



Guidance for Boards

THE DISSENTING DIRECTOR

Navigating a path through disagreement

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The Board Governance Forum (the “Forum”) is constituted as a forum of the Institute of Directors in South Africa (“IoDSA”), and is sponsored by PwC. The activities of the Forum have specific focus on helping advance corporate governance practices in South Africa by producing guidance papers and/or events for directors who serve on governing bodies.

The objective of the Forum is to serve as a platform for discussion on key topics and current governance or boardroom issues faced by directors.

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The Forum previously operated as the Corporate Governance Network (CGN), and was rebranded as the Board Governance Forum in 2020.

This paper was first published in July 2017 by the CGN and has now been revised.

Publication date: November 2021

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Executive Summary

Healthy and robust debate between directors¹ is an integral component of an effectively functioning governing body. The beginning point of deliberations may involve robust discussion around the issue at hand. Which may then result in differing views or disagreement on the matter.

The word “dissent” is used in this paper to describe the situation after these two stages have passed and the director cannot reconcile himself to the direction taken by the governing body as a whole. It is at this stage, when disagreement turns to dissent, that a director needs to carefully consider his position and the available options.

Issues such as the strategic path that the organisation takes into the future are more likely than others to result in disagreement. We set out guidelines and considerations for the director when faced with these issues in our sections on “Sensitive issues that may provoke dissent” and “Guidelines for dissenting directors”.

Organisations with governing bodies that do not entertain disagreement nor engage with management, or challenge their decisions, need to consider whether the governing body culture is conducive to healthy debate. They also need to consider whether directors with the appropriate levels of expertise and experience have been appointed.

The role of the chair and lead independent are also pivotal in this area. We discuss this in more detail in our sections dealing with “Possible reasons for an absence of healthy debate” and “The role of the chair”.

Introduction

The concept of an effectively functioning governing body is one that brings to mind optimal decision making in an atmosphere of mutual respect, trust, candour and open debate. However, it is to be expected that within this atmosphere, disagreements, differences of view, and in some instances, dissent will arise.

This paper seeks to highlight the importance of raising the dissenting voice. It also provides practical guidelines for doing so in the best interests of the organisation.

The governing body (and those individuals that constitute it) is charged with making decisions on behalf of the organisation. Directors’ duties arise from the common law, the Companies Act and other legislation. The organisation’s founding documents may impose further duties upon its directors.

A director acts in a ‘fiduciary’ capacity in relation to the organisation. This fiduciary duty entails that directors at all times act honestly and in the best interest of the organisation. Displaying dissent when required, and acting with unfettered discretion, forms part and parcel of this primary fiduciary duty. The director therefore has a responsibility to make his/her voice heard when s/he disagrees with a certain course of action.

¹ The word director denotes any person or member serving on a governing body, who has been duly appointed to serve on the governing body and/or its committees.

The essence of dissent

The terms “disagreement” and “dissent” as used in the paper are not meant to be synonymous. As illustrated below, disagreement does not necessarily constitute dissent but may lead to dissent.

Directors must have a proper grasp of the facts and assumptions that underpin a matter that the governing body must decide on. The first step when differences of opinion arise therefore is for directors to understand these facts and assumptions. Initial differences of opinion may arise over the underlying facts and assumptions and these need to be clarified at the outset to ensure that the debate is conducted from the correct premise.

More serious disagreement may arise over the purpose or objectives sought to be achieved by a proposed course of action. Such proposals should be consistent with the strategic direction of the company, which should already have been agreed upon by the governing body. Another possible cause of disagreement may be the method of implementation. This will often arise from differences in the perceived risks inherent in the proposed approach, as compared to alternative options, or differing appetites for risk.

Dissent on matters of ethics or principle are the most difficult to deal with. Personal and religious convictions aside, there are various other ethical considerations, such as fairness and transparency, amongst others, that come into play when business transactions are concluded and the governing body must consider these.

Disagreement on fundamental issues such as fraudulent, reckless, grossly negligent or unlawful conduct is most likely to lead to formal dissent. It is important that the governing body debate be conducted in such a way that the focus is on the issues involved and the effect that they will have on the long-term benefit of the organisation.

The extent of disagreement may vary from a minor difference of opinion over an immaterial issue to a fundamental disagreement. The latter, if it is unresolved, may result in the formal dissent from a governing body decision by one or more directors.

Characteristics of constructive dissent

Dissent is not the same as disloyalty but rather an honest expression of a director’s responsibility to act in the best interest of the organisation. The knowledge by each director that other members of the governing body take their responsibilities seriously creates a stronger, more effective monitoring unit.

Enterprise involves risk-taking to achieve its objectives. Effective decision-making entails understanding these risks and assessing whether the organisation is managing the risks appropriately. Dissent is inappropriate if aimed at avoiding risk in its totality. Dissent should therefore not be used to stifle innovation and business initiative. It is the final expression of a director’s personal opinion in the process of exercising his or her fiduciary duty.

Sensitive issues that may provoke dissent

Dissent may arise in relation to major decisions that may include, *inter alia*:

- formulation of strategy;
- implementation of strategy;
- dividend policy;
- unlawful conduct;
- appointment, remuneration, retention, retirement and re-appointment of directors; and
- issues relating to organisational culture, ethics and value systems.

Formalities of dissent

Governing body decisions are taken collectively and it is assumed that each director was party to a decision, unless indicated otherwise. Directors who disagree with a decision may be deemed to have consented unless they formally dissent. In most jurisdictions, abstaining from voting does not constitute dissent.

It is therefore important that governing body meeting minutes preserve an accurate and official record of the proceedings of a governing body or committee meeting. Well-kept corporate minutes and directors resolutions serve as a record of business decisions and reflect director dissent where appropriate.

Guidelines for dissenting directors

Where a director is in disagreement with a governing body decision, the following guidelines are available to the director:

- The director should raise his or her concerns at the governing body meeting and obtain all information necessary to make the decision.
- If still in disagreement, the director should thereafter engage in robust debate at the meeting and put forward facts and arguments in favour of his or her view.
- In raising a dissenting voice, the director should always ensure that he or she is doing so on an informed basis. To this end, the use of an independent professional may be required. The governing body should approve the protocol to be followed if it or any of its members or committees need to obtain independent, external professional advice at the cost of the organisation on matters within the scope of their duties².
- Upon having obtained this advice, the director should arrange for further governing body discussion relating to the matter.

² Part 5.3, Principle 6, Practice Recommendation 3 of the King IV Report on Corporate Governance™ for South Africa, 2016

- If, after receipt of further information and the additional governing body discussion the director is still dissatisfied, he or she may request the formal recording of the dissenting view in the resolution of the meeting where the matter is discussed.
- For concerns arising between scheduled meetings, the director can approach the chair or company secretary to convene a special meeting.
- The above may include drafting and distributing a detailed memorandum of concerns to the other directors and to request discussion of this memorandum at the special meeting. If the chair is not willing to convene a special meeting to discuss the issue, the Memorandum of Incorporation, founding documents, or Board Charter of the organisation should be consulted to determine if an individual director has the power to call a meeting and such should be approached
- Having taken the steps above, if the view of the dissenting director is then voted against or overruled on a matter which he or she regards as one of fundamental principle, and he or she is of the opinion that serious harm to the organisation is likely to result, the director may have no option but to resign from the governing body.
- A director intending to resign should obtain legal advice on his or her course of action.
- At this stage, the director should consider issuing a statement to the governing body explaining his or her position together with his or her resignation. In this instance, the director should seek legal advice to ensure his/her fiduciary duties and responsibilities are not breached.
- The director should discuss and preferably agree with the governing body the nature of the public communication regarding the resignation bearing in mind the fine line between the duty of confidentiality to the organisation and the duty to report to shareholders openly and transparently to enable them to properly exercise their powers of appointing directors.
- If the matter is one that will be reported upon in a circular or integrated report, the chair may consider allowing for the inclusion of the fact that the decision was not agreed upon unanimously.
- A director is bound by the fiduciary duty to maintain confidentiality concerning information acquired about the organisation's operations and affairs in his or her capacity as director, as well as any provisions contained in his or her service contract. This duty continues after the director has left the governing body. It is only in rare circumstances that the duty to maintain confidentiality is overridden by the duty to report to other authorities, for example, a requirement to report corruption under the relevant statutes. Where there is a legal obligation on the director to report, this would not result in a breach of fiduciary duty. In all instances, the director would be advised to seek legal counsel before disclosure.

Possible reasons for an absence of healthy debate

A governing body culture that discourages robust debate is often a reason for the lack of director involvement. Other reasons may include, *inter alia*:

- The view that directors should be completely loyal to the chair and support management demands creates a culture of conformity and dampens or eliminates healthy discussion and debate.

- Shortcomings in the selection process and the training of new directors may result in governing bodies being over-weighted with inexperienced members incapable of dealing with complex corporate issues.
- The chair may not understand how to manage the governing bodies deliberation process or lack the necessary skills to do so.
- Directors may lack the expertise, confidence and courage to analyse the organisation's problems and opportunities.
- Directors may not be groomed in governing bodies etiquette and may therefore be of the view that to ask a question in a governing bodies meeting is inappropriate.
- Directors do not adequately prepare for complex issues discussed at governing bodies meetings.
- Lack of leadership by the chair.

The role of the chair

The primary role of the chair of the governing body is to provide leadership to the governing body to ensure it functions effectively. This includes *inter alia* to preside over meetings of directors and to ensure the smooth operation of the governing body. The chair therefore has the key role in encouraging congeniality, teamwork and collaboration among governing body members without inhibiting candid debate and creative tension. This role of the chair will be elevated if there is disagreement and ultimately dissent.

The chair must encourage healthy and robust debate over decisions and ultimately strike the correct balance between too little and too much debate. Where a lead independent director has been appointed, s/he should assist the chair in achieving these objectives.

Conclusion

The role of critical and robust debate, disagreement and dissent at the appropriate levels and in the appropriate manner is undeniable in shaping the future of an organisation and maximising value.

To this end, directors must act with courage in the face of possible reprisals and stand firm in their conviction to do that which is in the best interests of the organisation. This is required not only as it is a legal responsibility of directors but more importantly because ethical standards demand it.

GUIDELINE FOR DISSENTING DIRECTORS

Options	Step 1	Step 2	Step 3a	Step 3b	Step 4a	Step 4b
	Obtain all information necessary to make a decision. Engage in robust debate at meetings and put forward facts and arguments in favour of your view.	Obtain independent professional advice and arrange for further governing body discussion.	Despite initial views, based on further facts and debate, agree to support decision.	If still do not support decision, request formal recording of dissenting view in resolution.	Consider appropriate further steps and obtain professional advice in this regard. Resignation and possible notice/communiqué to shareholders/other parties. Must still be acting in the interest of the company.	Consider appropriate further steps and obtain professional advice in this regard. Report to the relevant authorities where required by law.
Dissent on a matter of business judgement eg. strategy.	Obligatory	Optional depending on the importance of the issue.	No action	Recommended	Optional depending on the importance of the issue.	Not applicable
Dissent on matter of perceived business ethics or principle.	Obligatory	Recommended	No action	Obligatory	Recommended subject to legal advice, and provided ethical issue is concerning organisation and not personal view (for example on smoking, gambling, etc)*.	Not applicable
Dissent on fundamental matter that may constitute fraudulent, reckless, grossly negligent or unlawful conduct.	Obligatory	Obligatory	Where a fundamental matter is concerned, action is necessary.	Obligatory	Obligatory subject to legal advice.	Obligatory

* Where the personal values and ethics of a director conflict with the business of the organisation but are not generally offensive to the values of that organisation (for example an organisation has an investment in a casino but the personal convictions of a director do not allow him/her to support gambling), this kind of personal conflict does not require the actions set out above. The director should consider resignation if his/her fundamental values and ethics are not reconcilable with the business model of the organisation.

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