional advice at the organisation's expense?

Yes

No

26. Is the board adequately empowered to undertake its functions?

Yes

No

27. How do you rate the level of government/ministry involvement in the performance of duties by the board?

Excessive

Sufficient

Inadequate

Please justify your answer

.....
.....

28. How many board committees does your organisation have? Please name the committees.

.....
.....

29. Are all existing committees appropriately composed in terms of experience and qualifications? Please explain your answer

.....
.....

30. Do board committees have clear terms of reference setting out their scope of work, role and responsibilities to enable them to perform their functions properly?

Yes

No

31. How would you rate the effectiveness of your board committees?

Very Good

Good

Poor

32. Does your organisation have a competent company secretary?

Yes

No

33. How, in your view, can the board best be supported to effectively perform its role?

.....
.....
.....

SECTION D: BOARD SELECTION AND APPOINTMENT

1. Who is responsible for appointing your organisation’s board and what criteria are used?

.....
.....

2. Would you say board members selection and appointments are done transparently?

Please explain your answer

.....
.....

3. Do you believe that the ownership structure of your organisation has got an effect on the appointment, composition and performance of the boards? Please state reasons

.....
.....

4. In your opinion, does Zimbabwe have sufficient numbers of skilled and experienced directors to meet the needs of its public entities?

Yes No

If no, what effect do you think this shortage has had on the board appointment process in your organisation?

.....
.....

5. In the past 6 years what has been the tenure of the boards in your organisation?

.....

6. In your view, what practices or structures should be put in place to help to promote transparency and suitable board members selection and appointment in public entities?

.....
.....

SECTION E: COMPOSITION OF THE BOARD

6. What are the specific mandatory requirements for the compositions of members of your board of directors in terms of:

- minimum qualifications,
- board size,
- maximum years of tenure,
- maximum age of directors,
- minimum or maximum years of experience in specific areas,
- maximum number of board membership each director may hold

7. How many directors constitute your present board and what are their professional backgrounds?

8. How many of the directors are government officials?

9. How many of the directors are women?

10. Does your organisation's board have the right blend of skills, expertise and personalities, and the appropriate degree of diversity, to enable it to face today's and tomorrow's challenges successfully?
 Please justify your answer

11. Do you think board composition has an effect on the performance of your organisation? Please explain your reasoning

SECTION F: BOARD REMUNERATION

1. Does your organisation have a Remuneration Committee?
 Yes No
2. Who is responsible for the final approval of the board members' remuneration in your organisation?
 Board CEO Responsible Minister
3. Is directors' remuneration linked to corporate and individual performance?
 Yes No
4. What do you think about the financial compensation for non-executive directors in your organisation?
 Probably overpaid Adequate Inadequate

SECTION G: EVALUATION OF BOARD PERFORMANCE

1. What processes are in place for setting objectives and reviewing performance against those objectives, for the board as a whole and for individual directors?

.....

2. Who is involved in the evaluation of your organisation’s board?

Independent Consultant appointed by Shareholders	<input type="checkbox"/>
The Individual directors (self-evaluation)	<input type="checkbox"/>
Board Chairperson and nominations committee	<input type="checkbox"/>
The Parent Ministry	<input type="checkbox"/>
Other (specify)	<input type="checkbox"/>

.....

6. How often are board performance appraisals conducted?

.....

7. Is the board evaluated as a group, committee or as individual directors?

Individual Committee Group

8. What are the main challenges encountered in evaluating board performance?

Lack of evaluation tools	<input type="checkbox"/>
Reluctance by the board to conduct evaluations	<input type="checkbox"/>
Weak supervision by the parent Ministry	<input type="checkbox"/>
Other (specify)	<input type="checkbox"/>

.....

9. Do you think that the board members are adequately equipped to evaluate their performance?
 Please support your answer

.....

10. Are directors held accountable for their performance and if so, what penal provisions are there to punish poor performance?

.....

11. Did the Corporate Governance Framework for State Enterprises and Parastatals impact on the evaluation of board performance in your organisation? Please state reasons for your answer

.....

12.

How do you rate the Board's performance in the following key areas?	Score From 1 (poor) to 5 (excellent)
(a) Setting strategy and objectives	
(b) Monitoring implementation of agreed plans	
(c) Monitoring performance	
(d) Financial control	
(e) Taking key decisions	
(f) Managing risk	
(g) compliance with the law and corporate governance	
(h) Appraising the Chief Executive/Director	
(i) Maintaining a productive relationship with senior management	

13. How do you rate the overall performance of your board?

Very good Good Poor

14. Does your organisation hold Annual General Meetings?

Yes No

SECTION H- ENFORCEMENT OF COMPLIANCE WITH GOOD CORPORATE GOVERNANCE PRACTICES

9. Do you think that corporate governance should be made mandatory or voluntary in Zimbabwe's public entities? Please state reasons for your answer

.....

10. In your view, is the current legal and regulatory framework conducive and sufficient to enhance the effectiveness of public entities boards in promoting good corporate governance?

.....

11. Which organisations or authorities are responsible for enforcing corporate governance compliance in public entities?

.....

12. How do you rate the effectiveness of the corporate governance enforcement mechanisms?

Very good Good Poor

13. If you believe the enforcement mechanisms are poor, please list the factors you believe contribute to the poor enforcement?

.....
.....

14. How do you rate the overall performance of Zimbabwe's judicial system?

Very good

Good

Poor

15. If you believe the judicial system is poor, please list the factors you believe contribute to the ineffectiveness judicial system?

.....
.....

16. In your view, are the penal provisions for misconduct and poor performance being effectively implemented?

.....
.....

SECTION I- OVERALL COMMENTS/ RECOMMENDATIONS

What other comments or recommendations (if any) would you make to assist in improving the effectiveness of board of directors in promoting good corporate governance in your organisation?

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.....
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Thank you for your time and cooperation