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GENIUS METHODS WHITE PAPER

NON-EXECUTIVE DIRECTORS DON'T EXIST
A counterview by

Bob Garratt

I'm amazed that a group of active Chartered Directors have spent this evening discussing in detail an entity that does not exist at law! I feel that Corporate Governance in the UK has been derailed by an obsession with the Combined Code (for Listed Companies only) and its unwise use of the terms "non-executive directors" and "executive directors". The Code is not primary legislation and its regulator, The Financial Reporting Council, is not an active enforcer. So why do we continue to use such phrases when we have perfectly good primary legislation to give us an effective framework for directing? My experience is that it is a toxic mix of ignorance of the primary law by many directors to which is added a demeaning wish to be accepted by the wider business community by using the "right" words and phrases. Inclusion is a basic human need; but not when it reinforces an old wrong.

So let's start at the very beginning, if you can face the *Sound of Music* analogy. Under the primary legislation – the UK's Companies Act of 2006 - the *Seven Non-Exhaustive Duties of a Director* are spelled out clearly:

1. To act within the law
2. To ensure the success of the company
3. To exercise independent judgement
4. To exercise reasonable care, skill and diligence
5. To avoid conflicts of interest
6. Not to accept benefits from third parties
7. To declare interests in proposed transactions.

This is very clear and it allows a legal and ethical/behavioural framework in which any board can operate effectively – private, public or not-for-profit. It is worrying that the regulator, the Department of Business, Innovation and Skills is as lax a regulator as the FRC but at least the primary law is clear. It is worth noting that the only directoral terms used in the Act are *director, chairman* and *company secretary* – NEDs, executives, SIDs and other combinations are not present. And they should not be. The correct term for someone who has signed the Companies House form to be registered as a director is *statutory director*. It is unlawful to use the term "director" unless one is registered at Companies House. Let's keep it so.

The UK used to be seen as having the world-leading framework for corporate framework but it has ossified intellectually over the past 20 years. From a blazing start through Sir Adrian Cadbury's masterful initial Review and Code for the London Stock Exchange we have not seen the active national expansion of the basis of corporate governance but seen only tinkerings with the Codes design for listed companies and a mild nod to Stewardship. Now the world leader intellectually is South Africa through the incorporation of the *King 3 Review* into its primary legislation. This starts from the notion that the law concerning corporate governance applies to *all* registered organisations in the country – private, public and not-for-profit – and that the basis for developing any company in the twenty-first century must be Sustainability. Compared to that the UK's current corporate governance "debate" seems to be nearer the medieval disputations on how many angels can stand on the head of a pin.

So I argue that if you CDirs wish to have any real effect on the quality and quantity of future corporate governance in the UK then first give priority to the *Seven Non-Exhaustive Duties of a Director* and, second, set these within the social and economic context of the South African law.

You are the only active, growing group in the UK who can influence the acceptance of *statutory directors* as the norm; a collegiate group of equals around the boardroom table working for the success of their business whichever sector of the economy they are in.

Do you have the imagination and energy to do anything about this? If so, how?

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