BANK SUPERVISION DEPARTMENT

GENERAL REPORT ON THE STANDARD OF CORPORATE GOVERNANCE IN SOUTH AFRICAN REGISTERED BANKS AND MUTUAL BANKS (EXCLUDING THE FIVE MAJOR BANKING INSTITUTIONS AND FOREIGN BRANCHES)

SEPTEMBER 2005

TABLE OF CONTENTS

SECTION A

Page

SECTION B

SECTION A

ESTABLISHMENT OF THE REVIEW

During the second week of July 2004, the Registrar of Banks directed 14 locally registered banks ("the banks") in South Africa to submit to a review of the standard of corporate governance in the said banks in terms of section 6 of the Banks Act, 1990 (Act No. 94 of 1990 – "the Banks Act"), read with the provisions of the Inspection of Financial Institutions Act, 1998 (Act No. 80 of 1998) and section 4 of the Mutual Banks Act, 1993 (Act No. 124 of 1993) read with the provisions of the Inspection of Financial Institutions Act, 1998 (Act No. 80 of 1998). The banks under review included mutual banks, but excluded branches of foreign banks. The banks were informed that the review would be conducted by a team from the Bank Supervision Department ("the BSD") of the South African Reserve Bank, namely, Adv Jabu Kuzwayo (Assistant General Manager), Mr Johan Neethling (Senior Analyst), Mr Niresh Sukhnandan (Senior Analyst) and Mr Ben Motshoane (Senior Analyst).

The terms of reference for the review were the following:

1. <u>Purpose of the review</u>

The purpose of the review was to investigate compliance with corporate-governance best practices as laid down, for example, in the Banks Act, 1990, the Regulations relating to Banks ("the Regulations") and the recommendations of the Myburgh Report on the Standard of Corporate Governance in the Five Largest Banks in South Africa ("the Myburgh Report") and of the second King Committee on Corporate Governance ("King II").

In particular, and without limiting the generality of the aforementioned statement, the purpose of the review was to establish to which extent an adequate and effective process of corporate governance within a controlling company, a bank and its subsidiaries had been established and maintained, and to which extent the overall effectiveness of the process was monitored by the board of directors.

2. <u>Scope of the review</u>

Although not limited thereto, the scope was to establish, describe and express an opinion on the adequacy of the following areas:

(a) Structure, composition, role and functions of the board of directors.

(b) Role and functions of the:

- Risk-management committee.
- Audit committee.
- Remuneration committee.
- Directors’ affairs committee.
- Chief executive officer.
- External auditors.

(c) Status, role and scope of the:

- Risk function.
- Internal audit function.
- Compliance function.
- Company-secretariat function.

(d) Director selection, career path and development.

(e) Independence of directors.

(f) Leadership.

(g) Management-accountability structure.

(h) Systems of control.

(i) Decision-making process and decision-making capability of the board.

(j) Reports from management to the board.

(k) Board monitoring of management activities reported to the board.

(l) Disclosure to stakeholders.

(m) Related-party lending, conflicts of interest and related matters.

The review followed close on the heels of a similar review led by Adv J F Myburgh SC in terms of section 7 of the Banks Act, read with the provisions of the Inspection of Financial Institutions Act, 1998, on corporate governance conducted during the second half of 2002 and which was finalised on 30 April 2003 upon submission of a report.

The following literature was used to inform and guide the review process, as stated in Banks Act Circular 13/2004, titled "Review of the standard of corporate governance in banking institutions", which authorised the review and which was issued on 9 July 2004 to all banks, branches of foreign banks and mutual banks, namely the:

- Banks Act, as amended by the Banks Amendment Act 2003 (Act No. 19 of 2003).
- Regulations relating to Banks ("the Regulations").
- Mutual Banks Act, 1993.
- Regulations relating to Mutual Banks.
- Recommendations of King II.
- Recommendations of the Myburgh Report.

LEGISLATIVE ENVIRONMENT SINCE THE RELEASE OF THE MYBURGH REPORT IN APRIL 2003

Banks Act

After the release of the Myburgh Report in 2003, changes were introduced to the Banks Act by the promulgation of the Banks Amendment Act 2003, which came into effect on 5 August 2003. The main aim of the said Act was to strengthen corporate governance within banks in the aftermath of Adv Myburgh's findings in the Regal Treasury Bank investigation. Its main objectives were to grant the Registrar of Banks certain powers in the appointment and dismissal of a bank's and controlling company's board members and executive officers, and to compel all banks to establish a risk committee and a directors' affairs committee in the interest of sound risk management and corporate governance, as expressed, in part by the following:

> "…to require banks to establish and maintain an adequate process of corporate governance; … to make further provision regarding the fiduciary duty and a duty of care and skill resting on directors; … to grant certain powers relating to the institution of action for breach of the fiduciary duties to the registrar; to provide for the formation of certain committees and to determine their functions …"

The Myburgh Report's findings and recommendations were themselves informed by the Banks Act Amendment Bill, 2002, later promulgated as the Banks Amendment Act.

The following provisions (as featured in the Banks Act, as amended) are relevant:

Duty of care and skill – section 60 (1), (1A) and (2): Section 60 of the Banks Act codifies the duty of care and skill owed to a company, thereby adding the said duty to the generally accepted common-law fiduciary duty of a director. Thus, sections 60(1) and (1A) not only impose a duty of care and skill, but also define its dimensions and clarify the common-law uncertainty relating to the test that is applicable in determining whether the said duty has been discharged, since common-law interpretations appear to favour a subjective test, whereas the Banks Act now requires an objective test, as stated in the Memorandum on the objects of the Banks Amendment Act, 2003 (hereinafter referred to as “the Memorandum”).

The main purpose for the amendments is to provide depositors (by far the largest source of funding of a bank) with the protection that they may reasonably expect against their exploitation through reckless, negligent and fraudulent management of the business of their bank. According to the Memorandum, the amendments relating to the duty of care and skill have the effect of readdressing the currently outdated minimalistic standards set by our positive law in respect of the duty of care and skill and bring about a measure of conformity between these very light duties and the strict fiduciary duties of managers.

Thus, in order for a bank to be managed adequately and with due regard to the interests of both the bank and the depositors, the amendments introduce substantive principles to resolve such conflicts. Consequently, we see requirements, on the one hand, for a director to act *bona fide*, for the benefit of the bank, and to avoid conflicts of interest between the bank and the director, both of which arise from the term “fiduciary relationship”. On the other hand, there are requirements to possess the knowledge and skill that may reasonably be expected of a person holding a similar appointment and carrying out similar functions, and to exercise such care in the carrying out of his or her functions in relation to that bank as may reasonably be expected of a diligent person who holds the same appointment under similar circumstances.

Directors' liability – section 60 (1B): The amendments also provide the Registrar of Banks with the power to institute an action, in terms of section 424 of the Companies Act, 1973, against any director (as well as chief executive officer and executive officer of a bank or controlling company) who was knowingly a party to the conduct of the business of the bank in the manner envisaged in section 60(1B) of the Banks Act, the directors' liability provision.

Appointment of directors- section 60(5): The amendments further afford the Registrar of Banks with the power to object to a nomination of a non-executive director and to object to the appointment of an executive director. The Registrar is obliged, however, to provide written reasons for such objections, and the proposed appointee is afforded a reasonable period to respond. The objective of this amendment, according to the Memorandum, is, *inter alia,* to provide the Registrar with the power to gather information on directors of a bank in order to exercise a qualitative judgment on candidates for appointment. Another objective is to provide the Registrar with proper authorization to remove or replace serving directors of banks or to restrict their powers, as well as to prevent the appointment of individuals as directors and to disqualify individuals from becoming directors of banks.

Corporate governance – section 60B: Since banks are regarded as special institutions, which fulfil a unique role within a modern economy, the directors and executive officers of a bank are required to exercise a greater degree of care and skill than directors of other companies. Certain provisions pertaining to corporate governance have already been incorporated into the Regulations. Section 60B gives corporate governance the force of law and creates legal certainty in that regard. Section 60B(2) reinforces the principles pertaining to the fiduciary duty and the duty of care and skill owed by directors (and executive officers) to the bank. Section 60B(3) enables the Minister of Finance to issue further regulations relating to corporate governance. Furthermore, a definition of the term "corporate governance" was inserted into section 1(1) of the Banks Act as follows:

> "In relation to the management of a bank or a controlling company, includes all structures, processes, policies, systems and procedures whereby the bank or controlling company is governed".

Audit committee – Section 64(2)(d): Section 64(2)(d) was inserted to provide the Minister of Finance with the power to prescribe, by regulation, certain further functions of an audit committee.

New committees – sections 64A and 64B: In a further effort to promote the effectiveness of the board and its directors, the Act has introduced oversight mechanisms, such as the establishment of the risk committee and the directors' affairs committee, to enable the directors to fulfill their responsibilities with care and skill. Recent bank failures, including the failure of Regal Treasury Private Bank Limited, have also highlighted this need. One of the key functions of the directors' affairs committee, for example, is to conduct a regular review of the composition of skills, experience and other qualities required for the effectiveness of the board and to determine whether the services of any director should be terminated.

Mutual Banks Act

The Mutual Banks Act 1993 (Act No. 124 of 1993 – "the Mutual Banks Act"), first came into effect on 15 December 1993, and has since then been amended only once, by the promulgation of the Mutual Banks Amendment Act 1999 (Act No. 54 of 1999), which came into effect on 15 December 1999. The most significant change to the Mutual Banks Act was the strengthening of the powers of the office of the Registrar of Banks to achieve effective supervision. The amendment introduced, as a new definition, the "employee in charge of a risk management function", which is identical to the definition in the Banks Act, but applicable, of course, to a mutual bank. Beyond this, nothing of further corporate-governance substance has been introduced to the Mutual Banks Act, and provisions relating to directors' status remain the same as they were in the Banks Act before Act No. 19 of 2003 came into operation. The following provisions are relevant:

Fiduciary duties – Section 37(2) & (3): Like the Banks Act before the introduction of the amendments relating to corporate governance mentioned above, the Mutual Banks Act makes provision for only the common-law principle of a director's fiduciary duty, and seeks to clarify the principles pertaining to a fiduciary relationship as requiring directors to act honestly and in good faith and to exercise their powers to manage or represent the bank exclusively in the best interests and for the benefit of the bank and its depositors. The Mutual Banks Act does not make provision for the duty of care and skill, let alone to define it.

Appointment of directors – section 37(7): Like the Banks Act before the introduction of the amendments relating to corporate governance, the Mutual Banks Act provides for the furnishing of a prescribed notice of appointment of a director only in respect of the appointment of new directors. Furthermore, the Registrar is not authorised by the Mutual Banks Act to exercise a qualitative judgment on the qualities of a designated new director of a bank, and, as such, it would seem that the appointment becomes effective without the Registrar having the authority to prevent it.

Although the Mutual Banks Act had not been affected by the new corporate-governance provisions introduced to the Banks Act, the review team assessed the mutual banks against best practices, including those incorporated into the current Banks Act.

SUBSTANCE OVER FORM

It is worth reminding ourselves of the oft-quoted maxim, having its origins in a statement by The Business Roundtable and quoted with approval by King II on page 142: "… the substance of good corporate governance is more important than its form", which implies, as crisply stated in the same statement of The Business Roundtable, that "adoption of a set of rules or principles or of any particular practice or policy is not a substitute for, and does not itself assure, good corporate governance". This implies that, in order for corporate governance to be successfully implemented in any company, it needs to be viewed, not as a set of arduous rules that can be evaded by employing expensive consultants to assist in the task, but as a code of conduct or culture by which the company wants to project or personify itself to the outside world. As Myburgh states on page 25, paragraph 15 of the General Report, an assertion that substance should take precedence over form is a statement of the obvious.

It is also recognised, however, that all principles embodied in a code on corporate governance are effective only if adequate remedies and sanctions exist to enforce compliance with those principles. Currently, South Africa has a plethora of sets of laws drawn by the legislature, principally in the Companies Act, 1973, relevant to the duties of directors and managers, as well as other governance operations of a company. Thus, other than to improve current legal principles where appropriate, it is neither desirable nor is it recommended that any new legal principles be formulated to give further impetus to the principles of corporate governance. The review team shares the views of Myburgh, expressed on pages 28 to 29, paragraph 20 of the General Report, in which he states:

> "A danger of overregulation … is that potential suitably qualified non-executive directors will be discouraged from making themselves available to serve on bank boards. The Banks Act, the regulations, and the proposed amendments (since promulgated as the Banks Amendment Act 19 of 2003) appear to me to go far enough … [T]he most crucial element of effective corporate governance is the service of competent, ethical people as directors of public companies. If directors enjoying those qualities are deterred from serving on bank boards because their responsibilities become too onerous, it does not matter how many committees or structures are put in place by way of regulation."

Non-compliance with the legal principles will certainly expose a company to corrective sanction. Of greater risk to a company, especially a bank, however, is the reputational damage that it can suffer if it does not comply in substance with the principles of corporate governance. This risk can even extend to a country, because poor corporate governance within a financial system is often given as an important reason for investors withdrawing their funds from a country.

PERFORMANCE VERSUS CONFORMANCE

The Bank Supervision Department ("BSD") recognises that entrepreneurship and enterprise are important factors in driving the business of a bank. The key challenge for good corporate governance is to seek an appropriate balance between enterprise (performance) and compliance (conformance), thereby taking into account the expectations of all stakeholders, including the shareholders, who look forward to reasonable capital growth, and the regulators, whose interest lies in protecting the users of the services. Corporate-governance practices are built into the range of prudential techniques that are employed by the BSD and which are designed to promote the financial stability of our banking system and to prevent systemic crises arising in the first place. Conformance to corporate governance standards need not result in constraints on management. It ought to be viewed rather as, to use the expression of Myburgh, page 27, paragraph 18 of the General Report, "driving a car using a safety belt". It is within the power of a board of directors to ensure that compliance does not inhibit the board and management in being innovative and demonstrating entrepreneurial flair.

VALUE AND IMPORTANCE OF CORPORATE GOVERNANCE

In the light of the crucial role of good corporate governance in the soundness of the banking and financial systems, the BSD, in its 2001 Annual Report, committed itself to enhancing corporate governance in the South African banking system, in line with local and international developments, exemplified by King II, as well as the increasing emphasis that international investors are placing on good corporate-governance. To illustrate this commitment to good corporate governance standards in the banking system, the BSD has implemented, since January 2001, legislation such as Chapter 3 of the Regulations, which deals specifically with corporate governance, and the Banks Amendment Act, 2003, discussed above. The BSD shares the following views, quoted with approval by Myburgh, on pages 29 to 30, paragraph 24 of the General Report:

“- A company with good corporate governance will perform better over time, leading to a higher stock price.

– [It is] a means of reducing risk, as … it decreases the likelihood of bad things happening to a company.

– When bad things do happen … well-governed companies [are expected] to rebound more quickly.”

A good corporate-governance framework in a bank should provide a structure through which the objectives are set, and the means of attaining those objectives and monitoring performance are determined. Such a framework should also provide proper incentives for the board and management to pursue objectives that are in the interests of the bank and its stakeholders and should facilitate effective monitoring, thereby encouraging banks to use their resources more efficiently.

CORPORATE GOVERNANCE APPROACH

All institutions are expected to conform to best practices in implementing good corporate governance. The corporate-governance regulatory framework should be suitable for application to banks of varying levels of complexity and sophistication. It should thus be recognised that implementation of best practices may result in some banks customising the corporate-governance requirements of the legislature to make them relevant for their individual business and corporate structure. This implies that the regulatory framework should be less prescriptive on how the corporate-governance structure of a company should be implemented. Accordingly, the BSD believes that there is no "one-size-fits-all" approach to corporate governance. The corporate-governance framework of any bank should conform to its size and complexity, its structure and the risks affecting it. Adv Myburgh recognised this when, in the Myburgh Report, he concluded, for example, that given the size and complexity of the five banks investigated, the average size of the board should be no more than about 16 members, not more than four of whom should be executive directors.

REVIEW PROCESS

The BSD's review process included a preparatory phase very similar to that undertaken during the Myburgh review process, involving the following preliminary steps:

(a) The 14 banks were requested to provide various documents, including minutes of meetings from January 2002 of the following bodies:
   - Board of directors.
   - Audit committee.
   - Risk committee.
   - Remuneration committee.
   - Directors' affairs committee.

(b) The documents and the minutes were analysed.

(c) Separate meetings were held with the BSD's relationship teams in order to solicit information about each of the banks.

(d) Extensive lists of questions arising from relevant corporate-governance principles were sent for distribution to all parties interviewed.

During the period from 16 August 2004 to 10 December 2004, the second phase of the review process was undertaken, and involved interviews, at the banks' premises, with:

(a) The directors of all banks.

(b) The heads of the following functions:

- Risk management.
- Compliance.
- Internal audit.
- Company secretariat.

(c) The banks' external auditors.

Owing to the unavailability of some interviewees, some interviews were conducted either via telephonic conference facilities from the banks' premises, or from the offices of the Registrar of Banks, and some directors were kind enough to present themselves at the offices of the Registrar of Banks for their interviews.

In total, 191 people were interviewed during the review process.

The third phase was devoted to consolidating the interview transcripts of all interviewees, as well as report writing.

GENERAL FINDINGS

After reviewing the corporate governance of the 14 banks under review, the following general findings are made:

– The banks are committed to adherence to and application of high standards of corporate governance.
– The senior management and boards of directors of the banks reviewed take their responsibilities to ensuring effective corporate governance seriously.
– The banks, on their own initiative, from time to time review their corporate governance to ensure compliance with accepted corporate-governance principles.
– The corporate governance of the majority of the banks is sound.*
– The banks reviewed are mindful that they operate on the basis of continuous improvement, especially given the ever evolving governance standards in South Africa and internationally.

More specifically, the following areas appear to be in need of attention by most banks:

- The compliance function.
- Director selection.
- Continuous training and updating of skills of all directors.
- Board monitoring of management and unresolved issues.
- Transformation within the boards.
- Non-effectiveness of the Directors' Affairs Committees.

* This is at the time of the review. Subsequent events may alter the picture significantly.

SECTION B

INTRODUCTION

As already stated in Section A of the General Report, certain literature was used to inform and guide the review process, which is referred to in the Banks Act Circular 13/2004, titled "Review of the standard of corporate governance in banking institutions" and issued on 9 July 2004 to all banks, branches of foreign banks and mutual banks, namely, the:

- Banks Act, as amended by the Banks Amendment Act, 2003.
- Regulations relating to Banks.
- Mutual Banks Act.
- Regulations relating to Mutual Banks.
- Recommendations of King II.
- Recommendations of the Myburgh Report.

The recommendations of both King II and the Myburgh Report have been accepted by the BSD.

In its Annual Report of 2001, page 21, under the heading "Importance of good corporate governance", the BSD, in endorsing the King II report, committed itself to enhancing corporate governance in the South African banking system, in line with local and international developments, with specific reference to the draft King II report, as it then was. The report stated that the number of changes contemplated for the Banks Act, epitomised by the Banks Amendment Act, 2003, were intended to provide clarity on the principles of good corporate governance set out in King II.

In its Annual Report of 2003, the BSD stated that it had furthermore accepted the recommendations in the Myburgh Report and would be consolidating the information flowing from that review to determine whether the banking legislation required further amendment.

The principles espoused by King II and the Myburgh Report are not the only principles that have been adopted by BSD, however. In its Annual Report of 1997, the BSD also committed itself to the Basel Core Principles for Effective Banking Supervision ("the Core Principles"), a set of principles issued in September 1997 by the Basel Committee on Banking Supervision, considered to be the most authoritative standard-setting body for banking supervision. The BSD not only contributed to the development of the Core Principles, but has wholeheartedly adopted them as the benchmark for assessing the ongoing effectiveness of its supervisory processes.

Not to be sidelined, however, is the Financial Sector Black Economic Empowerment Charter (commonly referred to as "the Financial Sector Charter"), launched on 17 October 2003. The Financial Sector Charter, a voluntary initiative by the major institutional players in all material facets of the financial sector, has been endorsed by the financial sector, which committed itself to enabling black economic empowerment ("BEE"). The Charter has six key pillars, to each of which scorecard points are assigned in tendering for Government business. One of these pillars, ownership and control, scores 22 of a total 100 points. Among its components, the said pillar sets a target of 33 per cent black people on the board of directors by 2008 in each financial institution, and a target of a minimum of 11 per cent black women on the board of directors by 2008 in each financial institution. The review team considered these aspects for purposes of the review.

The Organisation for Economic Cooperation and Development ("OECD") recently released the much awaited revised OECD Principles of Corporate Governance of 2004 ("the OECD Principles"). Originally endorsed by the OECD Ministers in 1999, the OECD Principles have become an international benchmark for policy makers, investors, corporations and other stakeholders worldwide and have advanced the corporate-governance agenda and provided specific guidance for legislative and regulatory initiatives in both OECD and non-OECD countries.

All the above source documents informed the review team in their deliberations.

COMPOSITION AND STRUCTURE OF THE BOARD

The concept of a unitary board, consisting of executive directors and non-executive directors, who share responsibility for both the direction and control of the company, remains the favoured board structure for South African companies, including banks. The benefit of a unitary board is the value of executive knowledge within the board, alongside the value of the non-executive directors' wider experience. The law, however, does not recognise a distinction between executive and non-executive directors. These labels have evolved in practice and have been given a passing reference in the Banks Act, in which the definition of a director "includes an executive director and a non-executive director, unless expressly stated otherwise". Another label, "independent director", has lately come into common usage, but also does not enjoy any recognition in law. The closest that South Africa has come to having recognised definitions of these terms are the definitions in King II, which have served as a useful guide in boardrooms countrywide. Accordingly, for the purposes of this discussion, the King II definitions of executive director, non-executive director and independent director are used as a reference, and are restated as follows:

Executive director: an individual involved in the day-to-day management and/or in the full-time salaried employment of the company and/or any of its subsidiaries.

Non-executive director: an individual not involved in the day-to-day management and not a full-time salaried employee of the company or of its subsidiaries. An individual in the full-time employment of the holding company or of its subsidiaries, other than the company concerned, would also be considered to be a non-executive director unless such an individual, by his or her conduct or executive authority, could be construed to be directing the day-to-day management of the company and its subsidiaries.

Independent director: a non-executive director who:

- is not a representative of a shareowner who has the ability to control or significantly influence management;
- has not been employed by the company, or the group, of which it currently forms part, in any executive capacity for the preceding three financial years;
- is not a member of the immediate family of an individual who is, or has been in any of the past three financial years, employed by the company or the group in an executive capacity;
- is not a professional adviser to the company or the group, other than in a director capacity;
- is not a significant supplier to, or customer of the company or group;
- has no significant contractual relationship with the company or group; and

- is free from any business or other relationship that could be seen materially to interfere with the individual's capacity to act in an independent manner.

An analysis of information provided by the banks that were reviewed reveals that the composition of the boards is the following:

BANK	Executive Directors	Non-Executive Directors		TOTAL
		Non-independent directors	Independent directors	
African Bank	8	2	9	19
Bank of Athens	1	5	3	9
Capitec Bank	2	3	4	9
GBS Mutual Bank	2	1	4	7
Habib Overseas Bank	2	1	4	7
HBZ Bank	2	3	3	8
Imperial Bank	6[♦][♣]	5	2	13
Ithala	2	1	6	9
Marriott Merchant Bank	2	4	5	11
MEEG Bank	4[*]	3	5	12
Mercantile Bank	2	2	2	6
Rennies Bank	2	4	2	8
Sasfin Bank	2	1	4	7
VBS Mutual Bank	2	0	7	9

In keeping with best practise, most of the South African banks aim to maintain a high ratio of executive to non-executive directors. Adv Myburgh recommends that the number of executive directors should not exceed four in a board that should not exceed 16, that is a ration of 1:3. The above table reflects an average ratio of 2:7, which, it is submitted, reflects best practice. The prevailing wisdom is that it is healthier for non-executive directors (a fair number of whom should be independent directors) to outnumber the executive directors by a large margin since such a composition makes for a more objective and balanced environment. The danger of

[♦] The BSD was not able to interview one of the executive directors.
[♣] Three of the executive directors are in fact full-time employees of Nedcor.
[*] Two of the executive directors are full-time employees of ABSA Bank, but are also regarded as executive directors of MEEG Bank.

having a large number of executive directors is that the deliberations may become too operational and the answers are given before questions are asked. A contrary view, in favour of a stronger executive presence, is that having fewer executive directors poses a greater risk of distortion or withholding of information, or a lack of balance in the management contribution to the boardroom debate. It is submitted that this risk can be countered by management being in attendance at board meetings to report to the board or to respond to questions. This reduces the risk of a conflict of interest arising if the executive directors have to exercise voting rights on issues that they are seeking to promote to the board. The common practice is for the chief executive officer and one or two senior managers of a company to become executive directors and, hence, members of the board.

One of the factors believed to influence the size of any board is the size of the bank's balance sheet and the complexity of the operations of the bank's business. Unlike the big five banks, which were reviewed by Adv Myburgh in 2003, many of the banks under review are engaged in limited product ranges, thereby limiting the risk exposures affecting the banks.

The following table reflects, with regard to the South African registered banks, mutual banks and institutions designated in terms of the Banks Act under review, the business of each individual bank, the market for which it caters and the breakdown of its total assets as at 31 December 2004:

Bank	Business of the bank	Market	Total assets as at 31 Dec 2004 R million	Percentage
African Bank	Loans & advances	Retail (Micro-lending)	7 332	[redacted]
Bank of Athens	Traditional banking services	Retail and small, medium and micro enterprises ("SMME)	618	[redacted]
Capitec Bank	Deposits; loans and advances	Retail (Micro-lending)	728	[redacted]
GBS Mutual Bank	Deposits; mortgage loans; asset-based finance	Retail	421	[redacted]
Habib Overseas Bank	Deposits; loans and advances	Niche market	343	[redacted]
HBZ Bank	Deposits; loans and advances	Niche market	793	[redacted]
Imperial Bank	Asset-based finance; property-development finance	Retail	16 912	[redacted]
Ithala[*]	Mortgage loans; deposits	Retail	1 401	[redacted]
Marriott Merchant Bank	Asset management; property-development finance	Niche market	737	[redacted]
MEEG Bank	Traditional banking services	Retail	801	[redacted]
Mercantile Bank	Traditional banking services	Retail and SMME	2 734	[redacted]
Rennies Bank	Foreign exchange; loans and advances; deposits	Niche market	335	[redacted]
Sasfin Bank	Rental lease agreements; deposits	SMME	752	[redacted]
VBS Mutual Bank	Deposits; mortgage loans; ; loans and advances	Retail	209	[redacted]
Total assets	[redacted]	[redacted]	34 115	2.51%
Total assets for big five banks	[redacted]	[redacted]	1 325 613	97.49%
Total assets for SA banking sector	[redacted]	[redacted]	1 359 728	100%

The mean average in total assets for the big five banks as at 31 December 2004 amounted to approximately R265 123 million, and the board representation, as recommended by Adv Myburgh, was 16 directors. This means that there should be one director for every approximately R16 570 million worth of assets. If this is used as the benchmark, and if the above table is taken into account, the average board representation for the banks under review should stand at approximately 0,15 for total assets of approximately R2 437 million, suggesting that there should be no

[*] Designated in terms of paragraph (dd)(i) of the definition of "the business of a bank", in section 1 of the Banks Act.

board representation for the banks under review. Needless to say, such a suggestion should rightly be met with outrage and ridicule. Clearly, the total asset criteria should be dismissed as carrying any weight in arriving at an acceptable board size. No company would envisage the possibility of doing away with a board, to say nothing of the illegality of such an occurrence. Other criteria are called for to measure the acceptable board size of a bank.

The BSD shares Adv Myburgh's view that:

(i) On the one hand, the board must be large enough to accommodate the following:

- Executive directors and non-executive directors.
- A sufficient number of non-executive directors to serve on the ever growing number of board committees.
- The requirement that a company should consider the demographics of the board.

(ii) On the other hand, the board should not be so large that:

- Its size renders it ineffective.
- Its meetings are unnecessarily protracted.
- Directors are rendered passive by their anxiety not unduly to protract the meeting by asking questions or raising concerns.

A key aspect of the supervisory process is an evaluation of the competence, integrity and qualifications of the board of directors. A bank board should individually and collectively comprise persons with banking experience, other business experience, personal integrity and relevant skill. In addition, there should be a blend of knowledge and commitment to the board. The risk exposure of a bank is one of the factors that influences the composition of skills residing on a bank board. An analysis of the skills balance in the reviewed banks' boards follows in the table below:

Bank	Bankers[♦]	Other skills / qualifications / experience
African Bank	2 (Woollam & Steffens)	A blend of the following: agriculture, retailing, auditor, transformation & change management, entrepreneurs, human resources, chartered accountants, directors of companies, business strategists, practising lawyers, economist
Bank of Athens	6 (Arapoglou, Leopoulos, Oratis, Zarca, Stathoulis and Thomopoulos)	A blend of the following: mathematics, engineering, property management and development, practising lawyer, textile, shipping, economist, valuator, financial adviser, chartered accountant
Capitec Bank	5 (Le Roux, Du Plessis, Mouton, Otto and Stassen)	A blend of the following: financial consultant, nuclear physics, educationist, development financier, chartered accountant, stockbroker, academic in accounting
GBS Mutual Bank	1 (Tagg)	A blend of the following: practising lawyers, chartered accountant, accountant, computer scientist / IT specialist
Habib Overseas Bank	5 (H Habib, Hasan, Z Habib, Viviers and Zaheer)	A blend of the following: chartered accountant, industrialist
HBZ Bank	6 (M Habib, R Habib, Chowdari, Chowdhury, Field and Harvey)	A blend of the following: practising lawyer, accountant, business strategist, IT specialist, conservationalist
Imperial Bank	6 (Ball, Brody, Croucamp, Van der Linde, Wessels and Shuter)	A blend of the following: practising attorney; auditor, entrepreneur, stockbroker, chartered accountant, risk specialist, directors of companies, regulator, strategist
Ithala	4 (Bush, Mia, Luthuli and Kunene)	A blend of the following: entrepreneur, former MEC Finance, community leader, practising chartered accountant, insurer, tax consultant, economist, academic
Marriott Merchant Bank	3 (Moore, Norton and Polkinghorne)	A blend of the following: sugar baron / industrialist, directors of companies, chartered accountants, auditors, shipping industrialist, property industrialist, valuator, stockbroker, tax specialist
MEEG Bank	4 (Du Toit, Kaltenbruun, Nkonki, Van der Merwe and Dreyer)	A blend of the following: presidential economic adviser; director of companies; practising advocate; accountant, medical practitioner, professor of economic science, chartered accountant; community leader
Mercantile Bank	4 (Campos, Brown, Figuera and Osman)	A blend of the following: clothing retail businessman, chartered accountant; agricultural engineer
Rennies Bank	0[♣]	A blend of the following: economist, travel expertise, exchange-control consultancy, central banker, chartered accountants, investor, entrepreneur, businessmen, directors of companies
Sasfin Bank	5 (Smith, Sassoon, Greenstein, Blight and Axten)	A blend of the following: finance, asset management, insurance, stockbroking, director of companies
VBS Mutual Bank	3 (Luvhani, Sandamela and Vosloo)	A blend of the following: turnaround strategist, entrepreneur, community leader, practising attorney, businessman, chartered accountants, financial strategist, academic in accounting, academic in anthropology, minister of the church, financier

Given the weight and prominence placed on black economic empowerment by the financial sector through the Financial Sector Charter, it is deemed useful to give an

[♦] The law does not recognise the definition of a banker or banking. For purposes of this review, however, it is assumed that a key criterion to be a banker would be to have a proved track record in conducting the business of a bank in a commercial banking environment.

[♣] The management committee of Rennies Bank has some bankers, none of whom were members of the board at the time of the review, however.

analysis of information provided by the banks on the demographic (racial and gender) balance, as follows:

Bank	White		Black*		Total
	Male	Female	Male	Female	
African Bank	11	0	5	3	19
Bank of Athens	9	0	0	0	9
Capitec Bank	7	0	1	1	9
GBS Mutual Bank	5	1	1	0	7
Habib Overseas Bank	2	0	5	0	7
HBZ Bank	0	0	8	0	8
Imperial Bank	11	1	1	0	13
Ithala	1	0	6	2	9
Marriott Merchant Bank	10	0	1	0	11
MEEG Bank	4	0	6	2	12
Mercantile Bank	5	0	1	0	6
Rennies Bank	6	1	1	0	8
Sasfin Bank	6	0	1	0	7
VBS Mutual Bank	4	0	4	1	9

As in much of the corporate world, each of the banks has a board committee to help in the discharge of the directors' responsibilities. The Banks Act requires that all banks should have, as a minimum, an audit committee, a risk committee and a directors' affairs committee. According to King II, companies are required to have, as a minimum, an audit committee and a remuneration committee. Most directors are involved in one or more of the board committees. Few directors do not have any involvement in any committee. Adv Myburgh recommends that each board member be involved in at least one of the aforementioned committees, a view shared by the BSD. Few directors interviewed are members of all of what can be considered principal committees, namely, the audit committee, the risk committee and the remuneration committee. It has been suggested in some quarters, however, that it is undesirable for any one individual to be on all three of the aforementioned committees, since too much influence would be concentrated in one individual, a view also shared by the BSD.

* According to the Financial Sector Charter, and for the purposes of board representation, black people means all Africans, Coloureds and Indians who are South African citizens or permanent residents of the Republic of South Africa, and includes black[-owned] companies.

ROLE AND FUNCTION OF THE BOARD

The role and function of the board must be such as to render it effective. A strong relationship between the non-executive directors and management is essential and should be fostered in order to achieve an effective board. In addition, there should be a culture of openness, trust and mutual respect in order for a board to be effective. The chairman of the board has a central role to play in fostering these conditions.

Role of directors

The legal duties owed to a company by executive and non-executive directors are the same, resulting in the unitary board concept. This is in contrast to, for example, the European system of corporate governance, which typically separates legal responsibility for running a company between a management and a supervisory board. The Banks Act provides that a director owes a fiduciary duty and a duty of care and skill to the bank.

Although the legal duties of executive and non-executive directors are the same, this does not mean that the law will attach the same weight to their responsibilities, as illustrated by the following quote from case law (*Fisheries Development Corporation of SA Ltd v Jorgensen* 1980 (4) 156 (W) 165-6):

> "… the [executive director] participates in the day-to-day management of the company's affairs or of a portion thereof, and the [non-executive director] has not undertaken any special obligation and is not bound to give continuous attention to the affairs of the company, his or her duties

> being of an intermittent nature to be performed at periodical board meetings and at any other meetings which may require his attention. Furthermore, the non-executive directors are not bound to attend all such meetings, though they ought to whenever they are reasonably able to do so. They are not required to have special business acumen or expertise or singular ability or intelligence or even experience in the business of the company. They are nevertheless expected to exercise the care which can reasonably be expected of persons of their knowledge and experience."

The nature of most boards is that even among non-executive directors, a greater weight may be attached to the responsibilities of some than others. During the review, it was also found that the role played by some non-executive directors was more significant than the role played by others. This is common, for example, when a non-executive director was an executive member of the company prior to assuming the role of non-executive director; or when a non-executive director is a founding member of the company for which he is a non-executive director; or when non-executive directors represent the main shareholder on the board; or when some independent directors who play a key role on the board have been co-opted for the expertise, specialist skills and knowledge that they bring to the board by, for example, being appointed chairperson of the audit committee or chairperson of the information technology committee or being allowed to participate in the credit committee.

Informal orientation

Beyond the formal induction and orientation programme provided to new members of the board, new members of the board ought to take it upon themselves to inform themselves about the company as a first step towards being effective. The object of this exercise is to obtain as full a picture of the operations of the company as possible, in order to make informed decisions and, hence, be effective. Development of the requisite knowledge of the business of the organisation, as well as the legislative requirements relating thereto, cannot be achieved within the confines of the boardroom alone. It was found during the review that, in certain instances, directors were in fact not aware of critical regulatory requirements that impacted on their institutions. It was found in some banks that directors were encouraged to attend some management meetings held from time to time at the bank, always being mindful, however, of maintaining the relative distance from day-to-day matters to maintain their objectivity. Many directors interviewed were conscious of this need. Some directors had taken the opportunity to speak individually to management and staff in order to inform themselves about the company. Some directors, on their own initiative, had visited some branches of the banks that they served to inform themselves about the branch infrastructure, the service levels and the market in which the branch was operating.

Non-performing directors

During the review it was found that it was one thing for a director to have the knowledge and experience in a particular field or to possess the requisite skills or qualifications to earn a seat on the board. It was quite another to utilise these qualities in a meaningful way so as to be of value to the bank board. A director need not be garrulous during board proceedings to be seen to be effective. In the case of some bank boards, some of their most valued members are not necessarily talkative or do not necessarily make a noteworthy contribution at every board meeting that they attend. Their presence on the board is nevertheless always viewed as reassuring. Not all directors that the BSD met, however, could provide that reassurance, despite having qualifications and many years' experience working in their chosen professions outside the bank environment. Some appeared to be out of their depths in a banking environment and could not be said to have met nor understood their obligations to the shareholders or other stakeholders. In certain instances, the BSD was of the opinion that board membership was in fact a symbol of achievement in the public eye, rather than a position charged with the fiduciary duties and duties of care and skill referred to above. In some instances, fellow board members were criticized by their colleagues as being more likely to voice agreement with someone else's opinion without adding anything meaningful to the debate, or as adding their voices to board proceedings only to correct spelling or grammatical errors in the minutes. It was found that the effectiveness of directors was dependent not on their existing capability, but more on their willingness to extend and refresh their knowledge of, and skills pertaining to, the particular banking institution in which they were involved. Boards should acknowledge that to run an effective board they have to ensure that the resources for developing and refreshing the knowledge and skills of non-executive directors are provided. Failing this, however, boards of directors need to show sufficient courage to deal effectively with poorly performing members by developing and implementing an exit strategy if necessary. In terms of section 60(5)(2)(b) of the Banks Act, the BSD may itself take the initiative to terminate the appointment of a director who is found to be unfit and improper to continue as a non-executive director.

Soliciting advisory services at the expense of the bank

Many of the banks reviewed have a system whereby directors may solicit legal advice, at the bank's expense, on matters relating to the bank. It was found, however, that although board members were aware of this privilege, they had not found it necessary to make use of it.

Developing the bank's strategic direction

Other than to ensure that the necessary financial and human resources are in place for the board to meet the company's objectives and review management performance, the board is generally expected to set the company's strategic aims, or to use the expression used in King II, to determine the strategy to achieve the company's purposes. It was found that the reality in some of the banks visited was that the strategic aims were developed by management, who then presented them to the board for debate and decisions. The non-executive directors who were well-informed about the bank, of whom there were many, knew enough about the strategic challenges facing the bank to challenge and contribute to the development of strategy in the bank constructively. Of concern, however, was the fact that many directors interviewed were of the opinion that too little time was being spent on strategic planning and business development at board meetings. An often stated reason for this was in part the disproportionate amount of time that was spent on discussing regulatory matters pertaining to the banking environment.

Chairperson of the board

In all the banks visited, the chairpersons (who are male) were non-executive directors and maintained a separate role from that of the chief executive officer, and the chairperson was primarily responsible for the functioning of the board. It was also found that almost all the chairpersons shared a strong bond with the chief executive officer, being one of the prerequisites to having an effective board. None of the chairpersons interviewed were in violation of the King II requirement of the three-year cooling off period, whereby a former chief executive officer may assume the chairmanship of the same company only three years after relinquishing the position of chief executive. Indeed, none of the chairpersons interviewed were formerly the chief executive of the banks that they chaired.

King II recommends that the chairperson should preferably be an independent non-executive director. Fewer board chairpersons were found to fit the King II definition of independent directors, however, as reflected in the following table:

Bank	Independent Chairman	Non-independent chairman
African Bank	X	
Bank of Athens		X
Capitec Bank		X
GBS Mutual Bank		X
Habib Overseas Bank		X
HBZ Bank		X
Imperial Bank		X
Ithala	X	
Marriott Merchant Bank	X	
MEEG Bank		X
Mercantile Bank		X
Rennies Bank	X	
Sasfin Bank		X
VBS Mutual Bank	X	

Most directors probed had a favourable impression of their chairperson of the board. All the chairpersons possessed the requisite characteristics to perform their tasks. They were often looked upon to provide leadership, ensuring a constructive relationship and effective communication between the executive and the non-executive directors, managing board meetings in a satisfactory manner and ensuring that enough time was allowed to consider critical issues affecting the bank. They generally ensured that decisions were reached by consensus, rather than by a vote. To that extent, they ensured that when a topic was not fully canvassed, or when there was a dissenting voice on the board, sufficient time was allowed to arrive at a satisfactory outcome of the deliberations, even arranging informal meetings outside scheduled dates when appropriate. The chairpersons were found to be accessible to management and their board colleagues.

With one exception, the chairpersons of the boards that the BSD met very rarely absented themselves from board and committee meetings. Common features of all the chairpersons interviewed were that they of necessity spent more time on bank matters outside the confines of the boardroom than they did within and that they continued to be engaged by the company, management and their board colleagues, despite having other board appointments and commitments. The chairpersons in at least half of the banks did not have significant commitments to companies other than the bank or its controlling or parent company. These were usually persons who had founded the company; alternatively, the bank was a family business or historically linked to the family, or the chairperson was the chief executive or senior executive in the parent or controlling company. The BSD, however, is satisfied that, generally, the chairpersons provide exemplary leadership and that the banks for which they serve as chairpersons enjoy the full benefit of their expertise, experience and knowledge.

Recommendation

In view of the above, and given the small size and the less complex nature of the business of the banks compared to the big five banks reviewed by Adv Myburgh, it is recommended as follows:

- The ratio of executive directors to non-executive directors approximate 1:3 to 1:4.
- A significant number of non-executive directors be independent.

- The skills balance on the board be consistent with the type of business and risk exposure of the particular bank, and that a fair number of non-executive directors should have a proved banking track record.
- In order not to concentrate too much influence in one individual, a board member be involved, at most, in two of the three principal board committees, namely, the audit, the risk and the remuneration committee.
- Banks be urged to match the demographic targets set by the Financial Sector Charter.
- New members of the board take it upon themselves to inform themselves about the business of the company, as well as the regulatory environment pertaining to banks, as a first step towards being effective.
- The board show sufficient courage to deal effectively with poorly performing members by developing and implementing an exit strategy.
- In view of the important role fulfilled by chairpersons of boards, they ensure that they have sufficient time at hand to fulfil their fiduciary duties on and after accepting the position of chairman.

ROLE AND FUNCTION OF THE CHIEF EXECUTIVE OFFICER

In order for a chief executive officer ("CEO") to be effective, he or she should have the backing of a strong and supportive management team and of the board. It is critical that the bank's management team includes a substantial number of individuals with a proved track record in banking. The BSD prefers a CEO with a banking background, and most directors interviewed also expressed that preference. In some instances, it was found that CEOs might not have come from a banking background on assuming their role, but that, over time, they grew to become bankers.

A key characteristic of a CEO is being a visionary. The CEOs of the banks visited have generally been described as visionaries for the contributions that they have made to the bank or are likely to make. The term encompasses various attributes. Some of the attributes of the current CEOs described as visionaries, as proffered by the interviewees, were the following:

- Hard working, intelligent and with a vision.
- Good leader for management and the bank.
- Punch-line player.
- Good conceptualiser.
- Good grasp of the business.
- Perceives very seriously risks and corporate-governance issues in the bank.
- Understands the environment in which the bank is operating.
- Control orientated.
- Honest.
- Takes the bank through the transition.
- Knows the industry in which the bank is operating.
- Strong, hands-on participative manager.
- Good human relations.
- Innovative.

Although the above list is not exhaustive of the attributes that a CEO should possess, **it is recommended that a CEO should preferably have a banking background and possess all or most of the above attributes**.

An entrepreneurial mindset would be an added advantage in someone becoming a CEO of a bank, regarded as essential in most quarters. Some of the CEOs of the banks visited could be described as having an entrepreneurial mindset. As the expression goes, however, “a leopard can never change its spots”, and, in certain instances the entrepreneurial spirit will prevail over other considerations, in which case the strength of the board to oversee the activities of a bank and ensuring that the required checks and balances in the organisational structure are maintained becomes even more pronounced. The following have been said to be the defining characteristics of habitual entrepreneurs:[*]

- They passionately seek new opportunities …They stay alert, always looking for the chance to profit from change and disruption in the way business is done.
- They pursue opportunities with enormous discipline …They make investments only if the competitive arena is attractive and the opportunity is ripe.
- They pursue only the very best opportunities and avoid exhausting themselves and their organisations by chasing after every option …They go after a tightly controlled portfolio of opportunities in different stages of development. They tightly link their strategy with their choice of projects, rather than diluting their efforts too broadly.
- They focus on execution – specifically, adaptive execution …they get on with it instead of analysing new ideas to death. Yet they are also adaptive – able to change directions as the real opportunity, and the best way to exploit it, evolves.
- They engage the energies of everyone in their domain …They create and sustain networks of relationships rather than going it alone, making the most of the

[*] Source: Rita Gunther McGrath & Ian MacMillan <u>The Entrepreneurial Mindset</u> 2000 Harvard Business Press 2-3

intellectual and other resources people have to offer and helping those people to achieve their goals as well.

ROLE AND FUNCTION OF THE RISK COMMITTEE

Upon the promulgation of the Banks Amendment Act, 2003, it became obligatory for all boards of banks to have a risk committee. All banks visited had such a committee and, in some cases, the risk committee had already been in existence prior to the legislation being introduced. Most of the banks had a charter to address matters concerning the risk committee, and a review of the minutes of each of the banks, laid to rest any concerns that risk committees had an identity crisis as regarded its functions and those of the audit committee. The banks are succeeding in establishing these bodies as fully fledged and robust committees. The directors interviewed did not necessarily view these committees as an additional burden, which introduced yet another overlay of governance. Accordingly, risk committees have been generally received in a positive spirit.

The risk committees are structured differently for some banks. It was found that the risk committees were operated as stand-alones and under different chairpersons from other committees, or as stand-alones but sharing the same chairman as the audit committee; or as a committee consolidating audit and risk matters. The BSD is satisfied with the different structures introduced, since they suit the individual needs of each of the banks visited. Furthermore, the BSD is satisfied that the structures described do not violate the Banks Act, as amended. The Banks Act requirement, in turn, is informed by Basel Core Principle 13, which enjoins the creation of board and senior management oversight structures.

Bank	Risk committees		
	Separate committee with separate chairperson	Separate committee, sharing one chairperson with Audit Committee	Consolidated committee
African Bank	X		
Bank of Athens	X		
Capitec Bank		X	
GBS Mutual Bank[♣]	X		
Habib Overseas Bank	X		
HBZ Bank	X		
Imperial Bank	X		
Ithala[*]	X		
Marriott Merchant Bank			X
MEEG Bank		X	
Mercantile Bank	X		
Rennies Bank		X	
Sasfin Bank	X		
VBS Mutual Bank			X

It was found that, as a result of the obligation to create new committees in terms of the Banks Act, boards have inevitably had to increase the number of board members so as to distribute them among the committee structures, or, when they did not increase their numbers, so that directors could be involved in as many as three committees during the same tenure. Despite having created a separate risk and audit committee, some banks kill two birds with one stone by holding combined meetings for the audit committee and the risk committee and scheduled the meetings on the same day and at the same time. In these banks, most of the directors involved share a common membership in both committees. When the committees have separate chairmen, the chairman of one committee (say risk) will relinquish the chairmanship after the risk matters have been addressed to allow the chairman of the audit committee to take over and to deal with audit matters. It was found that the individual members of the consolidated committees or those participating in the combined meetings also participated in other capacities, either as chairmen or as members of the subordinate executive oversight committees, such as the credit committee or asset-and-liability committee, respectively. The banks maintained that it would not

[♣] The board risk committee meets only once a year to review guidelines, credit limits, etc. The Risk Management subcommittee meetings are held each week, and the chairmanship is rotated for a month among non-executive directors.
[*] Designated in terms of paragraph (dd)(i) of the definition of “the business of a bank”, in section 1 of the Banks Act.

be efficient to repeat structures when the same people served on these structures, particularly given the small size of the banks.

The agenda for the meetings of the committees varied from bank to bank. Some risk committees had comprehensive agendas, whereby the chairman would ensure that all risk categories were considered even if it resulted in noting “Nothing to discuss” or similar expressions in the minutes. This approach suggests a balanced assessment of the risks, as well as measurement of the effectiveness of the system of internal controls in managing those risks, and that the board satisfies itself that there is an ongoing process for identifying, evaluating, measuring, controlling, managing and monitoring the risks by the bank. This approach also recognises that not all risks have a major impact on the functioning of the bank and identifies such risks. When this approach was used, the minutes of committee meetings left the reader with the impression that the board indeed took risk management in the bank seriously and was conscious of its oversight responsibilities. There were unfortunately few banks that addressed their risk oversight function in terms of this agenda format. Most of the banks did not follow such a methodical approach. Most of the banks addressed risk types only when they became an issue. One bank, in terms of its charter, took the approach that one risk type would be discussed comprehensively at every risk committee meeting, to the exclusion of other risks. This approach implies that if the bank holds four risk meetings a year and all ten risk types in terms of regulation 38 of the Regulations relating to Banks (“the Regulations”) are considered, the first being, say, solvency risk, it will take three years for that risk to be considered again. Clearly, this state of affairs should not be condoned, and the BSD pointed out the injudiciousness thereof to the directors concerned, who undertook to remedy the impression created by such a clause in the bank’s charter.

Most banks' board minutes reflected, after each financial year, in terms of regulation 39(4) of the Regulations, that they had submitted their reports on the internal controls and going-concern aspect of their banks to the Registrar of Banks. The directors were routinely asked whether they were indeed taken through a robust process to satisfy themselves that the internal controls were adequate and the going-concern aspect was met. One board member's comments summed up the general view held by many: "… it is an ongoing process. That is what we are doing and that is what we are reviewing monthly. It is not as if we are now saying after twelve months, okay, let us now see whether we comply. That is too late. Then we would end up like (one of the failed banks). We cannot afford that".

It is recommended that risk committees should follow an agenda format that identifies and considers all risk types in a manner that suggests a balanced assessment of the risks, and which measures the effectiveness of the system of internal controls in managing those risks, in order to demonstrate an ongoing process for identifying, evaluating, measuring, controlling, managing and monitoring the risks by the bank.

ROLE AND FUNCTION OF THE AUDIT COMMITTEE

The audit committee is without doubt the most important board committee. One does not gain nearly the same insight from attending board meetings as one does from attending audit committee meetings. At meetings of this committee, a considerable amount of time may be spent on gaining a proper understanding of the issues. The banks visited were no exception. Unlike the risk committee, where the issues discussed may be of a limited nature, the audit committee may delve into any terrain, be it financial, operational, audit, risk or compliance. As such, especially in the wake of a number of high profile corporate collapses in South Africa and abroad, the audit committee has become the subject of close scrutiny by regulators and standard-setting bodies, among others. The banks for their part have certainly taken the role and function of the audit committee seriously and are particular about who serves on the audit committee, for which an accounting, auditing or financial backgrounds have been shown as preferred skills. Some banks have been bold enough to include people from other disciplines, such as law and, even, medicine. The review team has no objection to such members becoming members of the audit committee provided:

- They are not chairpersons of the audit committee.
- They display the relevant expertise, *inter alia*, to evaluate the adequacy and efficiency of the internal control systems, accounting practices, information systems and auditing processes.
- They can read and understand financial statements, a key instrument of the audit committee.
- They exercise good judgment in anticipating audit issues that must be given priority by the internal and external auditors for the next financial year.

The BSD found that most members of the audit committee appeared to be able to perform reasonably in the above-mentioned areas.

In keeping with section 64(3) of the Banks Act, none of the chairpersons of the banks visited are members of the audit committee. They certainly have access to the minutes of the audit committees and, on a regular basis, receive reports from the chairmen of the audit committees.

Most of the audit committees do not have final authority to arrive at decisions, but pass on their recommendations to the board, for its final decision. It was found, however, that any delegated authority that audit committees did possess, which was fairly substantial in some banks, was stipulated in their audit committee charters.

It is recommended that, given the scrutiny accorded the audit committee, the board appraise the performance of the audit committee members to ensure that they fulfil the functions of the committee in terms of the Banks Act and the audit committee charter.

ROLE AND FUNCTION OF THE REMUNERATION COMMITTEE

King II requires that a board should have a remuneration committee. Although the key mandate of most remuneration committees is to review executive and non-executive remuneration, especially executive remuneration, it was found that many such committees, of necessity, have broadened their mandate to include other portfolios. Other areas that are considered include nominations of non-executive directors; appointments of senior managers, especially the chief executive officer; succession plans; and human resource and transformation matters in the absence of a separate human-resource committee.

All members of these committees in the banks visited were non-executive directors. It was common, however, for the chief executive officers to participate in the proceedings as permanent invitees, recusing themselves from the proceedings only when their remuneration package was under discussion and consideration.

It was found that the members of the remuneration committees were usually senior non-executive directors of the board, such as the chairman of the board (who participated either as chairman of the said committee or as a member) and non-independent non-executive directors, such as senior executives in the group of companies, representatives of the main shareholder and founding members of the organisation. Accordingly, although it is best practise for the remuneration committee to be run by independent directors, the pattern followed in the banks visited is unlikely to change, and few of the committees of the banks visited consisted entirely of independent directors. The BSD, however, observed that committees consisting of independent directors alone were not always effective as regarded engaging management to implement the directors' decisions.

The general belief is that the independence of members of the remuneration committee from executive management is necessary in view of the potential for conflicts of interest. Although it is not suggested that independent directors are susceptible to having the wool pulled over their eyes, it was found that senior non-executive directors as described above were less susceptible thereto, in that they were more likely to challenge what they perceived to be inflated salary-increase motivations from the executive members of the company and were not afraid to ask embarrassing questions. The reason for this direct approach is that the non-executive directors who are not independent have a more tangible stake in the company than independent directors. Accordingly, such non-executive directors take the concerns of investors and the wider constituencies, whom they represent, more to heart, and are therefore more likely to exercise greater circumspection with regard to deciding the final remuneration package for the executives. Although judgments on remuneration may be informed by what is taking place in the market place, not all the banks visited necessarily compare their remuneration packages to what the peer groups in the market offer.

ROLE AND FUNCTION OF THE DIRECTORS' AFFAIRS COMMITTEE

All but one of the banks visited had a directors' affairs committee. It was found, however, that these committees had only recently been established, and for most of the banks it was too early to make a finding regarding their effectiveness. The BSD had access to the minutes of these committees, and more often than not the minutes were flimsy, devoid of vital content and generally reflected a committee structure that was still trying to establish itself. This, despite the fact that the Banks Amendment Act, 2003, which gave rise to the establishment of the directors' affairs committee, came into effect on 5 August 2003. Activities in which the committees are currently engaged include developing a charter, developing an agenda in the context of their organisations and, generally, trying to make the committee relevant to the whole organisation. Some banks have simply renamed what used to be called a nomination committee and a corporate-governance committee to a directors' affairs committee and others had relegated these committees to become subcommittees under the directors' affairs committee.

Regarding membership, some banks have taken the approach that all non-executive directors are members of the directors' affairs committee. Other banks have limited the membership to only a few non-executive directors.

The Mutual Banks Act, 1993, makes no provision for a directors' affairs committee. VBS Mutual Bank has, however, opted to follow South African best practise by extending the mandate of its Chairman's Committee to include director's affairs.

ROLE AND FUNCTION OF THE EXTERNAL AUDITORS

Relationship between supervisor and external auditor

It is very important that external auditors have a clear understanding of their roles in relation to the BSD. In many respects, the BSD and the external auditor have complementary concerns about the same matters, although the focus of their concerns may differ. The following table underscores the focus areas of the two parties:♦

BSD	External auditor
- Maintains the stability of the banking system. - Fosters the safety and soundness of individual banks in order to protect the interests of the depositors.	- Reports on the bank's financial statements either to shareholders or the board of directors.
- Maintains a sound system of internal control as a basis for safe and prudent management of the bank's business.	- Assesses internal control to determine the degree of reliance to be placed on the system in planning and performing the audit.
Ensures that: - Each bank maintains adequate records, prepared in accordance with consistent accounting policies and practices that enable the supervisor to appraise the financial condition of the bank and the profitability of its business. - The bank publishes or makes available, on a regular basis, financial statements that fairly reflect its condition.	- Concerned with whether adequate and sufficiently reliable accounting records are maintained in order to enable the entity to prepare financial statements that do not contain material misstatements and, thus, enable the external auditor to express an opinion on those statements

Recognising that audited financial statements prepared by the external auditors are not prepared with supervisory needs in mind, the BSD calls upon the external

♦ Source: Basel Committee on Banking Supervision The relationship between bank supervisors and banks' external auditors January 2000 Bank of International Settlements par 46 auditors to express an opinion on the prudential returns prepared by the banks for the supervisor, and when the external auditors find such returns to be acceptable, the BSD requires the external auditors to append their signatures to or sign off the returns. The BSD requires the auditors who sign off these returns to have a proved track record in auditing a bank. The BSD has in the past not hesitated to intervene when it believed that the auditor or auditing firm did not meet the required standards.

Additional tasks requested by supervisor

The BSD has fairly often called upon the external auditors to perform additional tasks of particular interest to the BSD, such as a review of the methods used by the bank to draw up its prudential returns, an assessment of the adequacy of the internal control system, or an evaluation of the bank's adherence to appropriate accounting policies. It was found that these extra tasks have been a source of fee disputes between the audit committees and the external auditors of some banks. Some firms, however, bear this possibility in mind when structuring and negotiating an appropriate fee for the next financial year.

Credentials of a bank auditor

The audit committee members of the banks visited were often asked which credentials an auditor for a bank should possess. The following were some of the views expressed:

- Adequate resources, including qualified staff.
- Sufficient theoretical knowledge of the business and the environment in which the bank has to operate, from both a legislative and regulatory point of view.

- Experience, that is, the auditor must have audited more than one bank at any one time and be in the banking group department team of the auditing firm.
- Independence.
- Courage to speak out if the auditors disagree.
- Hardworking.
- Integrity.

The BSD is generally satisfied with the competence and performance of the auditors and that their performance accords with professional standards. When shortcomings were identified, the review team was satisfied that the bank concerned followed the correct approach in addressing these shortcomings.

Firms employed

All the banks visited retained the services of one of the “big four”. The following table reflects the distribution of the firms:

Bank	Auditing firm(s)
African Bank	Deloitte & Touche
Bank of Athens	Deloitte & Touche
Capitec Bank	Pricewaterhouse Coopers
GBS Mutual Bank	Pricewaterhouse Coopers
Habib Overseas Bank	Deloitte & Touche
HBZ Bank	KPMG
Imperial Bank	KPMG
Ithala	Pricewaterhouse Coopers; Ngubane & Co
Marriott Merchant Bank	Deloitte & Touche
MEEG Bank	KPMG
Mercantile Bank	Deloitte & Touche
Rennies Bank	KPMG
Sasfin Bank	KPMG; Fisher Hoffman
VBS Mutual Bank	KPMG

Independence

None of the auditors expressed the view that their opinions or advice to the banks was undermined. The auditors generally performed their tasks without fear of reprimands, and there was no evidence that they covered up or favoured the executive position, at the expense of protecting the interests of the shareholders and other stakeholders. A case in which the strong hand of management was evident and which led to the replacement of a senior partner of a firm who would not kow-tow to management's wishes was disclosed during the review. It was revealed that management had tried to influence the said auditor to follow the particular position favoured by management. The outcome of the altercation was a meeting between management and the auditing firm, whereupon the audit partner concerned was summarily replaced at the instance of management. Even though the services of the auditing firm were retained, an incident of this nature does call into question the independence of auditors and the auditing firm.

Non-audit tasks

Most audit committees have developed policies and guidelines to define the amount of consultancy or non-audit work that can be performed for the banks by the external auditing firms. The general rule is that the banks' external auditors may perform consultancy or non-audit services only to a limit of 10 percent of the budgeted audit fee, and should they exceed this limit, they should seek the approval of the audit committee. Perhaps owing to the small size of some banks, few firms have been tasked with consultancy or non-audit work. Banks tend to use their own capacity to perform some of these tasks. When there is substantial consultancy or non-audit work, firms generally provide different teams of auditors to undertake the work. Some banks have opted for best practice by engaging the services of another auditing firm to perform specific consultancy or non-audit tasks. Consultancy or non-audit work usually performed by external audit firms includes tax advice, corporate-governance reviews, impact of International Accounting Standard IAS 39 / Accounting Statement AC 133, reviewing suspense accounts and review of preparedness for the new Capital Accord, among others tasks.

Rotation of auditors

Rotation of auditors can take two forms: rotation of audit partners or rotation of auditing firms. The audit committee members that were questioned about the issue favoured the former. Some external auditors that were questioned indicated that the issue of the rotation of the lead partner was already incorporated in their firms' policy, the position being that this should occur at every cycle, varying from five to seven years. Although many directors admitted that they had wrestled with the concept, they appeared to recognise the concern that external auditors can get too close to the operations of the banks and that a fresh mind was possibly a good proposition. One director, who was also a director of another company that rotated its auditors, alluded to the positive outcome of rotation in that he had been able to detect a different audit approach from that followed by the preceding auditors, which was thought to have benefited the company. There were those who maintained that rotating auditors could be costly to the bank, because a new person might take some time to orientate himself or herself to the new organisation. It is submitted that such a possibility can be avoided, since it is not necessarily the whole audit team that is rotated, but only the lead and engagement partners, who are rotated alternately, which ensures continuity.

STATUS, ROLE AND SCOPE OF THE RISK FUNCTION

All but one of the banks visited had a risk-management office and function of one form or another. The bank that is the exception manages its risk function entirely through weekly risk-management subcommittee meetings, the nature of whose operation does compensate for the bank not having a *de facto* head of risk to run risk issues in the bank since the subcommittee is really a manager of the risk committee. The strength of the said risk-management subcommittee lies in the fact that it is chaired by a non-executive member of the board of directors.

Because of the small size of some of the banks, it was common to find that the risk function was one among other portfolios managed by a single individual. Naturally, the issue of independence always arose, and the popular response was that it would simply not be efficient to employ a person who would be dedicated to the risk function. One director summed up the views of everyone in that regard with the following comment: “To employ somebody competent enough and qualified enough to be doing the job properly we would not be able to keep them occupied because our business is very, very simple.”

The following table reflects the spread of the portfolios of the risk manager in the banks visited:

Bank	Portfolios
African Bank	The enterprise-wide risk approach is being followed. The risk department is headed by a risk officer, who oversees internal audit, forensic, operational risk, legal, company secretarial, compliance, with an additional role of oversight over the ALCO and credit risk.
Bank of Athens	Risk management is currently focused more on credit-risk management than anything else. There is an ALCO, which reviews liquidity risk and interest-rate risk.
Capitec Bank	The enterprise-wide risk approach is being followed. The risk department is headed by the Chief Executive: Risk Management, who also holds the position of company secretary and oversees credit risk, internal audit, legal, the compliance function and the insurance portfolio.
Habib Overseas Bank	The risk manager looks after the total loan portfolio of the bank. He has held the title of credit manager since February 1999, which title was changed to risk manager in terms of the regulations, because he already fulfilled that type of portfolio then.
HBZ Bank	The head of risk also holds the portfolio of company secretary and finance director. Credit risk being the biggest risk, a dedicated credit-risk manager reports to the head of risk. Other risks monitored are liquidity risk and maturity risks, though they are not as critical.
Imperial Bank	A risk division is responsible primarily for operational risk and credit risk. There is a cosourcing arrangement with Nedcor Limited for some of the risks.
Ithala	The managing director is also the head of risk, and senior managers are responsible for different areas of risk. Thus the credit-risk manager is responsible for credit risk; the chief operations officer is responsible for operational risk and system risk; the finance director is responsible for interest-rate risk and liquidity risk; the managing director is responsible for market risk and solvency risk; the compliance officer is responsible for compliance risk.
Marriott Merchant Bank	The managing director is also the head of risk, responsible for internal audit, compliance, credit risk, treasury and liquidity risk.
MEEG Bank	The risk function is managed by ABSA Bank Limited, through various risk committees at an ABSA level. There is no dedicated risk manager within MEEG, but a business risk officer from ABSA enterprise-wide risk management level has been allocated to oversee the risk management of MEEG.
Mercantile Bank	Pending a new risk officer appointment, risk management is scattered among other divisions. Insurance has been allocated to an insurance-broking entity; risk policies, supervision and provisioning remain in the risk department; the new Capital Accord, IAS 39 (AC133), business-continuity management, disaster recovery and DI reporting are a joint effort between the acting head of risk and the head of finance; IT risk is managed by the head of IT; operational risk is managed by the divisional managers; legal risk is managed by the head of the legal department; and compliance risk is managed by the head of compliance.
Rennies Bank	The head of risk is responsible for five departments, namely, exchange control; internal audit; forensic investigations and security; the middle office, which handles all the controls between the front and the back office involving market risk and operational risk, as well as the new Capital Accord implementation workgroup; and credit risk.
Sasfin Bank	The head of risk also holds the portfolio of compliance. All aspects of risk are covered by this function.
VBS Mutual Bank	Risk being part of the duties of the Chief Financial Officer (CFO), the CFO is the risk-management officer, whose responsibility is to coordinate all risks. There is, however, collective responsibility for certain risks, for example, the CFO, the CEO and the operations manager are responsible for operational risks and technology risk. The CFO is also responsible for legal risk and regulatory compliance and is the company secretary.

Reporting lines

In keeping with best practice, the risk managers of the banks referred to above, have unfettered access to the CEO, the chairman of the risk committee and the chairman of the board for the purposes of executing their functions, although they report to a senior manager for administrative purposes, that is, the senior manager approves their leave requests and sign offs their performance appraisals, among other roles.

Risk assessment and importance of risk

The risk managers are generally taken seriously by their supervisors, and this is illustrated in some banks by their being allocated permanent membership of the executive or management committee of the bank. The BSD concurs with the view expressed by Advocate Myburgh that having the head of risk management on the executive committee of the bank is extremely beneficial to the bank, since that person will be expected to interpret the risk trends of the whole corporation. The process helps management to communicate among themselves and with the board about the dynamic issues affecting risk exposures, risk appetites and risk controls throughout the bank. To assess risk, it is important for all risk types to be assessed and channelled up the chain of command, with each level of management, in turn, considering the risks and controls under their responsibility. This will benefit line managers, who have to make commercial decisions in their business units, which decisions are informed by the risk measurements and evaluations routed to them, because ultimately, risk management is the responsibility of all managers.

Risk manager and risk committee

It is essential that the head of risk forge and maintain a good relationship with the chairperson of the risk committee. The risk committee has certain expectations that the head of risk needs to fulfil and for which he/she is accountable. It is important that the head of risk examine what these expectations are and how best to fulfil them. That process is best achieved through regular contact with the chairperson of the risk committee, where the head of risk also uses the opportunity to reemphasise his or her roles and responsibilities towards the bank and the risk committee, which is to ensure that the risks are identified, quantified, evaluated, measured, monitored and controlled (and not to manage risks, as is widely misconstrued, since that is the responsibility of line managers). The head of risk must in addition ensure that the risk committee remains effective by, *inter alia*, helping the committee to focus its attention on the appropriate risk areas. This the head of risk can partly achieve by taking it upon himself or herself to manage the whole risk-committee process by, for example, being responsible for the preparation of the agenda, and for the correlation of all data, overseeing the preparation and distribution of the pack and working closely with the company secretary to ensure that the decisions reached at meetings are not only accurately reflected in the minutes, but are acted upon with accurate feedback to the risk committee.

STATUS, ROLE AND SCOPE OF THE INTERNAL AUDIT FUNCTION

Few banks visited had a fully functional independent internal audit function. In many cases, the function was either outsourced or cosourced. The Basel Committee on Banking Supervision, in its publication titled “Internal audit in banks and the supervisor's relationship with auditors" dated August 2001, defines an outsourcing arrangement of internal audit as "a contract between the institution and an outsourcing vendor to provide internal audit services". In such a situation, the assumption is that the institution either does not have the capacity to perform the specific task, or when it has the capacity, it is so negligible as not to impact on the arrangement were such capacity to be withdrawn. In such arrangements, the outsourcing vendor is deemed to be the *de facto* provider or supplier of the service. A cosourcing arrangement of internal audit could thus be described as a contract between the institution and a vendor to assist the institution's internal audit function to provide efficient internal audit services. In such a situation, the institution has the capacity to perform the function, but requires additional assistance from outside to be more effective.

It was found that most outsourced or cosourced internal audit services are sourced either from an audit firm, the parent company or, as was the case with one bank, a professor of accounting from a university.

It is generally accepted that, for the small banks that were reviewed, the size and the extent of the risks do not justify establishing a full-time function or appointing a full-time staff member.

The BSD had no reason to doubt that the vendors rendering internal audit services devoted enough of their resources and time to perform the assignment with which they were charged effectively. When disputes between the bank and the vendor arise, which are usually related to fees resulting from a change in the terms of the original contract to expand the audit work, such disputes are quickly and amicably resolved.

The following matrix reflects the structure of the internal audit function in the banks visited:

Bank	In-house	Cosourced	Outsourced
African Bank	X		
Bank of Athens	X		
Capitec Bank	X	X	
GBS Mutual Bank			X
Habib Overseas Bank			X
HBZ Bank			X
Imperial Bank	X		X
Ithala		X	
Marriott Merchant Bank			X
MEEG Bank			X
Mercantile Bank		X*	X
Rennies Bank	X		
Sasfin Bank	X		
VBS Mutual Bank			X

It is generally accepted that outsourcing of internal audit activities can bring significant benefits to a bank, such as access to specialised expertise and knowledge otherwise not available within the bank. On the other hand, the argument is recognised by the banks that outsourcing may introduce risks to the bank, such as lost or reduced control of the outsourced internal audit activities.

Regardless of whether internal audit activities are outsourced or cosourced, one principle is clear: the board of directors and senior management remain ultimately responsible for ensuring that the system of internal control and the internal audit function are adequate and operate effectively. The banks reviewed took cognisance of this principle.

As the table above illustrates, some banks have cosourced or outsourced their internal audit activities to the same firm that performs their external audit. The BSD is

* This is a temporary arrangement pending an appointment of a new head of internal audit

known to have frowned upon such a scenario because it believes that such an arrangement may compromise, in appearance if not in fact, the independence of the external auditor. This practice can be condoned when the firm concerned operates in the following climate:

- Competency.
- Financial soundness.
- Appropriate skill, knowledge and expertise.
- Being large enough to maintain a proper segregation of these functions within the firm,

and it is cost-effective to the bank. It is this last element, the cost factor, which has been held to not justify the appointment of an alternative firm to conduct the internal audit.

Cooperation between internal and external auditors

It was found that there is regular consultation between the internal auditors and the external auditors, with a view to coordinating audit efforts, in order to reach a common understanding of the audit techniques and methods to be used and to discuss other matters of mutual interest. Cooperation between internal auditors and external auditors was found to be less effective when the internal auditors were based outside the country and visited the bank for inspection at specific periods during the year, usually, twice a year at most. It was found in one case that, as a consequence, the internal audit reports were not finalised by the time that the internal auditor had to fly back to his or her base abroad owing to delays caused by branch managers failing to respond in time to some of the queries raised in the internal audit reports. The reason for this lack of response, it was suggested, is that branch managers are not primed to react to such reports, but would rather go about their daily business of trying to find new customers. This, in turn, not only hampers the reliance that the external auditor can place on internal audit reports, but can result in delays in finalising external auditors' own external audit reports. In such and similar situations, management needs to put pressure on branch managers to respond timeously and satisfactorily to internal audit queries referred to them.

Internal auditor as team member

A question raised frequently with internal auditors during the review was whether they were taken seriously by the board, management and staff and whether they were able to perform their duties unobstructedly. It would appear that internal auditors are no longer viewed by all parties as adversaries or as serving a policing function to be viewed with apprehension, and that they are now viewed as a useful partner to benefit the whole organisation. They generally enjoy a close relationship with the chairperson of the audit committee.

Staff turnover

A problem that was found to have plagued internal audit departments was high staff turnover, which could impact on their effectiveness as a department. It is recommended that the banks give priority to developing and implementing a retention strategy for internal auditors, which strategy should provide for, *inter alia*, a career path, using internal audit as a conduit for progression within the greater group.

STATUS, ROLE AND SCOPE OF THE COMPLIANCE FUNCTION

The BSD has long believed that the compliance officer of a bank or banking group will be able to succeed in discharging his/her responsibilities if such an officer, among other things:

- Is part of the risk-management framework in the bank.
- Is independent, but not isolated.
- Has direct access to and demonstrable support from the CEO.
- Establishes a line of communication to line management in order to continuously monitor compliance with legal and supervisory requirements.
- Has sufficient staff, and of the correct quality.
- Reports any non-compliance timeously to the bank's CEO, board of directors and audit committee.

The principal issue highlighted during the review process was that of independence, which implies that:

(a) The compliance officer must be free to report irregularities or possible breaches to senior management and the board and, if necessary, be able to bypass normal reporting lines when this appears necessary, without fear of retaliation or disfavour from management or other staff members.

(b) The compliance officer should have the right to communicate with any staff member and obtain access to records of the bank to enable him/her to carry out his/her responsibilities.

(c) The compliance function should be provided with sufficient resources to enable it to carry out its responsibilities effectively.

(d) When the compliance function is decentralised, the compliance staff within a business unit should report to the head of the compliance function and not to management within their business unit.

(e) The compliance officer should not exercise any other non-compliance tasks, since these are perceived to create conflicts of interest with the compliance responsibilities.

Regarding (a) above, none of the compliance officers interviewed admitted to having exposed any irregularities or breaches. Most irregularities or breaches are uncovered or exposed by the internal auditors, who ordinarily enjoy priority over compliance officers as regards resources. A perusal of the minutes of most bank boards and committees revealed that the compliance reports tabled rarely elicited any response, discussion or action, but were merely noted.

Regarding (b) above, gaining access to records and communicating with staff implies that the compliance officer has the time and resources to conduct these tasks. In most cases, the compliance function was manned by one person, even in banks that had branches spread out through the country. The sheer logistics of such an undertaking make it difficult for a single compliance officer to embark on such a mission, however well intentioned.

Regarding (c) above, most compliance officers interviewed held that the allocation of resources was always a problem, but had resigned themselves to the fact that other departments, such as internal audit, enjoyed priority over them. Accordingly, the lack of resources incapacitates them from recruiting sufficient staff to monitor and test continuously the bank’s compliance with laws, regulations and supervisory requirements, and they generally strike an arrangement with the internal audit department, to which the task is assigned. The day-to-day tasks of compliance officers are thus limited to establishing written guidance to staff on the appropriate implementation of the applicable laws through policies, procedures, compliance manuals and practice guidelines; educating staff with respect to compliance with the applicable laws, rules and standards and acting as a contact point within the bank for compliance queries from staff members; exercising specific statutory responsibilities, such as fulfilling the role of anti-money-laundering officer; liaising with relevant external bodies, including regulators, the Compliance Institute of South Africa, The Banking Association South Africa and others. Some of these tasks are of a limited duration, once off or periodic. Hence, it was found that many compliance officers in the banks visited had other, non-compliance tasks to fulfil on a day-to-day basis.

Regarding (d) above, some of the larger banks visited had a decentralised compliance function, whereby compliance officers were distributed through the business units of the bank and reported to the heads of the business units. In other banks, especially where the compliance function was staffed by one person, each business unit had what was called compliance champions. Both instances had their problems, it was found. In the former, it is desirable if the compliance officers report to the head of compliance in order to maintain their independence and to avoid the risk of falling foul of the manager should the latter not like what was reported about his or her unit. Where there are compliance champions, the problem faced by many compliance officers is that the so-called champions, who are usually the head of the business unit, are more preoccupied with performing the tasks for which they are paid, which is bringing business to the business unit, and have not incorporated, into their normal operational duties, the duty to monitor the compliance of laws, regulations and supervisory requirements.

Regarding (e) above, it was found that most compliance officers held other portfolios within the banks, contrary to best-practice requirements that compliance officers should refrain from fulfilling other non-compliance tasks in order to preserve their independence. Common portfolios held included one or more of the following: company secretary, finance director, risk manager and a legal portfolio. None had revenue-generating responsibilities, such as marketing or dealing, added to their portfolios, however. This multi-tasking was particularly prevalent in the smaller banks. There being little or no evidence of support staff and the officer concerned being a jack-of-all-trades, it seemed that the bank displayed enormous reliance on such an individual. This inevitably raised issues of succession, since there was little or no evidence of any transfer of skills taking place. **It is recommended that the directors should take note of these concerns and address them.**

STATUS, ROLE AND SCOPE OF THE COMPANY SECRETARIAT FUNCTION

Few matters of concern were encountered in the company secretariat function. The company secretaries were generally highly competent and highly regarded individuals in the banks under review. The company secretaries were responsible for the entire administration of the board of directors. In most of the banks, the office of the company secretary was staffed by one person, although in the bigger banks it was possible to find, particularly in a bank with many board and executive committees, that they were assisted by an additional officer. The resource problem that was encountered in areas such as the compliance function, was never really an issue with the company secretariats. In an environment in which scheduling, attending meetings, complying with demanding statutory requirements and meeting strict time deadlines are the order of the day, it was found that the company secretaries were generally able to cope under these pressures, even when they were tasked with more than one portfolio.

The profile of the company secretaries varied from bank to bank. They ranged from those who have been with the bank for many years, fulfilling different capacities as they went along, to those who were relatively new in the bank. It was found that much of the institutional memory of the bank resided with company secretaries in particular, a quality not lost on some banks.

The board and committee minutes of the banks were generally well-documented and informative, with few corrections needed.

DIRECTOR SELECTION

A director, on appointment to the board of directors is, at common law and in terms of the Banks Act, subject to fiduciary duties requiring him/her to exercise his/her powers *bona fide* and for the benefit of the company and subject to the duty to display reasonable care and skill in carrying out his/her office. Banking law has derived a range of prudential techniques designed to promote the financial stability of banks. These are varied, but include vetting the controllers, that is, the directors and monitoring the management of banks. Authorisations being central to the prudential regulation of banking institutions, the criteria for authorisation involve factors such as the requirement for directors and managers to be fit and proper persons. These assessments are conducted by the Office of the Registrar of Banks, and every bank is required to give the Registrar of Banks written notice of the nomination of a non-executive director to its board, and written notice of the appointment of an executive director, among others, to the bank, and the Registrar is entitled to exercise the right to object to the nomination or appointment.

Given that it is the primary responsibility of banks to ensure that they are soundly and prudently managed and directed, and the board consequently requiring an appropriate mix of skills and experience to be effective as a decision-making body, the selection process for nominating non-executive directors was found to be largely informal in the banks under review. Although retiring members often give adequate notice of their intention to retire, a succession-planning programme of recruitment and retirement among board members simply does not exist. At best, some boards agree what competencies are needed on the board before a candidate is approached. Otherwise, a candidate would be approached even before competencies are identified. The recruitment of an individual to serve as a non-executive director is based largely on personal contacts, friendships or industry referrals. Once a person has been identified, he or she usually does not have to worry about contenders. Although a nomination committee is established for the process of interviews, this is often a mere formality and the choice of candidate is a *fait accompli*, with the nomination committee being a rubber stamp. None of the directors interviewed had applied for their appointments or were nominated through a formal request for nominations targeted to wider society than individuals closely associated with individual directors of the bank.

For banks whose directors represent key shareholders, the banks have less of an influence in that selection, since the nomination is left entirely to the shareholder. Some of these nominations have been taken to extremes, as in one case in which nominations were made without the board ever having been consulted by the shareholder prior to the new directors' first attendance at a board meeting.

The fitness and propriety of the shareholder of a banking institution has received very little attention. The profile of shareholders was found in some cases to be of paramount importance to determine whether or not they are a source of weakness to the banks in which they have invested in. Although many shareholders in the banks reviewed were active investors, even when they were in the minority, and preferred to be consulted on major issues, some banks' shareholders were found to be passive, their participation having little or no impact on the growth of the bank. The participating shareholders in the banks reviewed were represented by different sectors, which included freight, retail and Government. Some directors who had lessons to impart on partnerships in investments underlined a general sentiment, as exemplified by the following comment by a director of one of the banks, who believed that banks had to seek partners who "have the capacity to understand and manage the new dynamics in the banking sector". This does not mean that sectors involved should necessarily be financial to qualify to be shareholders of banking institutions. Indeed, many banks that have failed in the recent past had been backed by financial institutions. It was found that the level of commitment that shareholders demonstrated was a key element to determining their fitness or propriety as shareholders of banks.

CAREER PATH AND DEVELOPMENT

None of the banks under review had a formal induction programme. Although they agreed that an induction programme was desirable, some banks indicated that it had not been necessary to establish a formal programme, because there had not been a significant turnover of directors. Some banks were in the process of developing a formal and tailored induction programme for their new directors. This development has arisen out of necessity, owing to the regular recruitment of new directors in some banks.

Currently, the induction process is informal and takes different forms. Some banks have adopted the practice of inviting nominees to attend board meetings for a period of time to familiarise themselves with the board proceedings, as well as the expectations the board has of serving directors, while they await authorisation of their appointments from the BSD. Once they have been introduced as new members of the board, they are provided with an information pack by the company secretary, which might include the bank's annual report, previous minutes of the board, the applicable legislation and other essential documents. Some company secretaries also offer their assistance in explaining the layout of the documentation and interpreting some of the decisions in the minutes and legislation provided in the information pack. Members have also been encouraged to visit locations, such as branches or business units of the bank, and are encouraged to make informal contact with management. Beyond this, the boards, at regular intervals, invite an expert to present any relevant topic related to the activities of the bank, for example, credit risk, new trends in banking, proposed new legislation, etc, with the object of extending or refreshing the directors' knowledge. Some banks have offered to sponsor courses on corporate governance, offered by the Institute of Directors, for their members. Few directors have responded to these offers, time constraints being given as a justification. Given the complex environment within which banks operate, there are surprisingly few banks that offer their directors formal training with the aid of an expert on the requirements of the Banks Act and the Regulations. It is left to the individual directors to take the initiative in seeking coaching on the legislation.

When induction support is given, the training programme is either developed in-house or, growing in popularity, an auditing firm will be approached to assist directors in that regard.

It is recommended that banks develop comprehensive, formal and tailored induction programmes for all new directors.

LEADERSHIP

The effectiveness of the leader in a body such as the board of directors may be measured in terms of, *inter alia*, the leader's contribution towards enhancing cohesiveness within the board, the cooperation he or she receives from the followers, the motivation he or she gives the members and the manner in which the resolution of conflicts or disputes that are elevated to the board is managed or adjudicated. In this regard, the chairperson of the board, in executing his or her roles and responsibilities, is expected to display these leadership qualities, thus ensuring the board's effectiveness.

The chairpersons of the boards under review were for the most part mindful of their roles and responsibilities as non-executive directors of the board, looking to the chief executive officers to execute the boards' decisions, implement the policies and strategies and, generally, take charge of the day-to-day running of the banks. To that extent, there is already a high level of compliance with the King II recommendation that the role of chairperson be separated from that of the chief executive officer. It was evident, however, that the chairpersons devote much more time to bank matters than the average non-executive director, the latter for the most part being expected at the very least to attend and participate in scheduled board and committee meetings. Despite the chairpersons spending much time on the affairs of the bank, there was a degree of detachment and objectivity in their association with management.

The majority of the chairpersons, other than having a strong business, professional and/or banking background as a general characteristic, had a long and involved past with the bank, as founding members, or with strong family ties stretching back generations, or with a long-term relationship with the bank, through the parent company. Thus, the chairpersons were part of the original formulation of the bank's strategies and value systems, and were looked upon by the bank's workforce as the embodiment of the culture and *mores* of the bank. The chairpersons, although not part of the day-to-day running of the bank, paid close attention to the business of the bank, and maintained regular, if not daily, contact with the management of the bank. The chairpersons participated extensively in external events of the banks, usually being seen as the public face of the bank. Most had held their chairmanship positions for a lengthy period, evidence perhaps of their ability to satisfy the needs and expectations of the shareholders, the board members and staff. The BSD is of the view that these chairpersons are as invaluable to the board as those who strictly meet the King II test of independence on their first appointment.

The chairpersons of the banks reviewed were well liked, respected and admired as leaders. Directors and staff interviewed had nothing but high praise for the leadership, knowledge, intellect and energy that the chairpersons brought to their bank. They were credited for the smooth running of the bank, had been instrumental in the recruitment of good management and introducing a good corporate governance culture to the bank, and were largely responsible for ensuring constructive relations between the executive and non-executive directors.

MANAGEMENT-ACCOUNTABILITY STRUCTURE

The corporate-governance framework of any company ought to articulate the division of responsibilities clearly to ensure that the interests of stakeholders, especially depositors, are served to enable them to pursue key corporate-governance objectives. The management and committee structures of the banks under review were shown to be robust and astute, since they provided for different levels of oversight and provided assurance that the banks were serious about managing their risks.

SYSTEMS OF CONTROL

Banking supervisors are increasingly focusing on the importance of sound internal controls. The banks reviewed were generally found to have built into their systems the major elements of an internal control process, which included board- and management-oversight mechanisms, risk recognition and continual assessment mechanisms, a clear definition of control activities and mechanisms for the identification, minimisation and monitoring of potential areas of conflict. Banks, in particular, are expected to minimise the risks of overlaps and, even, conflicts in responsibilities. The credit policies of the banks in particular, for the most part, reflected the principles of segregation of duties, and the banks under review made an effort to adhere to these principles. Credit policies, for example, typically separate marketing or sales, credit granting and the collection functions. Although banks and boards are mindful of the principles pertaining thereto, it is always a challenge for small banks to manage this risk, since the allocation of responsibilities is inherently limited to a few individuals. Typically, the extent to which a bank successfully manages this segregation will depend on the size of the book that is managed. It was found in some banks that when the credit book was still small in size, one person would handle all responsibilities pertaining to the book. As the book grew in size, however, these banks gradually introduced new staff to reduce the overlaps or to handle different functions.

It was found that the effectiveness of the system of internal controls depended on the prevention or timely identification of malfunctioning internal control activities. Branch managers are generally the first point of contact for ensuring such prevention or identification, since much of the internal control activities take place at the branches and are under the purview of branch managers, who are expected to monitor the internal control activities on a daily basis. Should a branch manager fail to detect any malfunctions or fail to prevent them, or when some information has fallen through the cracks, it is the internal auditor who is next in line to ensure that the internal control systems do not succumb to weakness. Regarding internal audit, the approach to ensure early detection should go beyond providing assurance on compliance with company policies and procedures and testing all aspects of risk activities (found to be the key focus in many banks), but should extend to ensuring that the information that the internal auditor has gathered is acted upon timeously and informs risk management decisions in real time. The problem with internal audit in many of the banks reviewed was that their value lay in retrospective control, more so in those banks that had outsourced this function. The advantage that a bank with a well-resourced in-house internal audit function has, however, is that it is able to deploy a team of auditors at any time to audit activities at outlying branches to ensure continuously that branches comply with procedures laid down by the bank.

DECISION-MAKING BY THE BOARD

Every board needs an environment that enables sound decision-making. The key test is whether the board actively seeks out information that both confirms and refutes any existing views, and whether the board encourages “bad news” to be brought to the fore, or stated differently, whether the board discourages management from hiding bad news. Much of this depends on to which extent the non-executive directors inform themselves about the activities of the company and whether the chairperson of the board allows sufficient debate among board members to test critical assumptions in order to root out overly optimistic projections or to bring enlightenment where pessimism seems to prevail. On being asked to point out weaknesses in the chairperson of the board, one board member, while critical of those boards that allow issues to be belaboured *ad nauseam*, pointed out that the bank’s chairperson should be encouraged to allow more time for other ideas to flow without necessarily jeopardising the whole discussion. Otherwise, the directors interviewed generally accepted the way in which their chairpersons conducted their meetings.

It was found that when the board did reach a final decision, everyone would have supported the decision or have accepted its outcome. Generally, boards recognise that continued dissension, even by one person, can disrupt or undermine the effort to turn a decision into action. Directors interviewed acknowledged that very rarely, if at all, are decisions reached by a show of hands. The old adage “diversity in counsel, unity in command” clearly characterises the manner in which the boards conduct their proceedings.

The ability of the board to recognise a sunken ship and to cut its losses could pose a challenge. This scenario arises especially when the board is embarking on a new initiative not previously tested by the board. One small bank tried to launch an ambitious product initiative for the bank. After a lengthy process of consultation, which involved much time and effort being expended by the directors to realise the successful outcome of this project, the board finally decided not to go through with the project, believing that the risks were too great, despite recognising the opportunities for growth if the bank were to embark on the initiative. The BSD regards this as an example of courageous and exemplary decision-making by the board of the bank concerned. At the time of the review, the said bank was engaged in testing other options.

REPORTS TO THE BOARD AND BOARD MONITORING OF MANAGEMENT

It was found that the board members received their board packs a reasonable time before a meeting to allow them enough time to prepare for and participate constructively in meetings. On average, board packs were received by all members a week before a board or committee meeting was to be held.

Assessing the quality of information brought to the board from management, most of the directors of one bank said they had witnessed a vast improvement from, say, 1999. One director summed it up as follows: “it is kind of like chalk and cheese and I think we operate on a basis that there must be continuous improvement”. A critical issue for the directors, however, is the depth of information they receive to prepare for meetings. Although they complained about the often large information packs that they receive, they generally accepted that more was better than less. The boards generally employ two techniques to manage too much information. The first is to insist on an executive summary, which captures the main points addressed in a report. The other is to split the discussion, allowing certain topics to be discussed at one meeting and others at later meetings. This latter scenario has arisen especially in audit committee meetings, which are usually very lengthy, sometimes lasting a whole day. The committee would split issues between those relevant to the year-end and those not related to the year-end, for example.

On the whole, through the oversight mechanisms that are part of the corporate-governance framework of the banks, including the proper recording of board proceedings, the boards are generally able to monitor management in an effective way. In a few instances, matters recur at successive board meetings, without final resolution being reached. Common examples of ongoing recurrence and shifting deadlines relate to governance issues and to strategy. The main characteristics of governance issues are that they have no determinable deadline or are the subject of an ongoing deadlock with the supervisory authority. Examples include the case of an auditing firm providing both external and internal audit services to the same institution, or the case of the bank not having established an in-house compliance function, but outsourcing it.

In the case of unresolved issues relating to strategy, a director of one of the banks under review identified as a particular weakness the board's inability to reach finality on the bank's expansion strategy, since it would vacillate between in which geographic area to open a new branch, on the one hand, and whether or not to open a branch in a particular geographic area, on the other hand. He noted that one day "the manager would say 'we need to have a branch in town X'. And then he would go away and nobody would do anything. And then the next time it would be 'well what about town Y'. It was sort of like shooting from the hip and shooting everybody in the foot". It was finally agreed that the board would have a written five-year plan, against which the board would measure management's performance to ensure that they delivered according to the plan.

Other common examples of unresolved issues related to uncleared internal control issues and problems with unreconciled accounts raised frequently by internal or external auditors, which in both instances took time to resolve, owing to weak internal controls.

Recurring unresolved issues, although of concern to the board and receiving attention, have the potential of undermining the effectiveness of the banks' corporate-governance framework, signifying a weakness in the oversight and decision-making process of the board.

DISCLOSURE TO STAKEHOLDERS

At issue, from a corporate-governance perspective, is the extent to which a company exhibits transparency, one of the characteristics of good corporate citizenship, which is, to quote King II in paragraph 18.2:

> "… the ease with which an outsider is able to make meaningful analysis of a company's actions, its economic fundamentals and the non-financial aspects pertinent to that business. This is a measure of how good management is at making necessary information available in a candid, accurate and timely manner – not only the audit data but also general reports and press releases. It reflects whether or not investors obtain a true picture of what is happening inside the company."

Communication with key stakeholders and engaging them is par for the course with banks. Apart from shareholders and depositors, banks can count as key stakeholders the regulators with whom they are obliged to communicate in supplying statutory records. Key stakeholders for banks include the BSD, the Registrar of Companies, the Financial Services Board, the Financial Intelligence Centre, the JSE Limited for listed companies, the Exchange Control Department of the South African Reserve Bank, non-regulatory bodies, such as The Banking Association South Africa and, for some banks, the parent company.

Banks, being public companies, are obliged by law to make certain material disclosures in their annual reports and to engage their shareholders on a regular basis, the highlight of the calendar year in this regard being the annual general meeting. The banks under review, including the mutual banks, generally complied with their legal and statutory obligations towards their stakeholders.

From the perspective of the BSD, an issue that has arisen in some banks is the content of their statutory reporting to the BSD, that is, their DI reports, a matter taken very seriously by the BSD. Compliance issues in that regard that arose in the course of the review were whether, firstly, the banks complied on time; secondly, whether their information was complete; thirdly, whether their information was accurate; fourthly, whether their information was prepared using the same accounting policies as those applied in the management and statutory accounts; and, fifthly, whether their information was prepared in accordance with the directives and requirements of the Banks Act and the Regulations. The BSD found that one or more of these issues arose with some of the banks, although they were not serious and were subsequently addressed by the banks concerned. Faulty DI reporting usually emanated from those banks or institutions that have recently obtained the status of a bank or that enjoy an exemption status, since it often takes time for such banks or institutions to acquaint themselves with the BSD's requirements and processes.

From the BSD's point of view, any misrepresentation found to have occurred in such circumstances may lead to an irregularity in the conduct of the affairs of the bank being inferred, from which the bank may take time to recover. If taken to extremes, the bank could, for example, risk jeopardising its reputation by (1) its current rating status being threatened, (2) its ability to continue as a going concern being endangered, (3) the protection of the funds of the depositors being impaired, (4) its commitment to sound management, including risk-management principles, being questioned, and (5) the adequacy of its internal controls being questioned. It has been shown in the past that in all instances of failed banks, poor DI reporting was revealed to be the first warning sign of failure, although this does not imply that all instances of poor DI reporting led to a bank failure

RELATED-PARTY LENDING, CONFLICTS OF INTEREST AND RELATED MATTERS

Related-party transactions are common in banks that are part of a group of companies. Although banks maintain their exposure limits, which is 25 per cent of qualifying capital, the problem may arise that banks have to link exposures to related parties, which can place restrictions on the money that they lend out. A case in point is when an independent property developer is in partnership with another independent developer, and they have a partnership in a third developer. The bank then has to link them all. If something happens to one developer, it may have a knock-on effect on the next developer, which may restrict the amount of money that the bank is able to lend out. The advantage of such a transaction is that it reduces the bank's concentration risk. The director of the bank concerned believed it was a good thing that the banking regulations forced banks to link exposures.

Another issue that arose was that of the bank running the risk of being accused of giving an associate preferential treatment. The directors of the bank concerned advised that the benefit to the borrowers was that they obtained a more favourable rate of interest than could be obtained elsewhere. The directors and external auditors questioned about these transactions maintained that the transactions had been undertaken totally impartially despite favourable interest rates being charged on all intergroup advances.

It is essential for banks fully to disclose to the market, in their annual reports, material related transactions, either individually or on a grouped basis, including whether these transactions have been executed on an impartial basis and on normal market terms. The OECD Principles of Corporate Governance of 2004 provide that disclosure requirements should include the nature of the relationship where control exists and the nature and amount of transactions with related parties, grouped as appropriate. The OECD Principles document also provides that, given the inherent opaqueness of many transactions, an obligation may need to be placed on the beneficiary to inform the board about the transaction, and that the board, in turn, should make a disclosure to the market, without, however, absolving the company from maintaining its own monitoring.

Conflicts of interest in the banks were dealt with in terms of company law, and no burning issues on this or other matters arose during the review process.

CONCLUSION

The BSD hopes that this report will help all banks in their endeavours to improve and enhance their corporate governance practices. The BSD extends its thanks and appreciation to all parties for their inputs, time and candid participation.

List of abbreviations

ABSA Bank Limited	ABSA Bank Limited and related entities
African Bank	African Bank Limited and related entities
Bank of Athens	South African Bank of Athens Limited and related entities
the banks	Banks subject to review in terms of section 6 of the Banks Act, read with the provisions of the Inspection of Financial Institutions Act 80 of 1998, as well as mutual banks subject to review in terms of section 4 of the Mutual Banks Act, read with the provisions of the Inspection of Financial Institutions Act 80 of 1998, as the case may be
Banks Act	Banks Act 94 of 1990
the big five banks	ABSA Bank Limited, FirstRand Bank Limited, Investec, Nedcor and Standard Bank
BSD	Bank Supervision Department of the South African Reserve Bank
Capitec Bank	Capitec Bank Limited and related entities
Companies Act	Companies Act 61 of 1973
Core Principles	Basle Core Principles for Effective Banking Supervision, issued in September 1997 by the Basle Committee on Banking Supervision, Bank for International Settlements, Switzerland
FAIS	Financial Advisory and Intermediary Services Act 37 of 2002
FICA	Financial Intelligence Centre Act
Financial Sector Charter	Financial Sector Black Economic Empowerment Charter issued on 17 October 2003
GBS Mutual Bank	GBS Mutual Bank and related entities
Habib Overseas Bank	Habib Overseas Bank Limited and related entities
HBZ Bank	HBZ Bank Limited and related entities
Imperial Bank	Imperial Bank Limited and related entities
Ithala	Ithala Limited and related entities
King II	King Report on Corporate Governance for South Africa 2002, published in March 2002

Marriott Merchant Bank	Marriott Merchant Bank Limited and related entities
MEEG Bank	MEEG Bank Limited and related entities
Mercantile Bank	Mercantile Bank Limited and related entities
Mutual Banks Act	Mutual Banks Act 124 of 1993
Myburgh	Adv J. F. Myburgh SC
Myburgh Report	Report by Adv J F Myburgh SC in terms of s 7 of the Banks Act 94 of 1990 published in April 2003
Nedcor	Nedcor Limited and related entities
the regulations	Regulations relating to banks published in Government Notice R1112 on 8 November 2000
Rennies Bank	Rennies Bank Limited and related entities
the review	Review conducted in terms of section 6 of the Banks Act, read with the provisions of the Inspection of Financial Institutions Act 80 of 1998, as well as in terms of section 4 of the Mutual Banks Act, read with the provisions of the Inspection of Financial Institutions Act 80 of 1998, as the case may be
SARB	South African Reserve Bank
Sasfin Bank	Sasfin Bank Limited and related entities
VBS Mutual Bank	VBS Mutual Bank and related entities