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# GUIDANCE NOTE

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**INTERPRETATION OF THE NINE-YEAR TERM AS  
AN INDEPENDENCE FACTOR**

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# PURPOSE

This paper has been prepared to clarify the application of the nine-year's service as member of the governing body as one of the independence factors indicated in Practice Recommendation 42 of King V. It has been observed that this practice recommendation is frequently misinterpreted and, in some instances, applied as though it creates an automatic rule that a director who has served for longer than nine-years ceases to be independent.

The purpose of this paper is to explain the distinction between independence in substance and independence in form, the role of the governing body in assessing independence, and the correct application of the nine-year factor within the broader framework of King V.

# INTRODUCTION

Independence is a fundamental component of good corporate governance because it promotes objective judgement, constructive challenge and decision-making in the best interests of the organisation. Being clear on what it is that constitutes independence, manages the risk of governing bodies being influenced by personal interests, relationships or external pressures undermining their ability to discharge their fiduciary responsibilities effectively.

King V recognises that independence is not simply a matter of satisfying objective criteria but rather concerns over whether a director is able to exercise independent judgement in the discharge of his or her fiduciary duties.

Independence **in substance** requires governing body members to exercise independence of mind. The essence of this requirement is reflected in section 76(2)(a)(i) of the Companies Act 71 of 2008, which provides that:

*“a director...must not use the position of director, or any information obtained while acting in the capacity of a director, to gain an advantage for the director or for another person other than the company...”*

Independence of mind therefore lies at the heart of the fiduciary obligations owed by directors.

The requirement for independence of mind is not unique to the Companies Act. It is similarly reflected in sector-specific legislation, including the Public Finance Management Act 1 of 1999 and the Municipal Finance Management Act 56 of 2003, which impose comparable fiduciary obligations on members of governing bodies.

Independence **in form**, by contrast, involves the application of objective criteria that serve as indicators of independence. These factors are addressed in section 94(4)(b) of the Companies Act and in Practice Recommendation 42 of the King V Code. They include matters such as shareholding, previous employment, business or professional relationships and the interests of related parties. Length of service is an additional factor that may affect independence; and in Practice Recommendation 42 it is articulated as a director having served for longer than nine years.

Both concepts are important. Objective indicators provide useful signals that assist governing bodies in assessing independence, but they should not be applied mechanically. Ultimately, the governing body must exercise judgement in determining whether a member is capable of acting independently in the circumstances.

## INDEPENDENCE AND LENGTH OF SERVICE

It is common for corporate governance codes to include length of service as one of the factors to be considered when determining whether a non-executive director should be categorised as independent. The rationale is that prolonged service may create familiarity with management that could, in certain circumstances, impair objective judgement.

At the same time, it must be recognised that the selection of nine-years as a reference point is necessarily somewhat of an approximation, since it cannot reasonably be argued that a director remains independent on the final day of a nine-year term but automatically loses that independence the following day. Nevertheless, because objective criteria are intended to identify circumstances that may threaten independence, some point of reference is required. **The nine-year period should therefore be understood as an indicator warranting closer consideration rather than as a rule that determines the outcome.**

This approach is reflected in King V Practice Recommendations 41 and 43, which place the responsibility for categorising non-executive directors as independent squarely on the governing body and requires the governing body to evaluate “*all pertinent factors and circumstances holistically and within the substantive meaning of independence*”.

The King Committee’s approach therefore recognises that the assessment of independence is necessarily contextual. Objective indicators provide evidence of circumstances that **may** affect independence, but no single factor is determinative. A director who satisfies every formal criterion may nevertheless fail to exercise independent judgement because of unconscious bias, personal loyalty or the like. Conversely, a director who cannot be categorised as independent according to one or more objective indicators may consistently demonstrate objective decision-making in the best interests of the company. **Ultimately, it is independence of mind, rather than compliance with formal indicators, that the governance framework seeks to achieve.**

The treatment of length of service of members of the governing body illustrates this philosophy. Under King IV, service beyond nine years was addressed separately from the other indicators of independence and governing bodies were expected to conduct annual assessments of a director’s independence after that period. King V adopts a more integrated approach by including tenure alongside the other indicators within a holistic evaluation of independence. This better reflects the outcomes-based philosophy of King V by avoiding the elevation of any single criterion above the overall assessment of independence. In short: Whereas King IV singled out nine- years’ service for deliberate consideration, under King V all criteria should similarly be considered.

Accordingly, the inclusion of the nine-year period among the relevant indicators should not be interpreted as creating an inflexible rule. This is demonstrated in Practice Recommendation 43 which expressly provides that where the governing body concludes that a director remains independent despite the “*presence of one or more factors that may indicate otherwise, it should provide a rationale for its conclusion*” since limiting the length of service of a member of the governing body is meant to address the threat of familiarity, an argument in support of independence should include reference to factors that mitigate the risk of familiarity. Such a rationale should be sufficiently robust and objective so that it is capable of withstanding scrutiny by a reasonable and informed observer. This reinforces that the objective indicators are intended to inform, rather than replace the governing body’s judgement, while recognising that the governing body’s assessment must also be credible from an external governance perspective.

The assessment by the governing body should be supported by a documented process that considers independence in conduct as well as independence in form and should identify any safeguards or succession measures that mitigate risks arising from long service.

# INDEPENDENCE IN THE CONTEXT OF GOVERNING BODY COMPOSITION

In assessing whether length of service has impaired independence, the governing body should consider not only the individual member's length of service, but also the operational reality of the governing body.

Relevant considerations include:

- the aggregate tenure of the governing body; and
- the extent of board refreshment over time.

Furthermore, although independence is an important component of governing body composition, it is only one of several considerations. Principle 5 of King V calls for an appropriate mix of competencies, diversity and independence to enable the governing body to discharge its responsibilities effectively. In this context, long-serving directors may contribute valuable institutional knowledge, historical perspective and industry expertise that enhance the quality of governing body deliberations. These benefits should be weighed alongside any potential risks arising from familiarity.

## CONCLUSION

The Practice Recommendations of King V are not intended to operate as rigid rules. Rather, they should be applied in a manner that advances the achievement of the objectives as per the relevant governance principles. The indicators of independence, including length of service, should therefore be considered collectively and in context as part of the governing body's assessment of the optimal composition of the governing body as provided for in Principle 5.

By requiring governing bodies to exercise informed judgement, supported by a reasoned explanation where appropriate, King V promotes a principled and context-sensitive approach to independence that ultimately serves the best interests of the company.