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Companies Act, No 71 of 2008

Session 5: Directors

Presented by : Caryn Maitland CA(SA) RA

Agenda

- Definition
- Appointment and removal
- Delinquent Directors
- Meetings
- Director behaviour
- Directors Liability (S77)
- Indemnification and remedies
- Key take away points

Definition, Appointment and Removal

DEFINITION OF DIRECTOR EXTENDED

'Director' includes an alternate director, prescribed officer, a person who is a member of a committee of the Board or the Audit Committee (irrespective of whether or not the person is also a member of the company's board)

Such officers are subject to the same duties of care, skill and diligence and to the fiduciary duties applicable to directors and held jointly and severally liable with directors

The MOI and any additional rules are also specifically binding between the company and such officers

APPOINTMENT AND REMOVAL

Appointment

- **A profit company [not a SOC (Ltd)] must allow for shareholders to elect a minimum of 50% of the directors and 50% of the alternate directors**

Removal

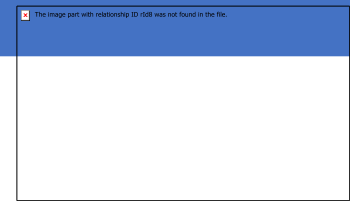
- **By ordinary resolution adopted at a shareholders meeting-provided certain conditions are met**
- **By Board resolution (without shareholder approval) only in certain circumstances including negligence and dereliction of duty**
- **Under certain circumstances during business rescue proceedings**
- **Court order – delinquency/probation**

DELINQUENT AND ON PROBATION

The company, a shareholder, director, company secretary, prescribed officer, a registered trade union that represents employees of the company or other representative of the employees may apply to court to declare a director delinquent or on probation

The director in question must be a current director of the company or within the twenty four months immediately preceding the application, was a director of the company

The Commission will keep a register of all those persons declared delinquent or on probation



Meetings

MEETINGS

Board meetings

- **A director may call a meeting of the board at any time**
- **Meeting obligatory if called for by at least 2 of the directors or in the case of a board with 12 or more directors, 25% of the directors require it**
- **Board may determine from time to time notice requirement for meetings**
- **May be conducted by electronic communication – as long as certain requirements met**
- **May be in the form of round robin**

Shareholder meetings

- **The Board or any other person specified in the MOI or rules may call a shareholders meeting at any time**
- **A company must hold a meeting under certain circumstances**
- **May be conducted by electronic communication, as long as certain requirements met**
- **May be in the form of round robin (Section 60)**
- **Resolutions – ordinary and special**
- **Quorum: votes and person**

Behaviour, Liability and Indemnification

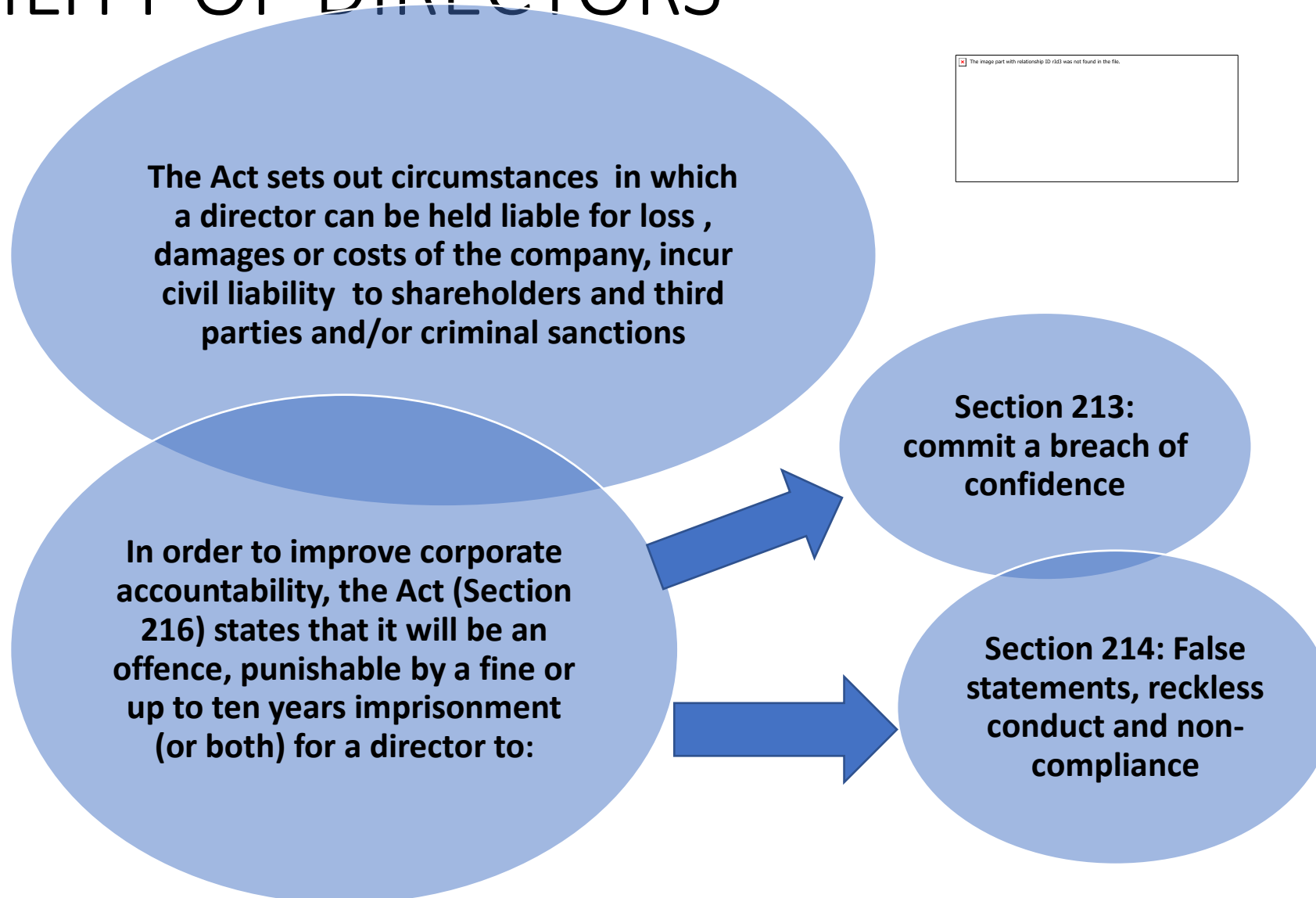
Directors Behaviour

- Directors must disclose **personal financial interests** in decisions – incl. related persons.
- **Directors Conduct** (incl. prescribed officers and committee members):
 - Can't personally gain
 - Can't harm co.
 - Must communicate info to board.
 - Can't disclose info to third parties.
 - Must act in good faith, in best interests of Co. and to best of abilities.
- Must use reasonable diligence to adhere, allowed to rely on advice of attorneys and accountants.

Personal interest implications

- Don't forget Special Resolutions required for
 - Directors remuneration
 - Financial assistance (S44 and 45)

LIABILITY OF DIRECTORS



S77 Directors Liability

- Directors Liability S 77, broad definition of Director
- (2) A Director may be held liable to common law of delict for any 'loss, damages or cost' arising out of:
 - a breach of fiduciary duty,
 - failure to act with required competence, or
 - breach of any other provision of Act or MOI.

Directors Liability (Continued)

- (3) Similar to sub 2 but includes 'indirect consequences' out of situation where Directors had:
 - Acted without authority,
 - Acquiesced to reckless, grossly negligent or fraudulent activity by Co.,
 - Been a party to act or omission designed to defraud creditors, shareholders, employees or third parties,
 - *Signed, consented to or auth. publication of false financial statements or prospectus **but** allowed to rely on accountants,*
 - Been at meeting and failed to vote against:
 - Issuing unauthorised shares or securities,
 - Granting of options to subscribe to unauth. Securities,
 - Provision of financial assistance for buying of shares,
 - Making a distribution (S&L),
 - Making an allotment of shares, or
 - Acquisition of own shares by Co.

CODIFIED LIABILITY-SECTION 77

A director is **generally** liable for:

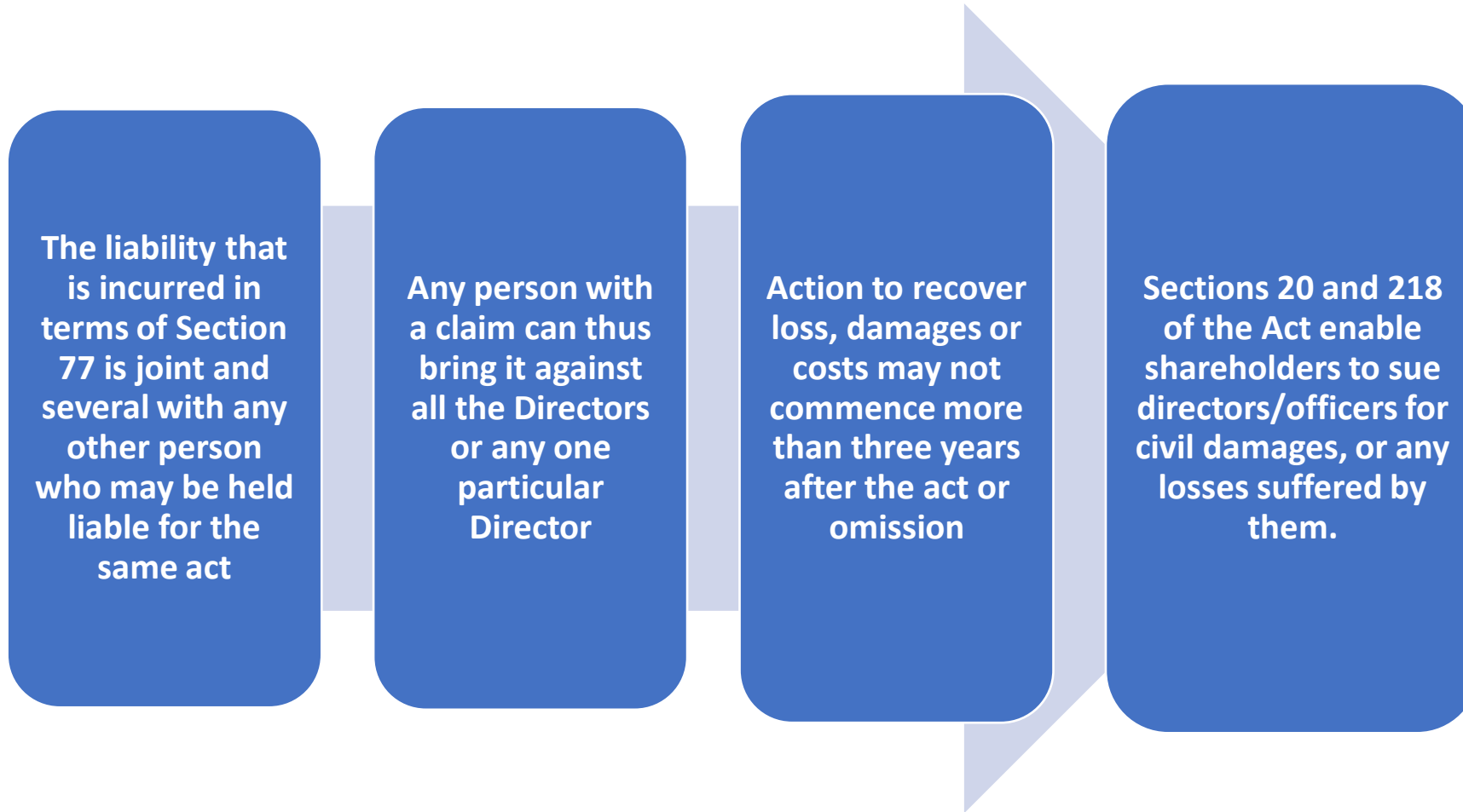
for any losses damages or cost sustained by the company from breach of Sections 75, 76(2), 76(3)(a) or (b) (relating to non-disclosure of personal financial interests, misusing the position as director to gain personal advantage, or not acting in good faith and for proper purpose or in the best interests of the company)

A breach of fiduciary duty

for any loss, damages or costs sustained by the company as a consequence of any breach by the director of a duty contemplated in Section 76(3)(c) [acting with the degree of care, skill and diligence that may be reasonably expected of such a person], or a duty as set out per the MOI, or any provision of the Act not otherwise mentioned in Section 77

Delict

SECTION 77 LIABILITY



Indemnification and Remedies

- Where potential liability, a director may apply to court to set decision of Board aside,
- Liability is joint and several,
- Liability capped to three year period from event,
- Defence if Director acted 'honestly and reasonably',
- Director can apply to court for exemption.
- MOI can't contract out of this liability and Co. can't indemnify Directors.

Accountability

Enhanced Accountability Roles and Committees

- Delegation of authority???

Company Secretary

- S86 – mandatory appointment for Ltd & SOC
- Every CS must have
 - Requisite knowledge of, experience in, relevant laws
 - Permanent RSA resident, & remain so for term of office
- Removal
 - Right to make notice

Duties of a Company Secretary

- Accountable to BoD
- Duties include but or not restricted to:
 - Provide guidance wrt directors duties, responsibilities & powers
 - Make directors aware of any law relevant to or affecting Co
 - Reporting to the BoD any failure by Co or Dir to comply with MOI or rules
 - All minutes (s/h, dir, committees) properly recorded
 - Certifying in AFS that all returns & notices have been filed, and that returns/notices appear “true, correct & up to date”
 - Send AFS to every person entitled to them
 - Carry out functions of S33(3) – file annual return

Audit Committees (S94)

- At each AGM (Ltd, SOC or MOI required) elect 3 members for Audit Com, unless
 - Subsidiary of Co that has Audit Com
 - That Audit Com provides the function of audit com for this Co

- Members

- Must be directors

- Must not be

- Involved in day to day management currently or in previous financial year
- A prescribed officer, full time employee of the co or another related/inter-related (past 3 financial years)
- A material supplier/customer that is not seen to be independent
- Can not be related to any of the above persons

- 40 bus days to fill vacancy

- Minister can prescribe minimum qualifications for members of the committee as a whole
- Reg 42: Min of 1/3 of committee at any given time must have academic qualifications or experience in:
 - Economics
 - Law
 - Corporate governance
 - Finance
 - Accounting
 - Commerce
 - Industry
 - Public affairs
 - HR

- Duties of Audit Committee

- Nominate auditor who is independent
- Determine audit fees and terms of engagement
- Ensure appointment complies with Act
- Determine nature & extent of non-audit services that an auditor must/must not provide to Co or related Co
- Pre-approve agreement for prov of non audit services
- Prepare report for AFS: describe functions, comment on Auditor's independence, any other comment deemed appropriate

- Duties (continued)

- Receive and deal with any concerns or complaints (internal, external, own initiative) relating to
 - Accounting practice % internal audit
 - Content or audit of AFS
 - Internal financial controls
 - Any thing else
- Make submission to BoD on relevant matters
- Perform any oversight functions determined by BoD

- Consideration of auditors independence
 - Consider fees (audit and other services)
- Consider whether auditor's independence is prejudiced
 - Any previous appointment as auditor
 - Extent of consultancy and other work
- Consider IRBA & and APA
- Board can appoint another auditor, provided Audit committee satisfied
- Audit com doesn't reduce the functions of BoD (except wrt appointment, fees & engagement of auditor)
- Company must pay all fees incurred by Audit Com

Social & Ethics Committee

- S72 (4) to (10), Regulation 43
- Applies to Ltd, SOC and Co with PI Score over 500 points (5 yr average)
 - Can apply for an exemption from Tribunal
 - Holding Co can perform function for sub
- Composition
 - 3 directors or public officers
 - At least 1 has to be a non – executive Director that hasn't been involved in the day to day running for the last 3 years

- Committee entitled to:
 - Request from any Director, PO or employee any info they need to perform their function
 - Attend general s/h meetings
 - Receive all notices & communication made available to s/h regarding general s/h meetings
 - Have the right to be heard at above meetings

- Functions: Monitor companies activities, being aware of legislation and best practice regarding:
 - Social and economic development (company's goals and purposes)
 - 10 principles per UN Global Compact principles
 - OECD recommendations regarding corruption
 - Employment Equity Act
 - BBEEE Act
 - Good corporate citizenship
 - Promote equality, prevent unfair discrimination, reduce corruption
 - Contribute to developing communities in which organisation operates
 - Record sponsorship, donations & charitable giving

- Function continued
 - Environment, health & safety
 - Consumer relationships (CPA)
 - Labour & employment
 - Working conditions
 - Development of skills & education
 - Draw matters to BoD attention
 - Report to shareholders

S159 Whistle Blowers

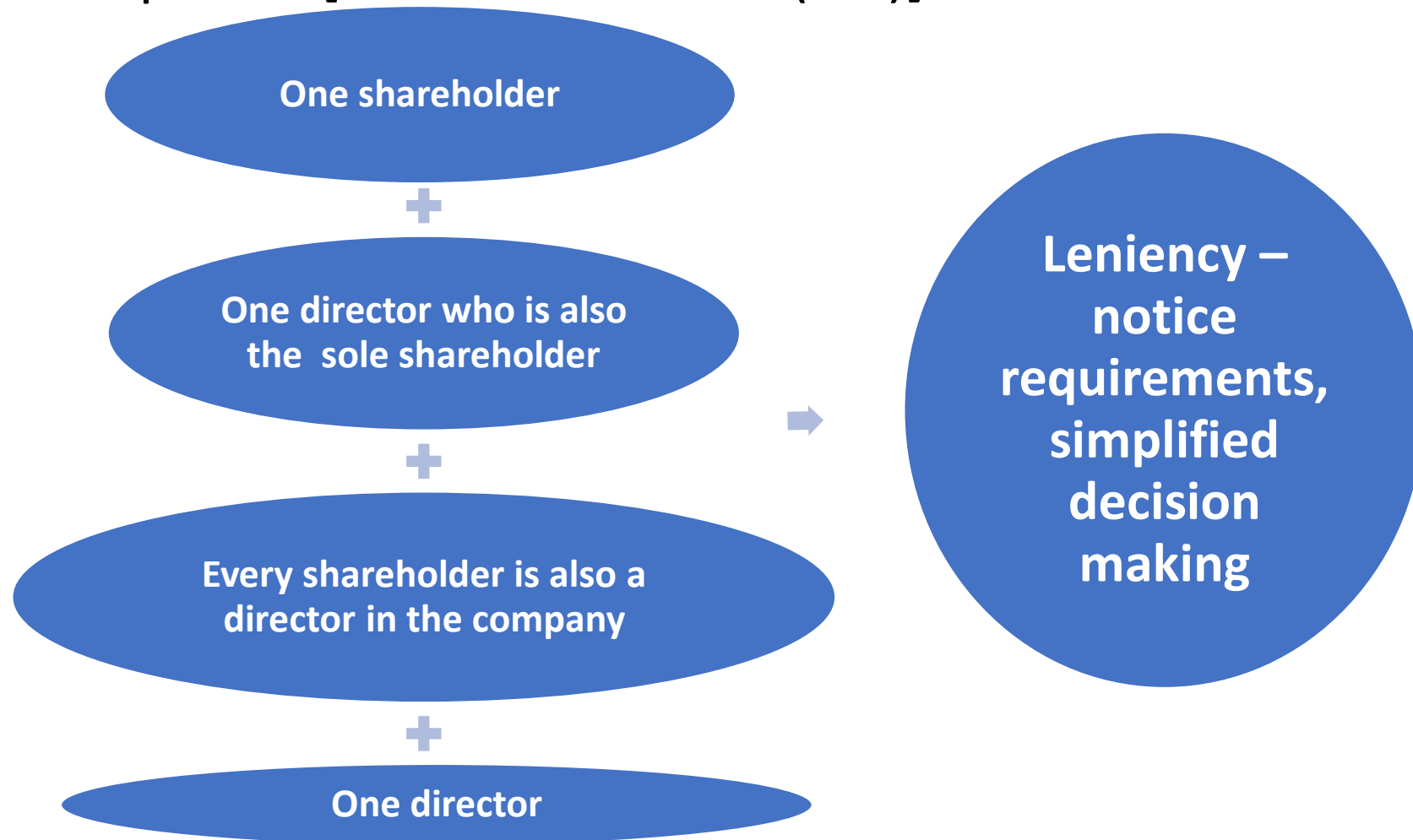
- Protection for whistle blowers
 - Employees
- Protected Disclosures Act, 2000
 - Co Act – in addition to and not in substitution
 - Protection irrespective of whether the PD Act provides
- Can't adjust MOI to void
- Disclosure made in good faith to...
- Person making disclosure reasonably believed ...
 - Co had contravened this Act
 - Failed to comply with statutory obligation
 - Engaged in conduct that was harmful to any individual or environment
 - Discrimination
 - Contravened any other legislation that exposes co to risk
- Advertise system

Role of King IV

Takeaway Points

EXEMPTIONS AND LENIENCY

- For profit companies [other than a SOC (Ltd)]



Key take away points

- Pty Ltd or Inc – 1 Director
- Ltd or NPC – 3 Directors
- Or as required for Socio Ethics Comm or Audit Comm.
- At least 50% of Directors of a profit co. must be elected by Shareholders.
- S66(9) – Directors remuneration into Special Res.
- Insufficient Directors doesn't invalidate action.

Key take away points (cont)

- S71 – Ordinary Resolution required to remove a director. Unalterable term.
- The Board may appoint committees of directors and delegate authority to them. (Dir Rule?), doesn't absolve Directors of responsibility.
- 25% of directors (if ≥ 12) or 2 can call meeting.
- Meetings may be electronic.
- Form of Notice determined by Directors, to MOI & Rules.

QUESTIONS

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THANK YOU FOR YOUR PARTICIPATION



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