Help Our Scheme – Governance and Oversight Risk Guide

What is Governance and Oversight Risk?

Governance and Oversight risks can have a material impact on the operations and financial position of a Community Scheme due to a break down in controls, processes, procedures, responsibilities, neglect of duties and lack of oversight.

Governance and Oversight risk management starts with a review of governance and oversight in the Community Scheme, the robustness of procedures, controls, performance management, adherence to these and accountability throughout the Scheme.

The management of Governance and Oversight risk will ensure that the Community Scheme is better equipped, and in a better position to effectively and consistently control its financial risk, its risk exposure from operational activities and engagement with contractors and service providers and the better management of supplier arrangements. It is also important to ensure clear accountability for actions and areas of responsibility.

Governance encompasses the system by which an organisation, business or body is controlled and operates, and the mechanisms by which it and its people, are held to account with the prime objective being the enhancement of the prosperity and viability of the business, organisation or body. In more simple terms it involves four key areas – people, processes, performance and having a clear purpose. Community Schemes are no different in this regard.

Policies, rules, codes of conduct, controls, ethics, risk management, compliance and administration are all elements of governance. These need establishment, proper implementation, enforcement and continuous monitoring by directors, trustees, shareholders, executive/estate management, members, stakeholders and governance/over-sight bodies where applicable. Governance also ensures that the balance of power and authority of all stakeholders is maintained.

It is important to bring structure to governance. This is as applicable to Community Schemes as it is to large organisations. This is best achieved by adopting a governance framework structure which delineates power and the governing or management/supervisory/ oversight roles in the Community Scheme. A framework also sets rules, procedures and other informational guidelines. In addition, governance frameworks define, guide, and provide for the enforcement of these processes. Frameworks are shaped by the goals, strategic objectives, performance targets, financial imperatives and established structures and processes of the Community Scheme.

The governance framework establishes and perpetuates the efficiency or lack of efficiency in a business or organisation or body's ability, to meet its goals. The structure and application of the governance framework is important for the image, reputation, credibility, success and sustainability of the Community Scheme in meeting its goals. A good governance framework needs to align with the industry it operates in. In the case of Community Schemes, it requires very specific elements around transparency, accountability, reporting and compliance.

Community Schemes, notably HOA's, should have constitutions which add to the overall governance and best practice management of the scheme. The constitution of a Community Scheme should contain the fundamental principles which govern its operation. Key elements include the objective of the Community Scheme, participation quotas, number of trustees/directors, required skills/competencies of Directors/Trustees, terms/rotation of Trustees/Directors, appointment of Managing Agents, signatory arrangements, delegation of authority, limits of authority, transactional limits, approval limits, procurement requirements, segregation of duties etc These “by-laws” establish the specific rules of guidance by which the Community Scheme is to function. All but the smallest of Community Schemes should have their basic structure and methods of operation documented.

A governance framework is a “living document” that needs to be continually reviewed in line with an ever changing and challenging operational environment. A governance framework is only as good as its enforcement and rigorous application.

It is critical that trustees/directors/shareholders/executive or estate management/ developers/ stakeholders in the Community Scheme, place a high priority on risk management and good governance. This extends from operational and financial management, to complying with regulations and being good “citizens” in the community they operate in. Instilling a risk culture in a Community Scheme is integral to good governance.

A hurdle for implementing risk assessment is often the perception that high risks equate to poor performance. People often resist the risk management process because they sense that acknowledging risks may be viewed by stakeholders as evidence that they are doing something wrong or that there is something to hide. However, significant risks can and do exist, and can emerge rapidly even when the Community Scheme is doing all the “right things”. Risks are often facts of the external environment and should not be seen as a failure of the Community Scheme. Rather, the goal should be to understand deeply, mitigate priority risks where you have the ability and the resources to do so, and engage partners creatively where the risks are systemic. This will not necessarily eliminate the risks, though it may reduce them, but it will help a Community Scheme to become more resilient to potential impacts.

While risk assessment is often seen as purely defensive, it can and must be connected to potential value creation and retention. It is not just about potential downside impacts, but about developing a unique and value creating ways of responding to challenges. Risk assessment isn’t something that can be outsourced to Managing Agents or third parties or risk specialists but must be initiated/engaged by the Trustees/Directors/Management/Stakeholders of the Community Scheme.

A Community Scheme should have a formal risk policy as well as best risk practices and controls that cover all areas of its operations, but these also have to be practical, implementable and effective. A risk champion, invariably a Trustee/Director or senior member of the Estate Management should also be formally appointed. Templates/examples of these are included in HelpOurScheme - Members Tools/ Repository General Documentation section.

Risk management is a process and not an event. An effective risk management program requires a Community Scheme wide acceptance of the importance of a risk management culture. A risk culture should be integrated into almost every aspect of the Community Scheme, starting with HR processes.

Risk appetite and the ability to absorb losses vary from one Community Scheme to another. As potential risk and losses are very hard to quantify, many Community Schemes will not have the capital base or reserves to carry a material loss and continue as a going concern.

Good governance needs to be driven and enforced from the top by Trustees/Directors/Estate Management with responsible parties and management effectively assuming the role of risk and governance "champions" in the Community Scheme.

Risk Culture

Risk culture is the system of values and behaviours present in a Community Scheme that shapes risk decisions of Trustees/Directors, Estate Management and employees. One element of risk culture is a common understanding of the Community Scheme and its business purpose/objectives. Employees and service providers must also understand that risk and compliance rules apply to everyone as they work towards the goals/objectives of the Community Scheme.

A good place to start is to adopt an introspective approach to your Community Scheme and to do a self-assessment of your risk culture and risk attitude. This involves asking yourself objective questions about your operational business environment, your own operational capabilities or limitations, calibre and skills of Trustees/Directors/Estate Management, general risk awareness and the behaviour of staff and service providers. In this way you will be able to identify the risk culture prevailing in the Community Scheme.

If a Community Scheme is to effectively manage the risks facing it, it has to create and entrench a risk culture.

A risk culture has to start from the top and transcend every dimension, area and facet of the Community Scheme. It must include all employees and extend to the contracted service providers, visitors/customers and suppliers to the Community Scheme.

A risk culture starts at the front gate and includes interactions with not just owners, residents and estate management, but with customers/visitors and suppliers/service providers. It is part of recruitment and the terms and conditions of employment, it forms part of job descriptions, it is part of employee induction and training, it is part of the code of conduct, it forms an integral part of all IT systems and their usage, it involves a specific focus on safety and security, part of the management of contracts and supply agreements and the minimising of risk in every operational process.

An inappropriate risk culture can result from certain individuals - often the owners, residents, trustees, directors, estate management or senior office bearers, or certain areas undertaking or conducting themselves in a way which is condoned or overlooked notwithstanding laid down procedures. These activities inevitably result in damage to the Community Scheme's reputation and financial losses.

By developing a proactive risk culture, Trustees/Directors and management has time to develop a strategic approach to potential future risk. While a risk culture will not eliminate all the risks facing a Community Scheme, it will:

- Help identify the bigger risks facing the Community Scheme
- Enable an assessment of the potential impact of these risks
- Enable the management of these risks by proactive programs, so that the impact is greatly reduced.
- Ensure better timed and informed decision making

The Trustees/Directors/Estate Management need to instil a culture, that at all times sends out clear signals regarding compliance, good governance and adherence to regulations, house/management rules laid down policies, procedures and controls. Clear accountability and responsibility between Trustees/Directors/Estate Management/Contractors and Managing Agents must be instilled. This culture needs to be entrenched in the Community Scheme.

Compliance

A Community Scheme needs to have a high level of governance and compliance with regard to the general regulatory environment, bye-laws, internal systems of control, legal/contractual obligations, documentation and contracts and more specifically with the regulations, codes and rules relative to the Community Schemes industry, and the business activities, if any, the Community Scheme operates in.

Governance and compliance is not simply just about complying with regulatory requirements and codes of conduct, but should be seen as something critical to avoid the risks that governance failures may cause. Governance needs to be taken very seriously and could include the holding of more regular board and executive committee/trustee meetings, the keeping of minutes and the passing of formal resolutions in respect of all material decisions, and in bigger schemes, even the rotation of auditors.

As part of regulatory requirements, a Community Scheme is required to have a formal external risk survey done every three years, which goes beyond a valuation for insurance purposes and which should cover a review of stormwater drainage, boundary walls, roads, paving, state of buildings, structures, rooves, railings, core electrics, security/access controls. These reports should complement and guide the risk assessment and management of the Community Scheme.

Operational and Financial Controls

A common feature of failing and under-performing Community Schemes is a failure of appropriate internal controls due to a lack of comprehensive policies, processes and procedures being in place. It is important to have policies and procedures for all the key business processes and systems for the respective functions and activities in the Community Scheme e.g. operations, maintenance, marketing and sales, security, procurement and supply, finance and accounting, human resources and environmental practices.

All processes and procedures should be documented in an "Operations Manual". This should be comprehensive and detailed to ensure consistency, enable monitoring/management and the maintenance of control. Documented procedures and processes need to be easy to follow and are largely to ensure that continuity is easily facilitated where employees/Trustees/Directors or Estate Management change. All routine, ad-hoc and emergency processes and procedures should be documented e.g. regular maintenance, access controls and procedures, handling of crime incidents, procurement of materials and services, security monitoring routines, payment approvals, revenue recovery, insurance claims, emergency service call outs, imposition of conduct/house rules, evacuation/fire emergency procedures, employee engagement/disciplinary processes.

Key operational deliverables and measurables must be set out in Service Level Agreements (SLA's), job descriptions and performance contracts.

Having these in place will ensure consistent application and act as the internal checks and balances for individual employees as part of their job descriptions or in the case of outsourced third parties, as part of their contracts. Risk and losses are reduced as a result of less crisis management and individual employees or third parties just "doing their own thing", which inevitably results in errors, financial losses or a failure to perform effectively and efficiently.

A Community Scheme needs to have tight controls around the over-riding, short-cutting or by-passing of controls, laid down procedures and processes (e.g. access controls, facilities usage and membership requirements, staff recruitment, amendment of invoices, waiving of fines or penalties, ignoring contractual terms, granting of discounts or refunds, granting of credit/extended payment terms, over-riding of set pricing, stock/asset write downs or write offs, by-passing of tender/procurement/contractual requirements, changing standard terms and conditions or amending standard approved agreements or contracts etc. Unilateral unauthorised amendments to agreements, contracts, documents and standard terms and conditions can expose a Community Scheme to increased risk, financial losses and unexpected legal costs. Exemptions and deviations from laid down procedures should be kept to an absolute minimum and only be allowed under exceptional circumstances e.g. emergency expenditure.

One of the advantages of a small Community Scheme is its agility and ability to make quick business/operational decisions. The trade-off between flexibility and tight controls, procedures and good governance is however, always a delicate balance.

Where authority is delegated to Trustees/Directors/Estate Management or third parties, the parameters and limits of authority need to be clearly defined and set.

Environmental

A Community Scheme should have an environmental policy and conservation focus. This is important particularly as it relates to common areas e.g. use of indigenous plants, removal of alien species, care of fauna and flora, protection of natural areas, habitat protection, water-wise focus, preservation of wetland areas etc.

Community Scheme Culture and Values

Another key component of governance is the instilling of a “culture and values” system which the Community Scheme stands for. This is critically important for every Community Scheme if it is to get the buy-in of owners and residents. In order to achieve and maintain a culture and values in the interests of all residents and owners, it is imperative that everyone put good neighbourliness, noise consideration and the privacy of people at the top of their list. This also includes full compliance with access controls and the visitor and parking policies of the Community Scheme from both a practical and security perspective.

While Conduct Rules may be comprehensive, many elements of a “culture” can’t be put in writing and need to be “lived” by residents/owners. The behaviour of owners and residents will have a major bearing on the effectiveness and running of the Community Scheme.

Examples of “culture/objectives” in a Community Scheme are – “a residential complex for working professionals, irrespective of their age, gender, race, colour, religion and sexual orientation, empathetic to the needs of people working from their units and those that have extended working hours and who need to sleep in the day”, “a holiday orientated complex for families with young children with a focus on outdoor activity, family fun and entertainment”, “a Community Scheme focused on retirees offering frail care support, communal leisure activities, high security and quite surroundings”.

The culture and value system of the Community Scheme needs to be instilled by the Trustees/Directors/Estate Management and needs to be understood and bought into by all employees, owners and residents.

Trustees/Directors/Developers/Estate Management must have clear planning steps to achieve the shared values/desired outcomes and objectives they want, need or require. Desired values and a culture won’t come about on their own but need to be driven and instilled by the Trustees/Directors/ Estate Management. These always need to be in the best interests of the Community Scheme e.g. desired conduct, clear financial goals, state of the complex/property, continuity of operations, level of security, type of living environment desired, level of maintenance, desired reputation, environmental standards etc. The strict and speedy enforcement of conduct rules is essential, as is the dealing with transgressions.

Criminality, Safety and Security

A culture of safety, security and fraud consciousness also needs to be instilled in all prime risk areas of the Community Scheme e.g. finance, general security, access controls, use of IT/ technology systems and recreational facilities.

Safety, health and hygiene standards also need to be strictly adhered to and complied with in order to reduce potential claims, fines, injuries and even unnecessary deaths. This is particularly important where facilities include recreational facilities like swimming pools, play areas, bike and riding facilities or access to wildlife areas and the provision of meals or health services. Appropriate signage and the required indemnification need to be put in place.

Many Community Schemes are by their very nature e.g. locality, nature of services/activities, employees and tenant mix, a ready target to criminal activity and extremely vulnerable to crime. It is important that a Community Scheme assesses the risk environment surrounding the Community Scheme. HR policies, financial and other controls need to be structured accordingly, and a zero tolerance to fraud, theft, collusion and criminal activity adopted. Staff behaviour needs to be monitored and lifestyle checks undertaken where felt necessary.

Unfortunately, there is also a high level of fraud perpetrated by Trustees/Directors and Management of Community Schemes. In most cases this is due to controls being circumvented, no segregation of duties, “abdication” of oversight by fellow Trustees/Directors, abuse of procurement processes, matters being dealt with verbally, one party having a strong personality, a lack of oversight over bank accounts, no reference or criminal checks having been performed on Directors/Trustees or Estate Management employees, conflicts of interest, collusion with suppliers/contractors or service providers, deviation of payments due to beneficiary bank account amendment controls being slack.

Acting unethically and ignoring good governance are not sustainable strategies for any Community Scheme.

Code of Conduct

A code of conduct defines how an organisation’s employees and office bearers should act on a day-to-day basis. It reflects the business or organisation’s daily operations, core values and overall culture. As a result, every code of conduct is unique to the organisation it represents. It will be beneficial for all medium and larger Community Schemes to have a code of conduct, particularly where they have employees. A good code of conduct requires a thorough understanding of the Community Scheme, its culture and vision.

All good codes of conduct have the following characteristics:

- They are written for the reader and are easy to understand. They don't include any technical or legal jargon.
- They are comprehensive and cover all the important details that may impact employees' daily lives, owners, residents and visitors and answers common questions that arise.
- They are supported by the Directors/Trustees and Estate management and have been acknowledged and approved by the Community Scheme’s Trustees/Directors
- They need to be accessible and readily available, and accessible to all employees and stakeholders.
- They should be visually appealing and follow a style that is clean and reflective of the Community Scheme

The Community Scheme needs to place a high priority on strict compliance with all legislation and regulations, strict adherence to laid down policies, controls and procedures and ensure compliance with conduct/house and management rules.

With technology forming an ever-increasing part of business and operations, it is essential that the Community Scheme has robust IT controls and disciplines in place, and that IT security and cyber-crime form an integral part of the risk management focus and culture.

Conduct, Management and House Rules

At the heart of any well-run Community Scheme are the House/Management Rules and Code of Conduct applicable to that Community Scheme. These rules are lodged with the Community Schemes Ombud Service (CSOS office) and form the basis of a behavioral and disciplinary code within the Community Scheme that is applicable to owners, tenants, lessees, visitors, service providers and customers. They need to be public and readily available so that all parties can familiarise themselves with the prevailing rules. This often needs to include letting agents active in the Community Scheme.

As such, rules need to be comprehensive and well thought through based on the specifics and individual circumstances of the Community Scheme in question. Rules need to be fair and reasonable and capable of being complied with. They also need to be consistently applied and enforced. Where rules continue to be flouted, broken or ignored despite warnings, fines and penalties must be applied to owners and residents.

Rules need to cover from safety protocols, access controls, visitor protocols and restrictions, movement restrictions, fire drills, speeding controls, noise levels/disturbance, obscene language use, violence/fighting, smoking, overcrowding, washing restrictions, hanging of washing, water usage, use of balconies, visitor restrictions, safety and security measures, social behaviour, disaster management restrictions, servant restrictions, alteration approvals, colour/aesthetic conformity, pet restrictions/limitations, illicit activities, parking restrictions, warnings and payment of fines etc.

Conduct/house/management rules and constitutions need to be reviewed on a regular basis to ensure they are enforceable, current, relevant and that they comply and align with current regulations and legislation. Conduct rules also need to cover the issuing of warnings, rectification measures and the application of fines for transgressions. Any changes or amendments to conduct and management rules need to comply with the laid down regulatory approval requirements. Amended conduct and management rules need to be lodged with the Ombud (CSOS).

Trustees/Directors/Developers/Operators need to resolve owner/member/lessee issues and those facing the Community Scheme diligently, quickly, transparently, fairly and objectively. The establishment of an internal dispute resolution process can be a very useful tool in improving the governance and best management practice in large Community Schemes. This process can be used to consistently and effectively manage any disputes and issues between owners/neighbours or tenants. This can reduce possible litigation with/between parties and reliance on CSOS (the Ombud) to resolve issues.

Trustees/Directors/Managing Agents of the Community Scheme must use legal and other formal measures to ensure compliance with conduct/management rules and/or required approvals e.g. zero tolerance of unacceptable behaviour, expulsion of tenants, disciplinary measures such as formal warnings/fines or other measures to punish undesirable or enforce desired behaviour of owners/tenants/lessees/ residents/visitors. Trustees/Directors need to be consistent and transparent in their approval and ruling processes and must themselves adhere to rules and decision-making processes and not pursue private or personal agendas.

It is particularly important that owners/shareholders/lessees get the required approval from the Trustees/Directors/Operators/Developers before undertaking any building, alterations or improvements to their properties. These must also align with the laid down aesthetic standards. Alterations to external structures or irregular structures on Common Property can finish up costing a Community Scheme a considerable amount in rectification, removal or repairs.

Trustees/Directors/Estate Management/Managing Agents need to control the practices or activities which are undertaken from/in the common property or from units or dwellings in the Community Scheme which will impact on other owners/ tenants or increase the cost of overheads in the Community Scheme. e.g. damage due to unacceptable sporting/ recreational activities, illicit activities, inappropriate and excessive use of common areas, trading operations, the conducting of active commercial business which impacts on security/access control/parking, informal letting, running of clubs/churches, provision of informal day care etc

The Community Scheme, Trustees/Directors, Managing Agents and/or estate management need to be observant and must take pro-active steps to deal with high-risk tenants, high risk behaviour, suspicious lessees/owners/visitors e.g. where units are being rented for cash, units bought with laundered moneys, parties undertaking or conducting criminal activity, unusual coming and going, drug dealing or other suspicious or unacceptable behaviour from within the Community Scheme.

Estate and letting Agents

While there is regulation around the blocking and giving of exclusivity to sales, letting or rental agents, these parties form an integral element in the good governance of a Community Scheme, and as such their activity needs to be monitored and managed.

They need to have a clear understanding of the conduct rules and culture/values of the Community Scheme. This is critical so that mixed messages are not given to new owners or tenants.

Rogue or maverick agents need to be advised of any irregular or undesirable behaviour and it should be made clear that this will not be tolerated by Trustees/Directors or Estate Management.

Estate/Letting/rental agents need to comply with the protocols, disciplines and processes set down by the Trustees/Directors/Managing Agents/Community Scheme as it relates to the disciplining of tenants, access controls, visitor and parking policies, compliance by tenants with conduct rules, maintenance/repair reporting, insurance claims process, damage to common property, rental restrictions, sub-letting restrictions, provision of tenant contact and other details, provision of lease/rental agreements, communication with tenants etc.

Trustee/Director Selection/Election

Section 7 of the Sectional Titles Schemes Management Act (STSMA) explains the functions and powers that must be performed by the Trustees.

In a new sectional title development, all the registered owners are trustees until the first general meeting of the body corporate takes place. At this meeting the owners have to nominate the people who they would like as their trustees.

The Act requires that any nominations for trustees have to be made in writing and must be provided to the chairman or the managing agent no less than 48 hours before the AGM starts. Nominations must be signed by both the nominator and the nominee, and nominations not meeting these requirements will be deemed invalid.

Deciding on the number of trustees

The Sectional Titles Schemes Management Act (STSMA) requires that an agenda is followed at the AGM. With regards to the election of the trustees, the first point of order is to decide how many trustees the body corporate wants to appoint.

Most commonly, three to seven trustees are appointed but this entirely depends on the number of units in the schemes. The STSMA only provides a directive for schemes where there are less than four owners of primary sections in the scheme. Here all the owners automatically become trustees of the body corporate without needing to be elected.

As voting at trustee meetings are determined by way of a majority vote, it is more efficient to elect an uneven number of trustees. This means that, when there are 5 trustees and they need to vote on a resolution, there can never be a deadlock.

Where there is an even number of trustees and a deadlock is reached, the responsibility lies with the chairman to cast an additional vote which will then determine the outcome. This is not an ideal situation as it provides the chairman with an unfair advantage – one which may not be in the best interest of the body corporate.

For this reason, it is advisable for the body corporate to elect an uneven number of trustees. This will ensure that any decisions the trustees take are based on a majority decision and not left to the chairman to determine the outcome of the vote.

A critical element of good governance is the composition of the Trustee/Director body. This extends from having appropriate selection criteria, a robust nomination/election process, having the required skills mix, having the appropriate number of Trustees/Directors relative to the size and complexity of the Community Scheme, having a representative gender and racial mix and the age and experience mix of nominated or selected parties.

The actual commitment of individuals and the carrying out of roles and responsibilities diligently is fundamental to the effective governance and management of a Community Scheme. Trustees and Directors need clear accountability and responsibility.

While it is important that continuity among Trustees/Directors is maintained, the rotation of office bearers is equally as important. Trustees/Directors must have integrity, not be conflicted and put their fiduciary responsibilities above all else.

The fiduciary position of trustees is established in terms of Section 40(2) of the STA, which stipulates that "each trustee of a Body Corporate shall stand in a fiduciary relationship to the Body Corporate".

This implies that a trustee shall in relation to the Body Corporate:

i) Act honestly and in good faith (which holds that they shall exercise their powers to manage the affairs of the Body Corporate in the interest and for the benefit of the Body Corporate and shall not act without, or exceed, their powers);

ii) Avoid any material conflict between their own interests and those of the Body Corporate.

As a Trustee/Director you will be required to wear many hats. It will be assumed that you have extensive knowledge of your Community Scheme.

The ideal "Anatomy" of a Trustee/Director requires a good head, a strong stomach and a good heart as well.

The skill set required will stretch from organisational to financial. People, communication and management skills will be extensively tested.

Given that the skills set required to manage a Community Scheme are very broad, it is likely that they will not all be found in single individuals. As such the appointment and selection of Trustees/Directors needs to try and strike a balance of individuals that collectively have the required skills and experience required. This is even more critical where a Community Scheme is self- managed, and the skills and knowledge of a managing agent can't be leveraged off.

Ideally, responsibilities and accountability of Trustees/Directors should be matched/aligned with their respective skill sets e.g. financial/accounting skills, people skills, project management, building/ maintenance skills, legal knowledge, gardening, use of technology etc.

Given the turnover of Trustees/Directors due to parties selling/moving/death and resignation, it is preferable to have alternate Trustees/Directors in place from a continuity perspective until the next AGM, rather than have an under complement of representatives. The same applies to the appointment of non-owners/residents or third parties who can bring strength and add value to the governance of the Community Scheme. The size, complexity and specific requirements of the Community Scheme should also dictate the number of Trustees/Directors.

An alternate trustee will have the powers and be subject to the duties of a trustee. The alternate trustee will cease to hold office if the trustee they replace ceases to be a trustee or if their appointment as alternate is revoked (PMR 8).

Trustee continuity is a big issue and is an area of weakness facing many Community Schemes. The void left by the resignation of Trustees/Directors or a Chairperson standing down, can have a severe impact on a Community Scheme. The loss of "institutional memory" is a big challenge for Community Schemes. This extends to historic decisions by Trustees/Directors, historic contracts entered into, legal and other disputes, the retention of records and key documentation.

Trustees/Directors who are owners are not entitled to remuneration for their time and services, unless otherwise determined by special resolution of the members. However, the body corporate/board may agree (PMR 10), to remunerate trustees who are not owners. Trustees/Directors (owners and non-owners) are entitled to be reimbursed for all disbursements and expenses actually and reasonably incurred while carrying out their duties and exercising their powers.

Trustees are indemnified by the body corporate (PMR 12) against any costs, losses, expenses and claims they may incur or become liable to during their term as trustee, unless they are found to be fraudulent or grossly negligent. Trustees/Directors are however obliged to put indemnity insurance in place for their conduct or omission.

Chairperson, Rules, Meetings (AGM), Notice, Resolutions, Quorum, Proxies, Voting, Minutes

Chairman/Chairperson
The STSM Act determines that (at the first Trustee meeting after the AGM) the Trustees must elect a Chairperson/Chairman.
The Chairman will have a casting as well as a deliberate vote only at Trustee meetings- not at General meetings.
Other than this and having to chair Trustee and General meetings the Chairman does not have any other powers that the other Trustees do not have in terms of the Act.
What is new in the STSM Act are the duties of a Chairperson of a meeting:

PMR 18(3) A chairperson must—

- maintain order, regulate the orderly expression of views and guide the members and other participants through the business of the meeting in accordance with the common law of meetings;
- ensure that all motions and amendments proposed are within the scope of the notice and powers of the meeting;
- ensure that the scheme's rules, the minute books and any other documents relevant to the items of business on the agenda are available at the meeting;

- act fairly, impartially and courteously to all members and others entitled to attend the meeting;
- ensure that all members and other persons entitled to speak are able to express their views without unnecessary disturbance or interruption;

(f) adjourn the meeting, when it is not able to complete or continue with its business;

- make decisions on points of procedure;
- settle disputes by giving rulings on points of order; and
- surrender the chair to a temporary chairperson elected by the members for any period during which the chairperson wishes to engage in the debate of any item of business.

(4) A chairperson at a general meeting must not—

- from the chair, attempt to influence members' views on any item of business; or
- disclose in advance of a vote how the chairperson intends to vote on any item of business

Rules

- One of the duties of a Trustee/Director is the enforcement of the Rules governing the Community Scheme.
- The different types of Rules can be explained as follows:
  The 1971 Sectional Titles Act introduced the system of Rules.
- Rules created under this Act were called Schedule 1 and Schedule 2 Rules. Schedule 1 Rules were the Management Rules (what is currently known as Annexure 1 of the STSM Act) and Schedule 2 Rules were the Conduct Rules (what is currently known as Annexure 2 of the STSM Act).
- In the few schemes where on 1 June 1988 the Schedule 1 Rules have never been altered and thus applied in their original form, the Prescribed Management Rules (Annexure 8) replaced those pre-existing Rules on that date.
- Similarly, the Prescribed Conduct Rules (Annexure 9) replaced any unaltered pre-existing Schedule 2 Rules that applied to a Body Corporate on that date. And subsequent to the new STSM Act, Annexure 8 and 9 were replaced with Annexure 1 and 2.
  If on 1 June 1988 the Schedule 1 or 2 Rules of a Body Corporate had been altered, they remain in force, as part of either the Management or Conduct Rules respectively, only to the extent that they were not irreconcilable with any prescribed Management Rule. In addition, the pre-existing Rules that remained in force were supplemented by any Rule that appeared in the prescribed Management or Conduct Rules but were absent from the pre-existing Rules.
- The Schedule 1 Rules also sometimes make provision for House Rules to be set in place. Any scheme that operates on Annexure 1 and 2 Rules cannot have House Rules.
- Schedule 1 and Annexure 1 Rules consists of clauses governing the basic constitution of the Community Scheme/Body Corporate and the rights of individual owners. These rules may be amended only by unanimous resolution of the Community Scheme/Body Corporate.
- Schedule 2 and Annexure 2 Rules deal more with the personal behaviour of the members of the Community Scheme/Body Corporate. These rules may be amended only by special resolution of the Community Scheme/Body Corporate.

Annual General Meetings

The STSM Act stipulates that the Body Corporate should have an Annual General Meeting (AGM) every year within four months after the Body Corporate's financial year end.

It is one of the duties of Trustees to ensure that the accounts of the Body Corporate are audited on an annual basis by independent auditors appointed by the Body Corporate at an Annual General Meeting.

The draft Annual Financial statements (AFS) need to be approved by the Trustees before the auditors will produce the final AFS.

There also needs to be a proposed budget approved by the Trustees to be tabled at the meeting for final approval by the AGM.

The Chairperson must prepare and sign a Trustee report for the year that has been passed. This must be added to the notices of the meeting.

The Trustees/Directors then need to decide on a date for the AGM – this should upon receipt by owners, give them at least 14 days notice of the meeting.

The notice of any general meeting must be accompanied by at least the following:

- an agenda
- a copy (or comprehensive summary) of any document that is to be considered or approved at the meeting
- a proxy form (in the prescribed format)

The order of business of the AGM is prescribed by the STSM Act:

- Confirm proxies, nominees and other representatives of owners and issue voting cards
- Determine that there is a quorum
- Elect a person to chair the meeting (if necessary)
- Present proof of notice of the meeting or waivers of notice
- Approve the agenda (this does not mean that items can be added to the agenda at the meeting – it only means that the order of the agenda (as circulated) needs to be approved
- Approve the minutes of the previous general meeting (if any)
- Deal with unfinished business (if any)
- Deal with any business requested by 25% of the owners or bondholders (of at least 25% of the primary sections) (if any)
- Receive reports from the Trustees/Directors or other committees (It is important to note that this is a "Trustee/Director" report and not a "Chairperson" report. The Trustees must give their input and be aware of what is said in the report. It must be signed by two Trustees or one Trustee and the Managing Agent)

- Approve the schedule of insurance replacement values (The STSM Act stipulates that the BC must do a replacement valuation every three years and table this to the AGM. The STSM Act also stipulates that the Body Corporate must prepare for each AGM schedules showing estimates of:
  - The replacement value of the buildings and all improvements to the common property
  - The replacement value of each unit (excluding the member’s interest in the land included in the scheme)
  - Determine the extent of insurance cover ito the following:
    - Public liability
    - Loss of funds
    - Other risks the owners want the BC to be insured for
- Approval of the admin fund budget and the reserve fund budget

It is important that the budgets be approved by the Trustees/Directors before being tabled to owners at the AGM. If the Trustees/Directors have not approved the budgets, it will be difficult to get to owners to approve it.

- Consider the annual financial statements (AFS)

It should be noted that the Act does not say “approval of the annual financial statements”. This is because the draft AFS have to be approved by the Trustees/Directors before the Auditor will issue the final set of accounts – these are also signed by the Auditors.

- Appoint an auditor (only if it will be proposed that new auditors be appointed is it necessary to attach details of the proposed new auditors – i.e. quotes from various auditors).
- Determine the number of Trustees (unless there is 4 or less members that are owners of primary sections; or where there is an Executive Managing Agent)
- Election of Trustees/Directors (if applicable as per the above)
- Report on the rules (this no longer is the responsibility of the Auditor)
- Deal with any new or further business

The agenda item “General” has always been a contentious one as it appears that this gives owners the impression that they can add anything to the meeting without proper notice being given. This point now removes the need for the item “General”. It still does not mean that an owner can’t add new agenda points under this item. Should owners at the meeting raise points / issues that are not on the agenda it is advisable that they be given the opportunity to raise them, but it is important to explain to them that these cannot be discussed or voted on at the meeting given that proper notice of these have not been given to all owners.

These items should then be taken as directions to the incoming Trustees/Directors to investigate and possibly table at the next general meeting for discussion and voting thereon.

- Give directions or restrictions to the Trustees
- Dissolve the meeting

The complete pack and notices should be sent to all owners and bondholders – to the domicile they selected/held on record.

If one of the owners subsequently comes forward with something they want to add to the agenda, it cannot be done as the Act states that at least 14 days' notice must be given with details of all agenda points attached.

Notice

PMR 15(6) states that notice of the AGM must be delivered to:

1. The service address of the members. The service address is the primary section registered in the member's name, unless that member has given the body corporate written notice to change the address to another physical, postal or fax address within South Africa or to an email address.
2. The most recent physical, postal, fax or email address that non-members notified the body corporate in writing.
3. The physical address of the section is the service address for any legal process or delivery of document to an occupier of a section.

Content of notice

The written notice must specify the place, date, and hour of the meeting. Where AGM meetings are held in person the meeting must be held in the local municipal area in which the scheme is located, unless:

1. The body corporate have made arrangements for attendance at the AGM by telephone or Zoom in terms of PMR 17(10).
2. The members have decided by special resolution in terms of PMR 15(4) to hold it elsewhere.

PMR 15(3) requires that the notice must be accompanied by at least the agenda for the AGM; a comprehensive summary of any document to be considered or approved by the members; and a proxy appointment form in the prescribed format.

PMR 17(7) requires that the agenda must contain the descriptions of the general nature of all business to be decided at the meeting and a description of the matters that will be voted on at the meeting including the proposed wording of any special or unanimous resolution.

Shorter notice period

PMR 15(7) provides two situations in which an AGM can be called on shorter notice periods:

1. The trustees can resolve to call an AGM on 7 days' notice in circumstances where there is urgency. In this circumstance the trustees must justify the short notice by setting out the reasons for such resolution. Furthermore, the trustees cannot use the shorter notice period to call an AGM where a resolution is to be taken to consider unnecessary improvements to common property or e.g. the installation of pre-payment meters.

2. In circumstances where all persons entitled to attend a meeting agree in writing, the meeting can be called on less than 14 days' notice. In these circumstances the notice period can be any number of days as long as the persons affected all agree thereto in writing.

Longer notice period

Section 6(2) requires that there be 30 days' written notice to all the members of the body corporate specifying the proposed resolution for situations where there is a unanimous or special resolution on the agenda of the AGM.

This notice must be delivered by hand to each member or sent by pre-paid registered post to the address of a member's section in the scheme or sent by pre-paid registered post to the physical or postal address in South Africa that the member has chosen in writing for such notice. In addition, such notice may also be sent to a member by fax or email.

PMR 15(9) states that voting at a meeting may proceed despite the lack of notice if all persons entitled to receive notice in writing waive their right to notice.

Special Resolutions

In terms of the Act, there are a number of instances where a special resolution needs to be passed by the Community Scheme/Body Corporate. There are two ways of obtaining a special resolution:

1. **By having a meeting**
   - At least 30 days written notice must be given of the meeting
   - The notice must either be given by hand or sent by registered post
   - The notice of the meeting must specify the resolution needed
   - At the meeting a quorum (as determined by the number of units in the complex) must be present or represented
   - At least 75% (in number (in terms of the number of units) and value (in terms of the participation quotas)) of the owners present or represented at the meeting must then approve the resolution in order for it to be passed
2. **By passing a round robin resolution.**
   - In this regard all owners are approached to give their written approval of the resolution
   - At least 75% (in number (in terms of the number of units) and value (in terms of the participation quotas)) of the owners must then approve the resolution in order for it to be passed

In terms of the Act all owners may vote for a special resolution – regardless of the fact that they may be in arrears with their levies or in contravention with any of the rules. If the Community Scheme/Body Corporate is unable to obtain a special resolution it may approach the CSOS Ombud for relief.

Unanimous Resolutions

In terms of the Act there are a number of instances where a unanimous resolution needs to be passed by the Community Scheme/Body Corporate. There are two ways of obtaining a special resolution:

1. **By having a meeting**
    - At least 30 days written notice must be given of the meeting
    - The notice must either be given by hand or sent by registered post
    - The notice of the meeting must specify the resolution needed
    - At the meeting a quorum of at least 80% of all owners must be present or represented
    - 100% (in number (in terms of the number of units) and value (in terms of the participation quotas)) of the owners present or represented at the meeting must then approve the resolution in order for it to be passed
    - Any owner that abstains from voting will be regarded as a vote in favour of the resolution
    - Where the resolution adversely affects any owner, they must give written approval for the resolution to be passed.

2. **By passing a round robin resolution.**
    - In this regard all owners are approached to give their written approval of the resolution
    - 100% (in number (in terms of the number of units) and value (in terms of the participation quotas)) of the owners must then approve the resolution in order for it to be passed.

In terms of the Act all owners may vote for a unanimous resolution – regardless of the fact that they may be in arrears with their levies or in contravention with any of the rules.

If the Community Scheme/Body Corporate is unable to obtain a unanimous resolution, it can approach the Ombud (CSOS) for relief.

Attendance

In terms of PMR 11(3), members, registered bondholders, holders of future development rights and the body corporate's appointed managing agent may attend the meetings and may further speak on any matter on the agenda. However, no one, other than the trustees, may propose any motion or vote.

Should any part of the meeting deal with issues relating to contraventions of the STSM Act and the rules of the body corporate, or any matter that the trustees resolve that the presence of the attendees will unreasonably interfere with the interests of the body corporate or a person's privacy, the trustees may request that any such attendees leave the meeting.

Quorums
At the meeting, an attendance register for all owners to sign must be provided. This will be used to determine the quorum present.

A quorum is the minimum number of people who should be present or represented at a meeting before the meeting can legally start.

PMR 19 deals with this and stipulates that business may not be dealt with at a general meeting unless a quorum is present.

The STSM Act (since 7 Oct 2016) stipulates that the quorum needed for a general meeting is as follows:

- Where there are less than 4 primary sections or less than 4 members:
    - Two thirds of the value of the votes of members
    - And they must be entitled to vote
- For any other schemes:
    - One third of value of the votes of members
    - And they must be entitled to vote

With the following new provisions (since 7 October 2016):

- At least two people must be present unless all the sections in the scheme are registered to one person
- When calculating the value of the votes (in terms of the quorum) the votes of the Developer must not be taken into account
- The value of the votes of any sections registered in the name of the BC must not be taken into account and the BC must not be considered to be a member

The emphasis is here on "entitled to vote". If an owner is in arrears with their levies and a court or adjudicator has given a judgment or order for the payment of that amount or the owner is in contravention of the Conduct Rules and a court or an adjudication has ordered that owner to refrain from breaching such a rule (and there are no special or unanimous resolution to be passed at the meeting) then he/she is not entitled to vote and therefore will not form part of the quorum.(This can lead to the situation where there is a room full of people but not enough of them are entitled to vote so you do not have a quorum for the meeting and the meeting cannot start).

PMR 19(4) states that if within half-an-hour from the time appointed for a general meeting a quorum is not present, the meeting shall stand adjourned to the same day in the next week at the same place and time, and if at the adjourned meeting a quorum is not present within half-an-hour of the time appointed for the meeting, the owners present in person or by proxy and entitled to vote shall form a quorum.

At the adjourned meeting there must be at least 2 owners present in person (one person present in person with proxies does not form a quorum).

It is therefore very important to always make sure that you will have a quorum present at the AGM by getting as many proxies as you can as you don't want just two people present at the adjourned meeting, being able to make decisions on your behalf.

Proxies

An owner who cannot attend a meeting can appoint someone as their proxy to attend the meeting and vote on their behalf. A provision was added in the STSM Act (since 7 October 2016) that a person must not act as a proxy for more than two members. With the emphasis on "member" – it does not say "section".

Ito PMR 20 a proxy does not have to be a member but must not be the Managing Agent; an employee of the Managing Agent or an employee of the Community Scheme/Body Corporate.

The PMR also provides that a proxy must be in the prescribed form and must be either:

- Delivered to the BC 48 hours before the time of the meeting OR
- Handed to the Chairperson at the start of the meeting

Under the previous Act – before 7 Oct 2016 – it was stipulated that the proxy must be handed to the Chairperson before the start of the meeting. The amendment provides that when proxies are handed in 48 hours before the meeting there is still enough time to verify the proxies and ensure that each person only has a maximum of two members' proxies.
It is important to remember that if an owner is not entitled to vote at a meeting their proxy will also not be able to vote on their behalf.

It is one of the duties of the Trustees/Directors to compile minutes of each meeting (Trustee/Director meetings and General meetings) and it is also stipulated in PMR 9 that the minutes must be circulated to all persons entitled to notice of the meeting – not later than 7 days after the meeting.

It is a good practice to have the minutes signed twice within 48 hours of the AGM. They should be declared as a true copy of the proceedings by the Chairperson and one Trustee or the Managing Agent directly after the meeting and then approved at the next AGM and signed by the Chairperson and one Trustee/Director or the Managing Agent again. The reasoning behind this is that minutes that are not signed are worthless – so for a year (until the next AGM) you have no minutes to give to owners, banks etc

At the AGM the owners, by approving the proposed budget, decide what the annual levies should be. The Act states that within 14 days after the meeting the Trustees/Directors should pass a resolution on how these levies will be payable and notify all owners of this within the 14 day period. E.g. Annually, weekly or monthly/on or before the first day of each month?

The Act does not state anything about how levies will be payable and it is up to the Trustees/Directors to decide what is most practical and realistic. The new levies only become payable on the passing of this resolution by the Trustees.

Voting
At the meeting, a motion proposed by any one trustee does not need to be seconded and must be determined by a resolution of the majority of the trustees present and voting, in terms of PMR 14(1). Each trustee, in terms of PMR 14(2), has only one vote in number, except the chairperson, who has a casting vote if there is a tie in votes.

A trustee, who has any direct or indirect personal interest in a matter to be discussed, considered or voted on by the trustees, including any contract to which the trustee is a party, is disqualified from voting, as set out in PMR 14(3). Furthermore, in terms of PMR 6(3), should a trustee have such an interest, they must not be present at, or play any part in the consideration or decision of the matter.

Members of body corporates must meet annually to deal with certain legislated agenda items and resolutions. The Sectional Titles Schemes Management Act 8 of 2011 (the "STSM Act") allows for these meetings to occur physically where members meet face-to-face, or remotely where members meet over the phone, or via an online video conferencing forum such as Zoom. Suitable notice periods for the AGM must be given to owners within a Body Corporate.

Minutes
In terms of PMR 9(e), the trustees must compile minutes of each meeting, and distribute these to the persons entitled to receive notice of the meeting not later than 7 days after the meeting. Furthermore, in terms of PMR 27(4), any member may request access to, or copies of, such minutes within 10 days of their written request.

Key elements of Governance and Oversight in Community Schemes

The following are the key elements to ensure that a Community Scheme has a focus on the key areas for good governance and oversight.

1. The Community Scheme needs to have a code of good governance and conduct, a risk policy in place, a risk culture, documented controls and disciplines along with clear accountability.
2. The Trustees/Directors need to ensure that risk management processes are in place and that the key risks have been identified.
3. High level of compliance with the applicable regulatory environment. e.g. CSOS regulations, labour, health and safety, disaster management, environmental and tax.
4. Having an appropriate number of fit for purpose, functional, capable formally elected and committed Trustees/Directors with a skill set relative to the size and complexity of the Community Scheme.
5. Ensuring that where management is in place that they are fit for purpose and appropriately skilled/qualified and experienced.
6. Ensuring that there is continuity of Trustees/Directors and "institutional" memory of the Community Scheme's affairs.
7. Ensuring that there is a change/rotation of Trustees/Directors.

8. Ensuring that the Community Scheme has good documentation, record keeping and general administration controls in place e.g. archiving, filing, continuity of records, financials statements and minutes of meetings.
9. Trustees/Directors/Estate Management or Office Bearers having clearly defined functional oversight responsibilities e.g. Finance, Operations, Technology, Gardens, Security, Projects, Conduct/Disciplinary, Owner/Lessee relations and Communication.
10. Holding of regular structured and compliant meetings (in tandem with their Managing Agents where applicable), which are well attended, structured, chaired by a chairperson and which are minuted.
11. Trustees/Directors who consistently exercise the required governance, diligence and over-sight required of them as well as taking their fiduciary responsibilities seriously.
12. Trustees, Directors or Management that are not conflicted in any way with decisions that are made, contracts entered into, or around the selection of suppliers/service providers.
13. Clear segregation of duties, particularly as it relates to contractual obligations, incurring of liabilities and making of payments.
14. A zero tolerance to fraud, theft and criminality.
15. High focus on the safety, well-being and security of residents, employees and visitors.
16. Relentless focus on the collection of levies, and in particular outstanding or arrears levies and assurance that the Community Scheme is a going concern at all times and in a position to meet its obligations.
17. Having an established Constitution, Code of Conduct and/or House/Management Rules.
18. Strict disciplinary code and enforcement of the Constitution, House/ Conduct and Management Rules.
19. Having an entrenched internal dispute resolution process in place.
20. Tight financial controls, budgetary, procurement and expense disciplines.
21. Decision making that is based on accurate and current financial reporting.
22. High focus on security, IT disciplines, asset management and pro-active maintenance plans.
23. Effective and regular communication with owners, lessees, tenants and stakeholders.
24. Having clear common objectives in place for the Community Scheme.
25. An effective, fair, consistent, responsible and responsive Trustee/Executive body basing decisions on accurate, factual and current management information.
26. Robust, repeatable administrative routines and control processes in place e.g. billing, levy recovery, IT controls, access and security controls, procurement controls, supplier management, HR processes, contract management.
27. All processes and procedures should be documented in an "Operations Manual". This should be comprehensive and detailed to ensure consistency, enable monitoring/management and the maintenance of control.
28. Documented procedures and processes need to be easy to follow and are largely to ensure that continuity is easily facilitated where employees/Trustees/Directors or Estate Management change.
29. Key operational deliverables and measurables must be set out in Service Level Agreements (SLA's), job descriptions and performance contracts.

30. Effective pro-active maintenance routines and processes. e.g. regular maintenance and comprehensive executable 10 year maintenance, repair and replacement plan ("MR&R plan") must be in place.
31. An environmental and conservation focus with specific focus on the impact of climate change, water and energy management.