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LEVERAGING THE ORGANISATION'S MEMORANDUM OF INCORPORATION TO IMPROVE ITS RISK MANAGEMENT AND SUSTAINABILITY

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An experienced board member will fully appreciate the various mechanisms contained within the organisation's Memorandum of Incorporation ('MOI') that can be altered to best suit the environment within which the company operates. More often than not, the MOI is trivialized as simply a 'founding document' of the company and once approved, it is filed and gathers dust. However, over-looking the importance of the MOI -- which contains information about the core elements of the organisation's governance -- amounts to an injustice to the nature and intent of this document, not least also the company and its stakeholders.

The MOI is not only the first point of reference when interpreting the manner in which the company 'hard-wires' its governance prescripts within its DNA; it also allows key stakeholders to understand the broader set of parameters regarding the manner in which the company manages its risk appetite and tolerance levels. Indeed, the application of the alterable provisions as set out in the Companies Act ('the Act'), will significantly determine the extent to which good governance is embedded within the company.

The Act provides that there are certain *unalterable provisions*, *alterable provisions* and *default provisions* which apply to a MOI. Whilst a company is unable to alter the substance or effect of an unalterable provision unless the provision in its MOI is more restrictive than the unalterable provision in the Act, the company may alter an alterable provision of the Act in its MOI to suit its specific requirements. Bearing this in mind and the fact that the MOI is essentially a contract between the company, the board and the shareholders, it makes sense to ensure that the MOI provides clear guidelines on important matters such as board composition, succession planning and the appointment of executive directors and prescribed officers. In this way, the ambiguity and personal biases often associated with the appointment of these critical positions can be minimized (or even avoided). By establishing and incorporating minimum requirements in respect of individual and collective skills and experience as well as independence, the MOI can be a useful governance tool in driving ethical behaviour and accountability particularly amongst the board members, management and other prescribed officers. In fact, the MOI can set out pre-determined terms of office for directors or include provisions to remove a director in extraordinary circumstances (provided such provisions are not contrary to law).

The Act also provides for a private company, limited liability company and non-profit company to elect to voluntarily comply with the extended accountability and transparency requirements which are compulsory for public or state-owned companies. In terms of these provisions, the company is required to have its annual financial statements audited and appoint a company secretary and an audit committee. By electing to comply with these requirements, a company can more readily demonstrate to its stakeholders its commitment to responsible risk management and accurate and fair reporting. In this way, the credibility of the organisation can be enhanced and leveraged to drive sustainable business.

Regrettably, the benefits of a well-considered MOI are often realized too late. In these situations, the company, its directors and/or its shareholders are being exposed to litigation and are 'scrambling' to prove that they have proper authority and the right or obligation to act, or not act as the case may be at the time. It is therefore important that the MOI is periodically reviewed to ensure ongoing compliance and continued appropriateness for the business and its

stakeholders. Contentious matters such as meeting quorums, proxies and voting procedures must be agreed and clearly understood to ensure that decision-making can withstand the scrutiny of an informed stakeholder.

Furthermore, the voice of public opinion acts swiftly. As such, the company, its directors and its shareholders should leverage the MOI to underpin the organisation's position on important policy matters such as ethics, good corporate citizenship and social responsibility.

One of the most significant implications of not carefully considering the provisions of the MOI would be that under the Act, in order to be classified as a private company, the MOI must restrict the transfer of all 'securities', and not only shares (ordinary or preference). The definition of securities has been expanded to include shares, as well as hybrid and debt instruments. Therefore, any company which has debt instruments (for example loans) in issue that are freely tradeable must accept that they will no longer be considered private companies. They will now be deemed to be public companies and required to comply with the applicable provisions of the Act.

The fact that the Act provides for alterable provisions to be incorporated into the MOI presents a unique opportunity for organisations to incorporate good governance into their statutory documents. However, certain organisations do not have the flexibility of amending their MOIs or other founding documents due to their unique structures and shareholding. This is particularly so of some state owned entities and public entities. To this end, the alterable provisions of the Act provide an opportunity for these organisations to embed good governance measures by incorporating the principles of the alterable provisions of the Act into their second tier governance instruments, namely their delegations of authority, policies, processes and procedures.

With the increasing corporate governance focus being placed on non-profit organisations, public entities and state-owned companies, good governance is no longer a "nice to have"; it's an absolute necessity from a stakeholder, government and public perspective. Moreover, given the dire state so many organisations find themselves in, directors and prescribed officers who do not regularly assess the manner in which risks may be contained or mitigated through the use of these alterable provisions -- be this within their MOIs or their second tier governance instruments -- may find themselves being accused of failing in their fiduciary duties.

In this regard it is incumbent on directors and prescribed officers to use the unique opportunity that the Act provides via its alterable provisions, to establish a Corporate Governance Framework® that is both compliant and acts as a strategic business enabler. A well-implemented Corporate Governance Framework® will facilitate risk management and sustainable decision-making across the organisation by identifying those matters for which the board will be held accountable and those matters for which management will be held responsible.

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