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Guide to **Companies Act No 71 of 2008**

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NOTES ON THE GUIDE TO COMPANIES ACT NO 71 OF 2008

This guide is intended as an easy reference, pocket-sized guide for directors, shareholders, company officers and any other stakeholder who has an interest in corporate law reform.

The information contained herein is a summary of some of the key aspects of the Companies Amendment Act, 2011 and the Companies Regulations, 2011 and the Companies Act, 2008 (read together), and is issued to clients as a general overview thereof.

The Act was signed by the President on the 9th April 2009 and gazetted in Gazette No. 32121 (Notice No. 421) and came into operation on 1 May 2011.

The Companies Amendment Act, 2011 purports to rectify certain provisions of the Act so as to ensure its improved administration, and establish a proper foundation for certain necessary Regulations.

The Companies Regulations, 2011 provide implementation detail on certain parts of the Act.

The Amendment Act and Companies Regulations came into effect on the general effective date of the Act. The Act should thus be read together with the Amendment Act and Regulations.

Due to fundamental reforms brought about by the Act, we recommend that professional advice be sought before making any decisions based on this guide's contents or when dealing with any matters relating thereto.

All references to the masculine gender shall include the feminine (and vice versa).

While every care has been taken in the compilation of this guide, no responsibility of any nature whatsoever shall be accepted for any inaccuracies, errors or omissions.

1. INTRODUCTION

- The Act, Amendment Act together with the Regulations completely replace the Companies Act of 1973. The Close Corporations Act, 1984 has been amended as provided for in Schedule 5. Together with the King 111 Code and Report implemented on 1 March 2010 – "this is the most fundamental reform of company law for over 30 years" – *Tshediso Matona (Director General of the Department of Trade & Industry (DTI)*";
- The Act was formed against the backdrop of a general **Corporate Reform Policy**, published by the DTI in 2004, its vision being that "company law should promote the competitiveness and development of the South African economy
  - by encouraging entrepreneurship; and
  - employment opportunities by simplifying the procedures for forming companies and reducing costs associated with the formalities of forming a company;
- The purposes of the Act and King 111 are, inter alia, to promote compliance with the Bill of Rights as provided for in the Constitution in the application of company law, to encourage transparency and high standards of corporate governance and provide for the balancing of rights and obligations of shareholders and directors.

Throughout the text, specific reference is made to the sections of "the Amendment Act" or "the Regulations" where applicable, otherwise any reference to a section in general means that it is in reference to the Companies Act, 2008, or "the Act".

Definitions and Abbreviations:

- "previous Act" – Companies Act no 61, 1973
- "Act" – Companies Act no 71, 2008
- "Amendment Act" – Companies Amendment Act no 3, 2011
- "Regulations" – Companies Regulations, 2011
- "MOI" – Memorandum of Incorporation
- "CC's" – Close Corporations
- "CC's Act" – Close Corporations Act, 1984
- "Members" – Members of Close Corporations or of a non-profit company (as the context indicates)
- "JP" – Juristic Person
- "AFS" – annual financial statements
- "AGM" – annual general meeting
- "BRP" – Business Rescue Practitioner

Regulatory Bodies

- The Commission – the Companies Intellectual Property Commission (CIPC, previously CIPRO)
- Tribunal – the Companies Tribunal
- The Panel – the Take-over Regulation Panel
- FRSC – the Financial Reporting Standards Council

2. CATEGORISATION OF COMPANIES

The Act provides for two categories of companies, namely for profit and not for profit companies as follows:

FOR PROFIT	**Section 8(2)** a) state owned company (SOC Ltd);
	b) a private company [(Pty) Ltd] if: (i) its not a state owned company; (ii) its Memorandum of Incorporation (MOI); (aa) prohibits it offering any of its securities to the public and (bb) restricts the transferability of its securities. **{note: no limit on no. of shareholders (previously was limit of 50) and a share no longer has a nominal or par value}**
	c) a personal liability company (Incorporated or Inc) if (i) it meets the criteria for a private company; (ii) its MOI states that it is a personal liability company {i.e that the directors and past directors are jointly and severally liable together with the company, for the debts and liabilities of the company that were contracted during their respective terms of office}. **{note: these are the old Section 53(b) companies}**
	d) a public company, (Ltd) in any other case. **{note: min number of incorporators is reduced from 7 to 1}**
NOT FOR PROFIT	Name to be followed by suffix "NPC", {previously Section 21 Companies}; {Incorporated for a public benefit or an object relating to one or more cultural or social activities, or communal or group interests}. {Can be incorporated with or without members}

External Company means a foreign company (for profit or not for profit) that is conducting business or non-profit activities within the RSA, as set out in Section 23(2) for example, if such a company is party to one or more employment contracts within the RSA. The company does business in the RSA while remaining primarily regulated by its country of origin or registration;

Regulation 20 – sets out requirements for registration at the Commission;

Domesticated Company means a foreign company whose registration has been transferred to the RSA in terms of Section 13(5) to (11). It is regulated as if it had been incorporated in the RSA.

Right to incorporate company or transfer registration of a foreign company:

For Profit Companies:

- 1 or more persons or an organ of State may incorporate;
- 1 or more directors required, 3 or more for public (Ltd) companies; (see page 18 relating to minimum number of Directors and Committees);
- no limit on number of shareholders;
- No shares will have a nominal or par value (except for banks as defined in the Banks Act);
- Schedule 5, Item 6 (read together with the Amendment Act): a share issued by a pre-existing company (before repeal of Company's Act 1973) and held by a shareholder immediately before the effective date of the Act continues to have the nominal or par value assigned to it when issued, subject to any Regulations made by the Minister (who may provide for the optional conversion and transitional status of any nominal or par value shares and capital accounts – as long as these preserve the rights of shareholders associated with such shares as at the effective date). Regulation 31 has been published in this regard.

NOT For Profit Companies:

- an organ of state, a juristic person, or 3 or more persons acting in concert, may incorporate;
- 3 or more directors required, (see page 18 in regard to minimum number of directors and committees);
- with/without members ie an NPC without members can be incorporated;
- can have voting or non-voting members;
- membership can be held by juristic persons, including profit companies;
- each voting member has at least one vote and the vote of each member is of equal value to the vote of each other voting member on any matter to be determined by vote of the members,exept to the extent that the company's MOI provides otherwise;
- A special set of fundamental rules for NPC's is set out in Schedule 1 of the Act;
- On dissolution, NPC's are restricted in terms of the distribution of any residual assets (see page 7);

Note: a company's MOI may provide for a higher minimum number of directors as those described above. SOC's and Public (Ltd) companies subject to enhanced accountability and transparency requirements, such as an audit. Others only if MOI provides for it (see pages 30 to 31);

Foreign companies: a foreign company may apply in the prescribed manner and form, accompanied by the prescribed fee, to transfer its registration to the Republic from a foreign jurisdiction and thereafter exists as a SA company, governed by the Act, subject to it meeting certain criteria as set out in section 8 of the Amendment Act.

3. COMPANY FORMATION AND REGISTRATION

– (Chapter 2, Part B of the Act)

The Act aims to simplify the process of forming and registering a company:

Registration

- Registration is effected by signature of the MOI by the requisite number of persons and by filing it together with the prescribed Notice of Incorporation at the Commission, together with payment of the prescribed fee;
- In regard to pre-existing companies (registered under previous Act) – see page 48 in regard to transitional arrangements;

Domestication of a foreign company:

A foreign company's registration is effected by the transferring of its registration to the RSA from the foreign jurisdiction in which it was originally registered by way of lodgement of the prescribed form and payment of the prescribed fee with the Commission, subject to it meeting the criteria to do so (see Section 13(5) as inserted by the Amendment Act);

Legal Status of companies

- A company becomes a juristic person from the date and time that its incorporation is registered, as stated in its Registration Certificate;
- A person who is a incorporator, shareholder or director is not liable for the obligations of the company except to the extent that the Act or the company's MOI expressly provide otherwise;

The Memorandum of Incorporation (MOI)

- A brief MOI replaces a 2 part Memorandum and Articles of Association;
- It must be consistent with the Act and is void to the extent it contravenes or is inconsistent with the Act, subject to Section 6(15) – which deals with listed companies requirements;
- Section 15(2)(a): The MOI may include any provision (i) dealing with a matter that this Act does not address (ii) altering the effect of any alterable provision of this Act or (iii) imposing on the company a higher standard, greater restriction, longer period of time or any similarly more onerous requirement than would otherwise apply to the company in terms of an unalterable provision;
- Section 15(2)(b): The MOI may contain any restrictive conditions applicable to the company, and any requirement for the amendment of any such condition in addition to the requirements set out in Section 16;
- Section 15(2)(c): prohibit the amendment of any particular provision of the MOI, or
- Section 15(d) – inserted by the Amendment Act: – The MOI must not include any provision that negates, restricts, limits, qualifies, extends, or otherwise alters the substance or effect of an unalterable provision of the Act, except where such a provision would impose on the company a higher standard, greater restriction, longer period of time or any similarly more onerous requirement, than would otherwise apply to the company in terms of an unalterable provision of the Act;
- It may thus incorporate "restrictive conditions" applicable to the company and any requirement for the amendment of any such condition. It may

prohibit the amendment of any particular provision of the MOI. In such cases the Notice of Incorporation must clearly point this out, and also indicate the particular clause's location in the MOI. The name of the company must have RF immediately following it (Ring fencing).

Additional rules and shareholder agreements

- Except to the extent that a company's MOI provides otherwise, the Board may make, amend or repeal any necessary or incidental rules relating to the governance of the company in respect of matters not addressed in the Act or the MOI – by publishing a copy of its rules to the shareholders and filing a copy thereof with the Commission;
- Once ratified, the MOI (and rules) are binding between the company and the shareholder(s) and between the shareholders themselves and between the company and each director or prescribed officer or as a member of a committee of the board;
- The shareholders may enter into any shareholders agreement with one another as long as it is consistent with the Act and the MOI;
- Any rule or provision in any shareholders agreement which is inconsistent with the Act or MOI is void to the extent of its inconsistency;
- **NPC's are required to insert in their MOI's the following statements:** (a) that the company is not for profit (b) that sets out one or more of the public benefit objects of the company (c) that applies all of its assets and income (however derived) to advance its stated objects as set out in its MOI (d) that names a particular association not for gain to receive any net assets upon the winding up of the company or sets out the manner in which the directors at the time of winding up the company may determine which association not for gain will receive such net assets.

Section 16: Amendment of MOI

- A company's MOI may be amended:
  a) in compliance with a court order (which must be effected by a resolution of the company's board) and does not require a special resolution by shareholders;
  b) in the manner contemplated in Section 36(3) and (4): in other words by the Board filing a Notice of Amendment with the Commission setting out the changes (to increase or decrease the number of authorised shares of any class of shares, reclassify any classified shares that have been authorised but not issued, classify any unclassified shares that have been authorised but not issued or determine the preferences, rights, limitations or other terms of shares in a class). [This is an alterable provision – i.e unless MOI provides otherwise], or
  c) at any other time if a special resolution to amend it is:
     (i) proposed by (aa) the board of the company, or (bb) *shareholders entitled to exercise at least 10% of the voting rights that may be exercised on such a resolution, and
     (ii) is adopted at a shareholders meeting, or in accordance with in accordance with Section 60 (shareholders acting other than at a meeting i.e by informal special resolution) subject to subsection (3), i.e this requirement is not applicable to NPC's – that have no voting members, in which case the board shall amend the MOI;
- A company's MOI may provide different requirements than those set out above* in respect to proposals for amendments.

Annual returns

Annual returns are required to be submitted by every category of company including external companies in the prescribed form with the prescribed fee and within 30 business days after the anniversary date of its date of incorporation (in the case of a company that was incorporated in the Republic, or the date that its registration was transferred to the Republic, in the case of a domesticated company), and together with the supplementary documents as follows (Regulation 30):

1) companies required to have their financial statements audited must file a copy of the latest approved audited financial statements – on the date it files its annual return, and if not yet approved, within twenty business days after the board approves those statements;
2) A company that is not required in terms of the Act or Regulation 28 to have its annual financial statements audited, may file a copy of its audited or reviewed statements together with its annual return;
3) a company that is not required to file annual financial statements in terms of (2) above or a company that does not elect to file a copy of its audited or reviewed annual financial statements in terms of sub-regulation (3), must file a financial accountability supplement to its annual return in Form CoR 30.2;
4) Each year, in its annual return, every company must designate a director, employee or other person who is responsible for the company's compliance with the transparency and accountability provisions in the Act.
5) Regulation 30(5): The Commission –
   a) must establish a system to select and review a sample of accountability supplements, audited annual financial statements or independently reviewed annual financial statements (see pages 26 to 30) that have been filed with the company's annual return, with the objective of monitoring compliance with the financial record keeping and financial reporting provisions of the Act; and
   b) may issue a compliance notice to any such company setting out changes that are required to the company's practices to better comply with the financial record keeping and financial reporting provisions of the Act.

4. COMPANY NAME, REGISTERED OFFICE AND RECORDS

– (Chapter 2, Part A of the Act)

4.1 COMPANY NAME

The Act reforms the criteria for acceptable names in such a way as to give maximum effect to the Constitutional right to freedom of expression.

Criteria for names of companies

- Company names will no longer be required to be descriptive (i.e reflecting the nature of the business). Names may be:

Section 11(1)(a): in any language together with any:

- Letters, numbers, punctuation marks;
- Any of the following symbols *, +, &, #, @, %, =, ";
- Any other symbol if permitted by the Regulations made in terms of subsection (4); or
- Round brackets used in pairs to isolate any other part of the name, alone or in any combination; or

[Note: the Minister may prescribe additional commonly recognised symbols for use in company names. The formal implementation of usage of symbols and special characters will be publicised in due course by the Commission].

Section 11(1)(b): in the case of a profit company, may be the registration number of the company, followed by "South Africa", or RF (ring fencing) if applicable, and the appropriate suffix to indicate the category of company (see page 4). The Minister may prescribe alternative expressions in any official language, which may be used in substitution for any expression as per this paragraph (ring-fenced, South Africa, and the appropriate suffix for category of company);

Section 11(2): The name of the company must:

a) not be the same as:
   (i) the name of another company, domesticated company, registered external company, CC or co-operative;
   (ii) a name registered for the use of a person other than the company itself, or a person controlling the company as a defensive name in terms of Section 12(9), or as a business name in terms of the Business Names Act, 1960, unless the registered user of that defensive name or business name has executed the necessary documents to transfer the registration in favour of the company;
   (iii) a registered trademark belonging to a person other than the company, or mark in respect of which an application has been filed in the Republic for registration as a trademark or a well-known trademark as contemplated in section 35 of the Trade Marks Act, 1993, unless the registered owner of that mark has consented in writing to the use of the mark as the name of the company; or
   (iv) a mark, word or expression the use of which is restricted or protected in terms of the Merchandise Marks Act, 1941, except to the extent permitted by or in terms of that Act;
b) not be confusingly similar to a name, trademark, mark, word or expression contemplated in paragraph (a) unless:
   (i) in the case of names referred to in paragraph (a)(i), each company bearing any such similar name is a member of the same group of companies;
   (ii) in the case of a company name similar to a defensive name or to a business name referred to in paragraph (a)(ii), the company, or a person who controls the company, is the registered owner of that defensive name or business name;
   (iii) in the case of a name similar to a trademark or mark referred to in paragraph (a)(iii), the company is the registered owner of the business name, trademark, or mark, or is authorised by the registered owner to use it, or
   (iv) in the case of a name similar to a mark, word or expression referred to in paragraph (a)(iv) the use of that mark, word or expression by the company is permitted by, or in terms of the Merchandise Marks Act;

c) not falsely imply or suggest or be such as would reasonably mislead a person to believe incorrectly that the company –

(i) is part of, or associated with, any other person or entity;

(ii) is an organ of state or a court;

(iii) is owned, managed or conducted by a person or persons having any particular educational designation or who is a regulated person or entity;

(iv) is owned, operated, sponsored, supported or endorsed by or enjoys the patronage of any foreign state, head of government or international organisation and

d) not include any word, expression or symbol that in isolation or in context within the rest of the name, may reasonably be considered to constitute propaganda for war, incitement of imminent violence or advocacy of hatred based on race, ethnicity, gender or religion or incitement to cause harm;

Reservation of names

- Name reservation will be available to protect one or more names but will not be a requirement;
- The name reservation process is no longer a separate, formal pre-registration process;
- If names are reserved, the reservation will last for a period of 6 months initially which may be extended on application, and which may be transferred;
- If the name in the Notice of Incorporation is the same as that of a registered company or reserved name, the Commissioner may use the registration number as the name in the interim, i.e the registration number followed by "South Africa";
- The Commission must reserve each name applied for unless it is in contravention of Section 11(2)(a) or unless it has already been reserved;

Section 14(3)(a) – as amended by the Amendment Act: If the Commissioner believes the name is in contravention of Sections 11(2)(b) and (c), it may require the applicant to serve a copy of its application to any person or class of persons named in the notice whom it believes to have an interest in the use of the proposed name by the applicant. The interested persons may apply to the Companies Tribunal for a determination and order as per Section 160; (see page 45 – remedies and enforcement section);

Section 14(3)(b) – as amended by the Amendment Act: If the Commissioner believes the name is in contravention of Section 11(2)(d) above, it may refer the application and name reservation to the South African Human Rights Commission, which in turn may apply to the Companies Tribunal for a determination and order also in terms of Section 160.

Change of Name

- Company required to file a Notice of Name Change and a copy of the Special resolution and the prescribed fee; (see page 7 re amendments of MOI's for requirements);
- Section 16(6): if a profit company amends its MOI in a manner that it no longer meets the criteria for a particular category of profit company, the company must also amend its name by altering the ending expression as appropriate to reflect the category of profit company into which it now falls;
- Section 16(9)(a) – as amended by the Amendment Act – the amendment of the MOI which as the effect of changing the name of a company, takes

effect on the date set out in the amended registration certificate issued by the Commission;

- Section 19(7): After a company has changed its name, any legal proceedings that might have been commenced or continued by or against the company under its former name may be commenced or continued by or against it under its new name.

Registered use of name and number

- Section 32(1): A company or external company must (a) provide its full registered name or registration number to any person on demand and (b) not misstate its name or registration number in a manner likely to mislead or deceive any person;
- Section 32(4): A company must ensure that its registered name and number are clearly stated in legible characters in all notices and other official publications of the company including those in electronic format, and in all bills of exchange, promissory notes, cheques and orders for money or goods, and in all letters, delivery notes, invoices, receipts and letters of credit of the company;
- Contravention of Sections 32(1) to (4) is an offence;

Consumer Protection Act and Business Names:

In terms of Chapter 4 of the Consumer Protection Act (implemented on 1 April 2011), a trading name will also need to be registered on a list of "business names" using the Commission's portal;

Regulation 8(5): if a proposed company name is the same as a name registered as a business name in terms of the Consumer Protection Act, 2008, as contemplated in Section 11(2)(a)(ii), the application or notice filed to reserve or use that name must include satisfactory evidence that (a) the name is so registered for the use of the company concerned.

4.2 REGISTERED OFFICE

- Every company and external company must:
  a) continuously maintain a registered office in RSA, and indicate such in its Notice of Incorporation;
  b) file a Notice of Change of Registered Office with the Commission if the address changes from time to time (subject to the requirements of the MOI).

4.3 RECORDS

- Must be kept in written form; or
- In a form or manner that allows the documents and information that comprise the records to be convertible into written form within a reasonable time (see pages 34 and 35 relating to electronic communications) and
- For a period of at least seven years or any longer period of time specified in any other applicable public regulation;
- Section 24(3) sets out the records that are required to be kept by a company;
- Regulation 22 states that a company must notify the Commission of the location of or any change in the location of any company records that are not located at its registered office.

5. COMPANY FINANCE AND CAPITAL

– (Chapter 2, Part D)

General

- The capital maintenance regime under the 1973 Act is done away with and the Act is now wholly based on solvency and liquidity. Thus all distributions (for example, share buy backs, dividends, redemptions) are to be treated the same way. This is to be achieved by subjecting all distributions to the solvency and liquidity test (see Table D on page 56 for definition);
- The interests of minority shareholders are protected by requiring a special resolution for share and option issues to directors or other specified persons (Section 41);
- Chapter 2 Part D replaces the existing archaic provisions relating to specific forms of debenture, with proposals for a general scheme designed to protect the interests of debentures holders without making unnecessary distinctions based on artificial categorisation of the debt instrument they hold;
- Part E of Chapter 2 retains the existing scheme for registration of and transfer of uncertificated securities;
- Chapter 4 presents a simplified and modernised scheme in regard to the primary and secondary offering of securities to the public, based on the principles of the current Act;
- Certain key sections of Chapter 2 are dealt with below as follows:

Shares

- Section 35: A share issued by a company is movable property, transferable in any manner provided for in the Act or other legislation;
- It does not have a nominal or par value, subject to item 6 of Schedule 5 (relating to transitional arrangements and pre-existing companies – see page 48);
- Schedule 5, Item 6(2): Despite Section 35(2) any shares of a pre-existing company that have been issued with a nominal or par value, and are held by a shareholder immediately before the effective date (of the Act), continue to have the nominal or par value assigned to them when issued, subject to the regulations made in terms of sub-item (3);

Item 6(3) as amended by the Amendment Act:

- The Minister, in consultation with the member of Cabinet responsible for national financial matters, must make regulations to take effect as of the general effective date, providing for the optional conversion and transitional status of any nominal or par value shares, and capital accounts of a pre-existing company, but any such regulations must preserve the rights of shareholders associated with such shares, as at the effective date, to the extent doing so is compatible with the purposes of this item;
- Share values to be determined by the market;
- A company may not issue shares to itself;
- An authorised share of a company has no rights associated with it until it has been issued;

Section 36: Authorisation for shares

- A company's MOI must set out:
  - the classes of shares and the number of shares of each class that it is authorised to issue (authorised share capital);
  - may authorise a stated number of unclassified shares which are subject to classification by the board;
  - In respect of each class of shares, a distinguishing designation for that class and the preferences, rights, limitations and other terms of that class;
- The authorization and classification of shares, the numbers of authorised shares of each class and the preferences, rights, limitations and other terms associated with each class of shares as set out in the MOI may be changed only by:
  - An amendment of the MOI by special resolution of the shareholders or
  - The board in circumstances set out in Section 36(3), except to the extent that the MOI provides otherwise, in which case the company must file a Notice of Amendment of its MOI with the Commission.

Section 37: Preference rights, limitations and other share terms

- All of the shares of any particular class authorised by a company have preferences, rights, limitations and other terms that are identical to those of other shares of the same class. This is not an alterable provision – in other words the MOI of a company cannot alter this.

Section 38: Issue of shares

- The board has the power to issue shares, to the extent that the shares have been authorised by or in terms of the company's MOI, and in accordance with Section 36;
- If a company issues shares that have not been authorised in terms of Section 36 or in excess of the number of authorised shares for any particular class, the issuance of those shares may be retrospectively authorised in accordance with Section 36 within 60 business days after the date on which the shares were issued.

Section 39: Pre-emptive right to be offered shares

- This Section does not apply to a SOC or a public company (except to the extent the company's MOI provides otherwise):
  - Every shareholder in a private company (and a personal liability company) has a pre-emptive right to be offered and to subscribe (within a reasonable amount of time) for a % of any shares issued or proposed to be issued equal to the voting power of that shareholders general voting rights immediately before the offer was made;
  - However, a company's MOI may limit, negate or restrict or place conditions on this right with respect to any or all classes of shares of that company.

Section 40: Consideration for shares

- The Board may issue authorised shares only:
  - for adequate consideration (as determined by the Board);
  - in terms of conversion rights associated with previously issued securities of the company, or
  - as a capitalisation share without consideration as contemplated in Section 47;

- When the company has received the consideration as approved by its Board for the issuance of those shares, they will be fully paid and the company must issue them and cause the name of the holder to be entered on the company's securities register;
- If the shares are issued in exchange for an instrument such that the value of the consideration cannot be realised by the company until a date after the time the shares are to be issued, or is in the form of an agreement for future services, future benefits or future payment by the subscribing party, the consideration is regarded as having been received and the shares fully paid only to the extent that the value of the consideration for any of those shares has been realised, or the party has fulfilled his/her obligation in terms of the contract. However, upon receiving the instrument or entering the agreement, the company is required to issue the shares immediately and cause these to be transferred to a third party to be held in trust and later transferred to the subscribing party in accordance with a trust agreement.

Section 41: Shareholder approval required for issuing shares in certain cases

- S41(1): An issue of shares* must be approved by a special resolution of the shareholders of a company if they are issued to: (a) a current or future director or current or future prescribed officer of the company, (b) person related or inter-related to the company or to a director or prescribed officer or (c) a nominee of any of the above;

[Note: in this Section, "future" does not include a person who becomes a director or prescribed officer of the company more than six months after acquiring a particular option or right].

- S41(2): Subsection 1 (above) does not apply where the issue of shares* is (i) under a contract underwriting the shares* (ii) in the exercise of a pre-emptive right (as per above) (iii) in proportion to existing holdings on the same terms and conditions as have been offered to all the shareholders of the company or to all the shareholders of the class or classes of shares being issued (iv) pursuant to an employee share scheme that satisfies the requirements of Section 97 or (v) on the same terms and conditions as have been offered to members of the public;
- S41(3): An issue of shares* requires approval of the shareholders by special resolution if the voting power of the shares that are issued or issuable as a result of the transaction** will be equal to or exceed 30% of the voting power of all the shares of that class held by the shareholders immediately before the transaction**;

** reference to "shares" includes securities convertible into shares or a grant of options contemplated in s42 or a grant of any other rights exercisable for securities, and*

***reference to "transaction" includes a series of integrated transactions.*

- S41(5): Any director who was present at a meeting which issues authorised securities and fails to vote against such issue despite knowing that such issue is inconsistent with this section may be held liable for any loss damages or costs sustained by the company as a result thereof.

Section 44: Financial Assistance for the subscription of securities

- The board may authorise the company (subject to the MOI) to provide financial assistance* (see definition on page 15) by way of a loan, guarantee, the provision of security or otherwise to any person for the purpose of or in connection with the subscription of any option, or any securities, issued or to be issued by the company or a related or

inter-related company (see definition of related or inter-related persons in Table E on page 57) or for the purchase of any securities of the company or a related or inter-related company, subject to the requirements set out in Table G on page 59 relating to conditions and consequences of lending financial assistance.

Loans or other Financial Assistance to Directors: Section 45:

- A company may not give direct or indirect financial assistance (i.e provide a loan to or secure a debt or obligation) to a director or prescribed officer of a company or of a related or inter-related company or CC, or to a person related to any such company, CC or director – i.e the Board may not authorise it unless it meets the requirements as set out in Table G on page 59;

{*Note: "financial assistance" in Section 44 and 45 does not include lending money in the ordinary course of business by a company whose primary business is the lending of money and additionally in re Section 45 includes lending money, guaranteeing a loan or other obligation and securing any debt or obligation, but does not include an accountable advance to meet legal expenses to be incurred by the person on behalf of the company or an amount to defray the persons expenses from removal at the company's request*}.

Section 46: Distributions to be authorised by the board

- No distribution may be made by the company unless it is pursuant to an existing legal obligation of the company or a court order or has been authorised by the board by resolution and immediately after giving effect to the authorisation it reasonably appears that the company would satisfy the solvency and liquidity test (see Table D on page 56), and the board resolution acknowledges that the board has applied the solvency and liquidity test and reasonably concluded that the company will satisfy that test immediately after completing the proposed distribution;
- A director of a company is liable to the extent set out in S77(3)(e)(vi) see page 21 if the director was present at the meeting when the board approved a distribution as contemplated herein or participated in the making of such a decision in terms of section 74, and failed to vote against the distribution despite knowing that the distribution was contrary to Section 46.

6. DIRECTORS

– (Chapter 2, Part F)

The Act reflects a trend towards personal liability for directors, and the requirement of a high standard of conduct;

Definition of Director extended:

The definition of "director" in the Act includes a member of the Board of a company or an alternate director;

- For purposes of those sections which deal with qualification, eligibility (S69), Directors Code of Conduct (S76), Liability (S77), and Indemnity and Insurance (S78), the definition is extended to include an alternate director, prescribed officer (see definition on page 16), 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);

- The Section relating to Indemnification and Insurance also applies to a former director;
- For purposes of Section 75 (Directors personal financial interests), the definition is extended to include an alternate director, prescribed officer, person who is a member of a committee of the Board (irrespective of whether the person is also a member of the company's board), and also a "related person" when used in reference to a director, has the meaning set out in Section 1 (see Table E on page 57), but also includes a second company of which the director or a related person is also a director, or a CC of which the director or a related person is a member. Section 75 does not apply to a member of an audit committee (per Section 48 of the Amendment Act).

Definition of Prescribed Officer:

- Regulation 38 sets out the definition of a prescribed officer of a company (despite not being a director) for all purposes of the Act as follows: if that person: –
  a) exercises general executive control over the management of the whole, or a significant portion, of the business and activities of the company, or
  b) regularly participates to a material degree in the exercise of general effective control over, and management of the whole, or a significant portion, of the business and activities of the company;
- The Regulation applies to such a person irrespective of any particular title given by the company to an office held by that person in the company or a function performed by the person for the company.

Non-eligible and Disqualified Directors: Section 69

(Director in these sections includes alternate directors, prescribed officers, member of a committee of a board or audit committee, irrespective of whether or not the person is also a member of the company's board);

- The Act sets out qualifications and disqualifications of Directors, (Section 69), subject to Section 70(2);
- Section 69 specifically states that a company may in its MOI impose additional grounds of ineligibility or disqualification on its directors, and set out minimum qualifications to be met by directors of that company;
- A company must not knowingly permit an ineligible or disqualified person to serve or act as a director;
- A person who becomes ineligible or disqualified while serving as a director ceases immediately to be entitled to continue to act as a director, subject to Section 70(2);
- A person is ineligible if the person is:
  - A juristic person;
  - An unemancipated minor or under similar legal disability or;
  - Does not satisfy any qualification set out in the MOI.
- The Act sets out disqualifications as follows:

Section 69(8)(a):

- a person who has been declared a delinquent or a court has prohibited that person to be a director (or member of a CC);

Section 69(8)(b):

1. an unrehabilitated insolvent;
2. is prohibited in terms of any public regulation to be a director;
3. any person removed from an office of trust because of misconduct involving dishonesty;
4. any person convicted of offences in the Republic or elsewhere, and imprisoned without the option of a fine, or fined more than the prescribed amount, for fraud, theft, forgery, perjury or an offence involving fraud, misrepresentation or dishonesty or in connection with the promotion, formation or management of a company or under this Act, the Insolvency Act, CC's Act, Competition Act, FICA, Security Services Act, Prevention and Combating of Corruption Actitivies Act. [Regulation 39(4) – the prescribed minimum value of a fine upon conviction for these offences which would result in automatic disqualification as per this point 4 is R1 000].

The disqualifications listed in 3 and 4 contained in S69(8)(b) above will end at the later of five years after the date of removal from office or the completion of any sentence imposed for the relevant offence, or at the end of one or more extensions as determined by a court;

Note: on application, a court may exempt a person from the application of any of the provisions listed in [S69(8)(b)];

Section 69(11A) – inserted by the Amendment Act – The Registrar of the court must upon (a) the issue of a sequestration order (b) the issue of an order for the removal of a person from any office of trust on the grounds of misconduct involving dishonesty, or (c) a conviction for an offence referred in the block above (no.4), send a copy of the relevant order or particulars of the conviction to the Commission.

Delinquent Directors and Directors on Probation: Section 162

- The Act introduces a remedy to shareholders and other stakeholders (namely the company, director, company secretary, prescribed officer, a registered trade union that represents employees of the company or other representative of the employees) to hold directors accountable by an application to Court, to : declare a director delinquent (and thus prohibited from being a director) or under probation (and restricted from serving as a director in terms of the conditions of the probation). Refer Table A and B (pages 53 and 54) for specific provisions relating to these applications;
- The director in question must be a current director of the company or within the 24 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;

Board of Directors: Section 66 and 70

- The MOI may provide for the direct appointment and removal of directors by any person named therein;
- The Board may discharge a director under certain specific circumstances without shareholder approval including negligence or dereliction of duty;
- 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

[Note: as the majority of directors should be non-executive directors it would suffice for only non-executive directors to be elected]. Each director to be appointed by a separate resolution;

- A director may be appointed on a temporary basis;
- Minimum number of directors per category of company:
- For Profit Companies (private or personal liability company): One or more directors required to be appointed;
- Public (Limited) and Non-Profit Companies: Three or more are required, in addition to the minimum number of directors that the company must have to satisfy any requirement, whether in terms of the Act or its MOI, to appoint an audit committee, or a social and ethics committee (per Section 44 of the Amendment Act);
- The MOI may provide for a higher minimum number of directors than those required by the Act;
- Section 66(11) – A failure by a company at any time to have the minimum number of directors does not limit or negate the authority of the Board or invalidate anything done by the Board or the company;
- Section 66(12) – inserted by the Amendment Act: Any particular director may be appointed to more than one committee and when calculating the minimum number of directors required for a company, any such director who has been appointed to more than one committee must be counted only once.

Election of Board Committees: Section 72

- Board Committees may appoint non-directors to a Committee; (as long as they are not disqualified or ineligible);
- Such persons shall not have a vote. The Board may delegate to the Committee any of the authority of the Board;
- The creation of a committee, delegation of authority or action taken does not alone satisfy or constitute compliance by a director with the required duty of a director to the company;
- The Minister may by regulation prescribe the category of company that must have a Social and Ethics Committee if it is desirable in the public interest, having regard to annual turnover, its workforce size, or the nature and extent of the activities of such companies, and may also prescribe the functions to be performed by the Social and Ethics Committee, and the rules governing the composition and conduct of the same.

Social and Ethics Committees: Regulation 43:

The Minister has prescribed the categories of companies required to form a Social and Ethics Committee in terms of Regulation 43, as follows:

- Every SOC Ltd company and every listed public company, and any other company that has in any two of the previous five years, scored above 500 points in terms of Regulation 26(2);
- An exemption can be applied for by these companies;
- The committee must comprise not less than three directors or prescribed officers of the company, at least one of whom must be a director who is not involved in the day-to-day management of the company's business, and must not have been so involved within the previous three financial years;

- A company required to have a Social and Ethics Committee is required to elect members to that Committee at each Annual General Meeting of the company;
- The board must appoint an advisory panel to the committee who represent the community and public interest having regard to the location and nature of the company's activities;
- Regulation 43 sets out the functions of the committee in detail.

Board Meetings: Section 73

- A director may call a meeting of the board at any time and a Board meeting is 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.
- A company's MOI may specify a higher or lower percentage or number in substitution for those set out above;
- Board meetings may be conducted by electronic communication (EC) or one or more of the directors may participate in the meeting by EC (see requirements on page 34);
- The board may determine from time to time the requirement for notice for meetings (form and time for giving notice), as long as this complies with the MOI or rules and no meeting may be convened without notice to all the directors subject to the scenario where all the directors of the company acknowledge actual receipt of the notice, are present at a meeting or waive notice of the meeting, then the meeting may proceed even if the company failed to give the required notice of that meeting or there was a defect in the giving of the notice;
- A majority of the directors must be present in person or by electronic communication before a vote may be called at the meeting;
- Each director has one vote on a matter before the board, and a majority of votes cast on a resolution is sufficient to approve that resolution, and in the case of a tied vote, the chair may cast a deciding vote if he has not previously voted. In all other instances the motion is not carried.

Removal of Directors: Section 71 and Section 137(5)

- Despite anything to the contrary in the MOI or rules or agreement between a company and director or between any shareholders and a director, a director may be removed by an ordinary resolution adopted at a shareholders meeting by the persons entitled to exercise voting rights in an election of that director provided that director has been given notice of the meeting and the resolution and has been afforded a reasonable opportunity to make a presentation in person or through a representative to the meeting before the resolution is put to vote;
- Under certain specific circumstances, the Board, (as long as the company has more than two directors), may remove a director without shareholder approval -Section 71(3) provides that where a director or shareholder alleges that a director has become disqualified or ineligible [other than on the grounds per Section 69(8)(a)], incapacitated, or has neglected or been derelict in performance of the functions of a director, the Board may remove that director;
- A director may also be removed from office under certain circumstances during business rescue proceedings (see page 38).

Personal Financial Interests of Director: Section 75

- A director (including one appointed as a member of a Board Committee), is required to disclose his personal financial interest in respect of a matter to be considered at a meeting of the board (this is also applicable to a related person to him and to an alternate director and prescribed officer);
- He must disclose his interest before it is considered by a meeting of the Board [as set out in Section 75(4)] and recuse himself by leaving the meeting, without taking part in the discussion (Note: the previous Act did not require the director to recuse himself);
- This section does not apply to certain directors in certain circumstances – see Table F on page 58 (leniency and exemptions).

Section 75(7) – as amended by the Amendment Act: A decision by the Board, or transaction or agreement approved by the Board is valid despite any personal financial interest of the director or person related to him only if it was approved following disclosure of that interest or despite there being lack of disclosure, the decision was subsequently ratified by ordinary resolution of the shareholders following disclosure of that interest or has been declared valid by a court (on application by any interested person).

Codified Regime of Directors Duties: Section 76

- A codified regime of directors' duties is introduced in the Act;
- Section 66 places a positive duty on the directors to manage the company;
- Section 76 applies to certain non-directors, i.e to persons appointed to committees who are not directors, for example a member of the audit committee, alternate directors, and a prescribed officer;
- Section 76 does not exclude the common law but rather expands on it, while retaining much of the common law intact;
- Section 76 therefore promotes higher thresholds of transparency, corporate governance and standards of accountability to directors, in line with international best practice;
- Section 76 states that a director:
  - act in good faith and for a proper purpose;
  - has a duty to act in the best interests of the company;
  - has a duty to exercise care, skill and diligence;
  - has a duty to avoid conflicts of interest;

  See Table C on page 55 for an expansion of Section 76.

General Liability of Directors and Prescribed Officers: Section 77

A "director" in Section 77 includes an alternate director, prescribed officer, a person who is a member of a committee of a board of a company, or of the audit committee of a company irrespective of whether or not the person is also a member of the company's board;

Such a director, is liable for:

- a breach of fiduciary duty (in accordance with the principles of the common law), 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);

- in accordance with the principles of common law relating to delict 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;

Section 77(3) sets out specific liabilities as follows:

Directors are liable for loss, damages or costs sustained by the company as a direct or indirect consequence of the director having:

- S77(3)(a) – acted in the name of the company despite knowing he did not have the authority to do so;
- S77(3)(b) – acquiescing to carrying on of company's business despite knowing that it was being conducted contra to Section 22 (reckless trading);
- S77(3)(c) – party to an act or omission by the company despite knowing that it was calculated to defraud a creditor, employee or shareholder, or had another fraudulent purpose;
- S77(3)(d) for signing or consenting to the publication of any financial statements that were false or misleading in a material respect or a prospectus which contained an untrue statement, despite knowing that the statement was false, misleading or untrue, [subject to S104 (3) – liability will not attach if there were reasonable grounds for the director to believe the statement was true];
- S77(3)(e) for being present at a meeting or for knowingly consenting to or failing to vote against:
  - (i) the issue of unauthorised shares, which had not been authorised;
  - (ii) the issuing of authorised securities despite knowing that such issue was inconsistent with Section 41;
  - (iii) for granting unauthorised options;
  - (iv) the provision of financial assistance to any person contemplated in S44 for the acquisition of securities of the company despite knowing that the provision was inconsistent with S44 or the company's MOI;
  - (v) the provision of financial assistance to a director for a purpose contemplated in S45 despite knowing that the provision of financial assistance was inconsistent with that section or the company's MOI;
  - (vi) a resolution approving a distribution despite knowing that the distribution was contrary to S46;
  - (vii) the acquisition by the company of any of its shares or the shares of its holding company despite knowing that the acquisition was contrary to S46 or 48;
  - (viii) an allotment by the company despite knowing that the allotment was contrary to any provision of Chapter 4 of the Act.
- for granting unauthorised options;
- for agreeing to the granting of financial assistance to directors or other parties, when not in accordance with requirements (Section 45);
- for knowingly failing to vote against a share purchase which did not accord with legislative requirements;

- Section 46 – a director will only be liable for failing to vote against a distribution if immediately after so voting, the company failed to satisfy the solvency and liquidity test and this was reasonably predictable;

Liability is joint and several with other parties found liable in the Act;

Action to recover loss, damages or costs may not commence more than three years after the act or omission.

Indemnification and Directors' Insurance:

Section 78(2): Director may not be relieved of liability

- Any agreement, provision in the MOI or rules of the company, or resolution which directly or indirectly relieves a director of liability in regard to the duties contemplated in sections 75 and 76 and liability contemplated in section 77 or which serves to negate, limit or restrict any legal consequence arising from the act or omission that constitutes wilful misconduct or willful breach of trust on the part of the director, is void;

Section 78(3): Indemnity of directors/Company may advance legal expenses:

- The provisions of this section are in addition to any common law consistent with the section;
- A company may,if authorised in its MOI:
  a) advance expenses to a director to defend litigation in any proceedings arising out of his/her service to the company;
  b) directly or indirectly indemnify the director for expenses as per (a) above irrespective of whether it has advanced those expenses if the proceedings are (i) abandoned or exculpate the director or (ii) arise in respect of any liability for which the company may indemnify the director, in terms of subsection (5) and (6), however may not so indemnify the director if:
     (i) the director has had proceedings instituted against him/her regarding Sections 77(3)(a) to (c) [see page 21] or for (ii) willful misconduct or breach of trust (unless (s)he has been exculpated);

     A company may not indirectly or directly pay any fine that may be imposed on the director or on a director of a related company as a consequence of that director having been convicted of an offence, unless the conviction was based on strict liability, subject to subsection 3A (Amendment Act) – see Table F on page 58 (leniency).

A company may not indemnify a director of liability arising from Section 77(3) (a), (b) or (c) or from wilful misconduct or wilful breach of trust or in terms of any fine as per above.

Section 78(7): Directors' Insurance:

- the company may purchase insurance to protect the company, or the director against liability and expenses as contemplated in this section;

Section 214: false statements reckless conduct and non-compliance:

A person is guilty of an offence if that person is:

(1)(a) party to the falsification of any accounting records of a company or

(1)(b) with a fraudulent purpose knowingly (see definition on page 51) provided false or misleading information or

(1)(c) was knowingly a party to an act or omission by a company calculated to defraud a creditor or employee of the company, or a holder of the company's securities or with another fraudulent purpose, or

(1)(d) is a party to the preparation, approval, dissemination or publication of a prospectus or a written statement contemplated in Section 101, that contains an untrue statement as defined and described in Section 95.

Section 214(3) it is an offence to fail to satisfy a compliance notice issued in terms of this Act, however should an administrative fine have been imposed by a court in respect of the non-compliance, then no person can also be prosecuted for such an offence;

Section 214(4) [inserted by the Amendment Act] states that a person who contravenes Section 99(1) to (9) (which deals with general restrictions on offers to the public) – and if that person is a company, every director or prescribed officer of the company who knowingly was a party to the contravention is (a) guilty of an offence and (b) liable to any other person for any losses sustained as a consequence of that contravention.

Section 20:

Each shareholder has a claim for damages (a personal claim) against any person including a director who intentionally, fraudulently or due to gross negligence causes the company to do anything inconsistent with the Act or any limitation, restriction or qualification in terms the MOI (unless the action has been ratified by shareholders). (Note: An action may not be ratified if it is in contravention of the Act).

Section 22:

A company must not carry on its business recklessly, with gross negligence with intent to defraud any person or for any fraudulent purpose.

Section 218: Civil actions

A shareholder (and any other stakeholder) can also have a claim against the directors or any person who contravenes the Act for damages for any loss or damaged suffered as a result of that contravention – i.e the action does not need to be fraudulent or carried out with gross negligence for a valid claim in terms of this Section.

Sections 20 and 218 of the Act enable shareholders to sue directors/ officers for civil damages, or any losses suffered by them.

NB: Section 218: Subject to any provision in the Act specifically declaring void an agreement, resolution or provision of an agreement, MOI or rules of a company, nothing in the Act renders void any other agreement, resolution or provision of an agreement, MOI or rules of a company that is prohibited, voidable or that may be declared unlawful in terms of this Act, unless a court has made a declaration to that effect regarding that agreement, resolution or provision.

Section 165: Derivative Actions

- A person may serve a demand upon a company to commence or continue legal proceedings, or take related steps, to protect the legal interests of the company, if that person –
  a) is a shareholder or person entitled to be registered as a shareholder of the company or of a related company;
  b) is a director or prescribed officer of the company or of a related company;
  c) is a registered trade union that represents employees of the company, or another representative of employees of the company, or
  d) has been granted leave of the court to do so, which may be granted only if the court is satisfied that it is necessary or expedient to do so to protect a legal right of that other person.

7. SHAREHOLDERS

– (Chapter 2, Part F)

The Act introduces flexibility regarding the manner and form of shareholder meetings, the exercise of proxy rights and standards for the adoption of ordinary and special resolutions;

Proxies

- Section 58: At any time, a shareholder may appoint any individual including an individual who is not a shareholder of that company as a proxy to speak at, participate in and vote at a meeting of shareholders or give or withhold written consent on behalf of the shareholder to a decision contemplated in Section 60;
- A proxy is entitled to exercise or abstain from exercising any voting right of the shareholder without direction, except if the MOI or the instrument appointing the proxy directs him/her.
- A proxy appointment must be in writing, dated and signed by the shareholder and remains valid for one year after the date on which it was signed or any longer or shorter period expressly set out in the appointment;
- A shareholder may appoint two or more persons concurrently as proxies and may appoint more than one proxy to exercise voting rights attached to different securities held by the shareholder;

Notices

- Section 62: Except as otherwise provided for in the company's MOI, the company must ensure that notice of each meeting is delivered to each shareholder of the company as of the record date for the meeting as follows:

Public companies or NPC (that has members)	15 business days
All other categories of companies	10 business days

A company's MOI may provide for failure to give required notice or a defect in the notice may be condoned if:

- All the holders of the shares entitled to be voted in respect of each item on the agenda acknowledge actual receipt of the notice and;
- Are present at the meeting and;
- Waive notice of the meeting or;
- In the case of a material defect in the manner and form of the notice, ratify the defective notice.

Compulsory AGM's

- A public company must convene the first Annual General Meeting (AGM) of its shareholders no more than 18 months after the company's date of incorporation, and thereafter once in every calendar year but no more than 15 months from the date of the previous AGM.

Shareholders Meetings:

- Section 61: The Board or any other person specified in the company's MOI or rules may call a meeting of shareholders at any time;

- Subject to Section 60, a company must hold a meeting when:
  - The board is required by the Act or the MOI to refer a matter to shareholders for decision (for example the Act requires this in relation to fundamental transactions);
  - Whenever required in terms of Section 70(3) to fill a vacancy on the Board;
  - When required by the MOI;
  - When an AGM of a public company is required;
  - When one or more written and signed demands for a meeting are delivered to the company and each demand describes the purpose for which the meeting is proposed, and in aggregate, the demands for substantially the same purpose are made and signed by the holders, as of the earliest time specified in any of those demands, of at least 10% of the voting rights entitled to be exercised in relation to the matter that is proposed for consideration at the meeting. A company's MOI may specify a lower percentage than 10%. If such a demand is received, the board or any other person specified in the company's MOI or rules must call a shareholders meeting.

Section 60: Shareholders acting other than at a meeting:

A resolution that could be voted on at a shareholders meeting may instead be (a) submitted for consideration to the shareholders entitled to exercise voting rights in relation to the resolution and; (b) voted on in writing by shareholders entitled to exercise voting rights in relation to the resolution within 20 business days after the resolution was submitted to them;

Any business of a company that is required to be conducted at an AGM, in terms of the company's MOI or the Act, cannot be conducted in this manner.

Resolutions:

- Every resolution adopted is either:
  - A special resolution, or an ordinary resolution – see Table I on page 62;
  - Section 65(8): Note: the minimum % of 51% will however still apply in the removal of a director under Section 71 (see page 19).

Quorum:

Section 64: Votes quorum

- The quorum for all meetings is the presence at the meeting of the holders of at least 25% of all of the voting rights that are entitled to be exercised in respect of at least one matter to be decided on at the meeting and a matter to be decided on at the meeting may not begin to be considered unless sufficient persons are present at the meeting to exercise in aggregate at least 25% of all of the voting rights that are entitled to be exercised on that matter at the time when the matter is called on the agenda;
- NOTE: the MOI may lower or higher the % required above.

Person quorum

- Irrespective of the votes quorum if a company has more than two shareholders, a meeting may not begin or a matter may not be debated unless at least three shareholders are present and the requirements of the "votes" quorum above or the MOI, if different, are also met.

- In other words despite any percentage figures as per the votes quorum or in any provisions of the company's MOI, if there are more than two shareholders, a meeting may not begin unless at least three shareholders are present;
- Refer to Table K on page 63 for list of actions required to be ratified by special resolution in terms of Section 65(11).

8. ACCOUNTING RECORDS, FINANCIAL STATEMENTS, FINANCIAL REPORTING STANDARDS – AUDIT AND INDEPENDENT REVIEW

– (Chapter 2 Part C of the Act)

The Act places increased onus and liability on preparers of financial statements.

- Some key provisions are as follows:

Section 28: Accounting records

- All companies must keep accurate and complete accounting records (see definition on page 51) in one of the official languages of RSA at its registered office (a) as necessary to enable the company to satisfy its obligations in terms of this Act or any other law with respect to the preparation of financial statements and (b) including any prescribed accounting records, which must be kept in the prescribed manner and form. It is an offence for a company to not adhere to these requirements;
- Regulation 25(2) states that the accounting records must provide an adequate information base to (a) enable the company to satisfy all reporting requirements applicable to it, as set out in Section 28(1) read with Section 29(1), and (b) to provide for the compilation of financial statements, and the proper conduct of an audit, or independent review, of its annual financial statements, as applicable for that particular company;
- Regulation 25(3) sets out information/documentation that should be included in the accounting records of a company;
- Accounting records may be kept in electronic format, subject to certain conditions – see page 35;

Section 29: Financial statements

- If a company provides any financial statements (including annual financial statements) to any person for any reason, these must satisfy the requirements as set out in Section 29(1) of the Act;

Any such statements must not be false or misleading in any material respect or incomplete in any material particular. If they are in the form of a summary, these summaries must comply with prescribed requirements for summaries. Non compliance is an offence.

Section 29(6): Subject to Section 214(2), it is an offence to prepare or be party to the preparation, approval, dissemination or publication of any financial statement (including any annual financial statements) as contemplated in Section 30, knowing that those statements fail in a

material way to comply with the requirements as listed in Section 29(1), or are materially false or misleading. The Act places increased onus and liability on preparers of financial statements [Section 214(1)(d)].

Financial Reporting Standards

S29(4) The Minister after consulting with the Financial Reporting Standards Council (FRSC) may make regulations prescribing the financial reporting standards or the form and content requirements for summaries. Regulation 27 has been published in this regard.

Section 30: Annual financial statements (AFS)

- All companies are required to produce annual financial statements (AFS) each year within 6 months after the end of their financial year which are:
  - S30(2)(a): Audited in the case of a public company or
  - S30(2)(b): In the case of any other profit or non-profit company, –
    - (i) Audited if so required by the regulations made in terms of subsection 7, taking into account:

      inter alia whether it is desirable in the public interest, having regard to the economic or social significance of the company as indicated by any relevant factors including –

      (aa) its annual turnover;

      (bb) the size of its workforce;

      (cc) the nature and extent of its activities, or
    - (ii) Be either (aa) audited voluntarily if the company's MOI or a shareholders resolution so requires or if the company's board has so determined or (bb) independently reviewed in a manner that satisfies the regulations made in terms of subsection 7, subject to Section 30(2A) (see below);

Note Section 30(7): The Minister may make regulations including different requirements for different categories of companies, prescribing (a) the categories of profit or non-profit companies that are required to have their annual financial statements audited as contemplated in subsection (2)(b)(i) and (b) the manner form and procedures for the conduct of an independent review under subsection (2)(b)(ii)(bb) as well as the professional qualifications, if any, and duties of persons who may conduct such reviews and the accreditation of professions whose members may conduct such reviews;

Section 30(8): inserted by the Amendment Act: Despite Section 1 of the Auditing Profession Act, an independent review of a company's AFS required by this section does not constitute an audit within the meaning of that Act.

S30(2A) of the Amendment Act: Exemption of Owner-Managed Companies

If, with respect to a particular company, every person who is a holder of, or has a beneficial interest in, any securities issued by that company is also a director of the company, that company is exempt from the requirements in this section to have its annual financial statements audited or independently reviewed, but this exemption –

a) does not apply to the company if it falls into a class of company that is required to have its annual financial statements audited in terms of the regulations contemplated in subsection 7(a); and

b) does not relieve the company of any requirement to have its financial statements audited or reviewed in terms of another law or in terms of any agreement to which the company is a party.

The Regulations have been published in terms of Section 30(7), and provide as follows:

Regulation 26 sets out the criteria for determining the "public interest score" for purposes of Regulations 27 to 30, 43, 127 and 128;

Regulation 27 – Financial Reporting Standards;

Regulation 28 – Categories of company to be audited;

Regulation 29 – Independent Review of Annual Financial Statements;

Regulation 30 – Company Annual Returns;

Regulation 43 – Social and Ethics Committees;

Regulation 127 – Restrictions on Business Rescue Practitioners;

Regulation 128 – Tariff of Fees for Business Rescue Practitioners;

Regulation 26: Every company must calculate its "public interest score" as follows:

PUBLIC INTEREST SCORE (for purposes of Regulations 27–30, 43, 127 and 128)
Every company must calculate its public interest score for each financial year, calculated as the sum of the following: a) number of points equal to the average number of employees of the company during the financial year; b) one point for every R1 million (or portion thereof) in third party liability of the company at the financial year end; c) one point for every R1 million (or portion thereof) in turnover during the financial year, and d) one point for every individual who at the end of the financial year, is known by the company – (i) in the case of a profit company, to directly or indirectly have a beneficial interest in any of the company's issued securities, or (ii) in the case of a non-profit company, to be a member of the company or a member of an association that is a member of the company.

Regulation 27: Financial Reporting Standards

Refer to Table H on pages 60 to 61 for a summary of the financial reporting standards scoring system as per the Regulations.

Regulation 28: Categories of Companies required to be audited

- This Regulation applies to a company unless exempt in terms of Section 30(2A):
- In terms of Regulation 28, the following categories of companies are required to have an audit, conducted by a registered auditor:
  1. A public company (listed and unlisted);
  2. State owned companies (SOC Ltd);
  3. Any profit or non-profit company, if, in the ordinary course of its primary activities holds assets in a fiduciary capacity for persons who are not related to the company and the aggregate value of such assets held at any time during the financial year exceeds R5 million;

4. Any non-Profit company, if it was incorporated –
   a) Directly or indirectly by the state, an organ of state, a state-owned company, an international entity, a foreign state entity or a foreign company, or
   b) Primarily to perform a statutory or regulatory function in terms of any legislation or to carry out a public function at the direct or indirect initiation or direction of an organ of state, a state-owned company, an international entity, or a foreign state entity, or for a purpose ancillary to any such function; or
5. Any other company whose public interest score, for the particular financial year as calculated in accordance with Regulation 26(2) – is
   (i) 350 or more, or
   (ii) Is at least 100, if its annual financial statements for that year were internally compiled.

Internally or Independently compiled Financial Statements:

- Financial statements may be either internally or independently compiled, which determines the financial reporting standard prescribed.
- Regulation 26(1)(e) defines "independently compiled and reported" as annual financial statements that are prepared –
  (i) by an independent accounting professional (see below);
  (ii) on the basis of financial records provided by the company and
  (iii) in accordance with any relevant financial reporting standards.
- Regulation 27(2) states that for all purposes of Regulation 27, 28 and 29, a company's financial statements must be regarded as having been compiled internally unless they have been independently compiled and reported as defined in Regulation 26(1)(e). Internally compiled means that the financial statements were prepared "in-house" or by the company's staff.

Regulation 26(1)(d): An "independent accounting professional" being a person who:

(i) Is
   (aa) A registered auditor in terms of the Auditing Profession Act, or
   (bb) A member in good standing of a professional body that has been accredited in terms of Section 33 of the Auditing Profession Act, or
   (cc) Qualified to be appointed as an accounting officer of a CC in terms of Section 60 of the Close Corporations Act and

(ii) Does not have a personal financial interest in the company or a related or inter-related company, and

(iii) is not a person as described in table 17 on page 52;

(iv) Is not related to any person who falls within any of the criteria set out in clause (ii) or (iii);

Regulation 29: Independent Review of annual financial statements

- This Regulation applies to a company unless exempt in terms of Section 30(2A), or unless the company is required by its own MOI or in terms of the Act or Regulation 28 to have its annual financial statements for that financial year audited, or has voluntarily had its annual financial statements for that year audited;

- The following companies are required to have an independent review (in accordance with ISRE 2400), by the following persons:
  a) In the case of a company whose public interest score for the particular financial year was at least 100, by a registered auditor or a member in good standing of a professional body accredited in terms of Section 33 of the Auditing Professions Act;
  b) In the case of a company whose public interest score for the particular financial year was less than 100, by a person contemplated in paragraph (a) above, or a person who is qualified to be appointed accounting officer of a Close Corporation in terms of the Close Corporations Act;
- An independent review of a company's annual financial statements cannot be carried out by an independent accounting professional who was involved in the preparation of the said annual financial statements;

Note: a company not requiring an audit may be audited voluntarily, either in terms of the Act or in terms of its MOI.

Section 30(3): The annual financial statements must include an auditors report if the statements are audited, and a report by the directors with respect to the state of affairs, the business and profit or loss of the company or group of companies (if the company is part of a group) including any matter considered material in enabling the shareholders to appreciate the company's state of affairs, and any prescribed information, and be approved by the board and signed by an authorised director, and be presented to the first shareholders meeting after the statements have been approved by the board;

Section 76(5)(b) states that directors of a company may rely on information provided by accountants.

Annual General Meeting Requirement

- The Act only requires a public company and SOC Ltd to call an AGM within eighteen months of its date of incorporation and thereafter once in every calendar year, but no more than fifteen months of the date of the previous AGM to present the audited annual financial statements to the shareholders;
- The Act does not require a private company to have an AGM;
- However, the Board is required to approve the annual financial statements, and these are required to be presented to the first shareholders meeting after they have been so approved (there is no time frame stipulated), unless exempted.

9. ENHANCED ACCOUNTABILITY AND TRANSPARENCY

– Chapter 3

Section 84: Chapter 3 applies to:

a) every public company* (see below),

b) every company that is a state-owned company**(see below),

c) a private company, a personal liability company, or non-profit company:

(i) if the company is required by this Act or regulations to have its annual financial statements audited every year: Provided that the provisions of Parts B (Company Secretary requirements) and D (Audit Committees) of Chapter 3 will not apply to such a company;

(ii) otherwise only to the extent that the company's MOI so requires as contemplated in Section 34(2) – i.e voluntarily or in terms of Section 84(1)(c);

The companies listed in (a) to (c) above are hereinafter referred to as the "relevant" companies.

*[*subject to Section 5(6), and also Section 94(1) – i.e Chapter 3 applies to a company subject to Section 64 of the Banks Act [but Sections 94(2)–(4) will not apply to the appointment of an audit committee by any such company], and Chapter 3 will not apply to a company granted an exemption in terms of the Banks Act];*

*[**except where exempted by the Minister in terms of Section 9: e.g local government – state owned companies owned by a municipality; Section 94(3) – if there is conflict between Chapter 3 and the Public Audit Act, the latter will prevail, where the Auditor-General has elected to conduct an audit for any financial year, then that SOC Ltd is not required to appoint an auditor for that financial year];*

Chapter 3 requires the relevant companies [apart from those referred to in S84(1)(c)(i)] to:

- Appoint a company secretary;
- Appoint an auditor and establish an audit committee;

*Regulation 43 – certain categories of company are required to set up a Social and Ethics Committee (unless exempted), see pages 18 to 19.

Directors

Section 66 – as amended per Amendment Act:

- In the case of a public company (or a non-profit company), the minimum number of directors required to be appointed is three, which is in addition to the minimum number of directors that the company must have to satisfy any requirement (whether in terms of the Act or the company's MOI) to appoint an audit committee or a Social and Ethics Committee;

Section 66(12) inserted by the Amendment Act – Any particular director may be appointed to more than one committee of the company, and when calculating the minimum number of directors required for the company, any such director who has been appointed to more than one committee must be counted only once (subject to the company's MOI or as otherwise provided for in the Act).

Company Secretary

- Must be permanently resident in SA and have the requisite knowledge and experience to act as such, is accountable to the Board, duties are set out in the Act.

Appointment and rotation of auditor (S90)

- Upon its incorporation and each year at its annual meeting, relevant company must appoint an auditor, who must be a registered auditor and acceptable to its audit committee. Section 90(1A) inserted by the Amendment Act states that the companies voluntarily electing an audit –

must only appoint an auditor if the requirement to have its annual financial statements audited applies to that company when it is incorporated, or at the AGM at which the requirement first applies to the company and at each AGM thereafter;

- The auditor must not be a director, prescribed officer, or employee or consultant of the company who was or has been engaged for more than one year in the maintenance of any of the company's financial records or the preparation of any of its financial statements or a director, officer or employee of a person performing the secretarial work for the company. Neither must the auditor be a person who, alone or with a partner or employees, habitually or regularly performs the duties of secretary or bookkeeper of the company, or is related to any such person, or a person who at any time during the five financial years immediately preceding the date of appointment was a person contemplated above;
- Any firm appointed as auditor must, in order to be a valid appointment, specify the name of the individual member of the firm who will undertake the audit and that individual must also meet the requirements of the paragraph above, and;
- The same individual may not serve as the auditor or designated auditor for more than five consecutive financial years. [Note: Schedule 5, Item 7(11) – inserted by the Amendment Act: these five years must be calculated from the date of commencement of the Act];
- If an individual has served as auditor or designated auditor for two or more consecutive financial years and then ceases to be the auditor, that individual may not be appointed again until after the expiry of at least 2 further financial years;
- Section 93 sets out the rights and restricted functions of auditors and cannot perform any services that would place him in a conflict of interest as determined by the Independent Regulatory Board for Auditors (IRBA) in terms of the Auditing Profession Act OR any other services determined by its audit committee;

Audit committee (S94)

- At each AGM, a SOC Ltd, public company or one that is required only by its MOI to have an audit committee as contemplated in sections 34(2) and 84(1)(c)(ii) must elect an audit committee (i.e the shareholders and not the board of directors) must elect an audit committee for the following financial year (subject to certain exemptions); It must have at least three members who must be non-executive directors of the company;
- Each member of the committee must therefore be:

  a director, who satisfies the minimum qualification requirements as per Section 94 and as prescribed by the Minister by Regulation (refer to page 52). Regulation 42 has been published in this regard;

The audit committee has the following duties with respect to the financial year for which it is appointed:

a) nominate for appointment by the Board and subsequent confirmation by the members, a registered auditor of the company, who is independent of the company;

b) determine fees to be paid to the auditor and the auditors terms of engagement;

c) ensure the appointment of the auditor complies with the Act and any other legislation governing auditors;

d) to determine the nature and extent of non-audit services the auditor may provide to the company or that auditor must not provide to the company, or a related company, (subject to the provisions of Chapter 3);

e) to pre-approve any proposed contract with the auditor for the provision of non-audit services to the company;

f) to prepare a report, to be included in the annual financial statements for that year – (i) describing how the audit committee carried out its functions (ii) stating whether or not the audit committee is satisfied that the auditor was independent of the company, and (iii) commenting in any way the committee considers appropriate on the financial statements, the accounting practices and internal financial control of the company, and

g) to receive and deal appropriately with any complaints from within or outside the company or on its own initiative relating to (i) the accounting practices or internal audit of the company (ii) to the content or auditing of the company's financial statements (iii) the internal financial controls of the company, or (iv) any related matter;

h) make submissions to the Board on any matter concerning the company's accounting policies, financial control, records and reporting, and

i) to perform such other oversight functions as may be determined by the board.

- Section 94(11): A company must pay all expenses reasonably incurred by its audit committee including the fees of any consultant or specialist engaged by the committee to assist it with the performance of its functions (if the audit committee considers it appropriate);

Note: Section 94(2)(a): If a holding company has an audit committee, the subsidiary does not require one – as long as the audit committee of the holding company will perform the functions required under Section 94 on behalf of the subsidiary company.

Additional sections in Act relating to enhanced accountability and transparency requirements:

Section 159: Confidential disclosures

- A relevant company must directly or indirectly –
  - Establish and maintain a system to receive confidential disclosures of any person as contemplated in Section 159 (see section on Whistle-blowers on page 44) and act on them, and
  - Routinely publicise the availability of that system to directors, secretaries, other officers, employees, registered trade unions of the company, a supplier of goods or services to a company or an employee of such a supplier.

10. ELECTRONIC SIGNATURES, COMMUNICATION AND SUBSTANTIAL COMPLIANCE

– (Chapter 1 Part A)

Section 6(12) provides that a signature or initial on a document may be made:

a) by or on behalf of a person by the use of an electronic signature or an advanced electronic signature, as defined in the Electronic Communications and Transactions Act, 2002;

b) by two or more persons, it is sufficient if:

   (i) all those persons sign a single document in person or as per (a) above;

   (ii) each person signs a separate duplicate original of the document, in person or as contemplated in (a) above, and in such a case, the several signed duplicate originals, when combined, constitute the entire document;

- Section 6(7): An unaltered electronically or mechanically generated reproduction of any document other than a share certificate may be substituted for the original for any purpose for which the original could be used in terms of the Act if that reproduction satisfies any applicable prescribed requirements as to the form or manner of reproduction;
- Section 51(2) relating to certificated securities (see definitions) states that a signature contemplated in terms of subsection (1)(b) of that section (i.e the certificated security must be signed by two persons authorised by the company's board) may be affixed to or placed on the certificate by autographic, mechanical or electronic means;
- Section 6(10): If, in terms of the Act, a notice is required or permitted to be given or published to any person, it is sufficient if the notice is transmitted electronically directly to that person in a manner and form such that the notice can be conveniently printed by the recipient within a reasonable time and at a reasonable cost;
- Section 6(11): Document, records or statements [other than a notice contemplated in Section 6(10)], which are required to be retained, may be so retained in an electronic original or reproduction of that document, as provided for in Section 15 of the Electronic Communications and Transactions Act and may be published, provided or delivered by electronic communication in a manner and form which enables them to be conveniently printed within a reasonable amount of time and at a reasonable cost or by giving notice (eg via a weblink) of its availability, a summary thereof and instructions for receiving the complete document;
- Thus Proxy forms, annual financial statements, prospectuses and annual reports may be lawfully created, signed, retained and sent electronically. Proxies sent electronically are valid for up to one year;
- A notice of meeting to shareholders as contemplated in Section 62 may be "in writing or electronic form" (unless the company's MOI provides otherwise);
- Faxes, telephone communications and conference calls – are all electronic communications which are suitable for establishing a "virtual" presence for purposes of meetings as contemplated in the Act;
- Section 63 relates to shareholders meetings and Section 73 refers to Board meetings of Directors and provides that a meeting of shareholders

and directors respectively may be conducted entirely by electronic communication or if held in person, one or more of the shareholders, directors or proxies may participate by electronic communication – so long as the methods employed enables all persons participating to simultaneously communicate with each other without an intermediary and to participate reasonably effectively in that meeting (and so long as the MOI allows for it). In such a case the notice of that meeting must inform shareholders/directors (whichever is applicable) of the availability of that form of participation, and provide any necessary information to enable shareholders or their proxies/directors – to access the available medium or means of electronic communication. Such access is at the expense of the shareholder or proxy/director, except to the extent that the company determines otherwise;

- Thus the definition of "present at a meeting" includes a "virtual presence" or representation by electronic proxy;
- Record retention will be complied with if an electronic original or reproduction is retained in terms of S15 of the Electronic Communications and Transactions Act 25 of 2002;
- Refer to page 11 for requirements regarding generating, maintaining and holding company records and registered office in SA.

REGULATIONS – REQUIREMENTS FOR DOCUMENTS TO BE HELD IN ELECTRONIC FORMAT
Regulation 32(5): If a company keeps its securities register in electronic form it must provide adequate precautions against loss of the records as a result of damage or failure of the media on which the records are kept and ensure that these records are capable of being retrieved to a readable and printable form; Regulation 25(6): if a company keeps any of its accounting records in electronic form the company must provide similar precautions as described above.

11. BUSINESS RESCUE

– (Chapter 6 of the Act)

The existing regime of judicial administration of failing companies is replaced by the Business Rescue Regime – which is largely self administered by the company – under independent supervision (and subject to Court intervention from time to time on application by any of the stakeholders);

The Chapter recognises the interests of shareholders, creditors, and employees, and provides for their respective participation in the development and approval of the business rescue plan;

- Business rescue means proceedings to facilitate the rehabilitation of a company that is financially distressed* by providing for:
  - the temporary supervision of the company and the management of affairs, business and property;
  - a temporary moratorium on the rights of claimants against the company or in respect of property in its possession;

- the development and implementation, if approved, of a plan to rescue the company by restructuring its affairs, business, property, debt and other liabilities, and equity in a manner that maximises the likelihood of the company continuing in existence on a solvent basis or if this is not possible, which results in a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company;

** financially distressed means: within the immediately ensuing six months: (i) it appears to be reasonably unlikely that the company will be able to pay all of its debts as they become due and payable, or (ii) it appears to be reasonably likely that the company will become insolvent;*

"affected person" in this section means: in relation to a company, (i) a shareholder or creditor of the company, (ii) any registered trade union representing employees of the company (iii) if any of the employees are not represented by a registered trade union each of those employees or their respective representatives;

Some of the key provisions relating to Business Rescue in the Act, are as follows:

Company resolution to begin proceedings (Section 129)

- The Board may resolve that the company voluntarily begin business rescue proceedings and place the company under supervision the board has reasonable grounds to believe that (a) the company is financially distressed and (b) there appears to be a reasonable prospect of rescuing the company;
- Such a resolution has no force or effect until it has been filed, and may not be adopted if liquidation proceedings have been initiated by or against the company;
- Within five business days after a company has adopted and filed a resolution, (or longer time as the Commission on application by the company may allow), the company must: (a) publish a notice of the resolution and its effective date to every affected person including a sworn statement of the facts relevant to the grounds on which the board resolution was founded and (b) appoint a business rescue practitioner (hereinafter referred to as "the practitioner") who satisfies the requirements of S138 and who has consented to his/her appointment in writing.

The Business Rescue Practitioner:

Qualifications: Section 138 read together with Section 88 of the Amendment Act:

A person may be appointed as a business rescue practitioner of the company only if the person:

a) is a member of good standing of (i) a legal, accounting or business management profession accredited by the Commission, or (ii) has been licensed as such by the Commission in terms of subsection (2) – see below;

b) is not subject to an order of probation in terms of Section 162(7);

c) would not be disqualified from acting as a director of the company in terms of Section 69(8);

d) does not have any other relationship with the company such as would lead a reasonable and informed third party to conclude that the integrity, impartiality or objectivity of that person is compromised by that relationship, and

e) is not related to a person who has a relationship contemplated in paragraph (d);

Section 138(2): For the purposes of subsection (1)(a)(ii), the Commission may license any qualified person to practice in terms of this Chapter and may suspend or withdraw any such licence in the prescribed manner;

Section 138(3)(b): The Minister may make regulations prescribing minimum qualifications for a person to practice as a BRP including different minimum qualifications for different categories of companies. Refer to Table J on page 63 and Table L on page 64 (Regulation 126);

Note: Section 88 of the Amendment Act seeks to establish a regulatory authority – so that regulation of the practitioner is not left to associations for self-regulation – the Commission is therefore set up as the suitable organ entrusted with the regulation of practitioners. The Minister is also empowered to make regulations regulating standards and procedures to be followed by the Commission in carrying out its licensing functions.

Objections to company resolution (Section 130)

- An affected person may, at any time after the adoption of a resolution and until the adoption of a business rescue plan, apply to a court for an order:
  a) setting aside the resolution on the grounds that:
     (i) there is no reasonable basis for believing that the company is financially distressed;
     (ii) there is no reasonable prospect for rescuing the company, or
     (iii) the company has failed to satisfy the procedural requirements set out in Section 129;
  b) for an order setting aside the appointment of the practitioner on the grounds that the practitioner (i) does not satisfy the requirements of Section 138 (ii) is not independent of the company or its management, or (iii) lacks the necessary skills, having regard to the company's circumstances, or
  c) requiring the practitioner to provide security in an amount and on terms and conditions that the court considers necessary to secure the interests of the company and affected persons.

Court order to begin business rescue proceedings (Section 131)

- An affected person in the paragraph above may apply to court for an order placing the company under supervision and commencing business rescue proceedings, in the event that the company has not taken a resolution as per S129;
- Such an applicant must then serve a copy of the application on the company and the Commission, and notify each affected person of the application in the prescribed manner;

Each affected person has a right to participate in the hearing of an application in terms of the sections referred to above (S129 and 131);

Sections 132 to 135 deal with duration of proceedings, general moratorium on legal proceedings against the company during Business Rescue, protection of property interests, post commencement finance.

Effect of business rescue on employees and contracts

Section 136 (as amended by Section 87 of the Amendment Act):

Section 136(1)(a): During a company's business rescue proceedings, employees of the company immediately before the beginning of those proceedings, continue to be so employed on the same terms and conditions, except to the extent that –

(i) changes occur in the ordinary course of attrition; or

(ii) the employees and the company in accordance with applicable labour laws, agree different terms and conditions, and

b) any retrenchment of any such employees contemplated in the company's business rescue plan, is subject to section 189 and 189A of the Labour Relations Act, 1995, and other applicable employment related legislation;

Section 136(2): Subject to subsection (2A) and despite any provision of an agreement to the contrary, during business rescue proceedings, the BRP may:

a) entirely, partially or conditionally suspend for the duration of the business rescue proceedings any obligation of the company that: –

(i) arises under an agreement to which the company was a party at the commencement of the business rescue proceedings and

(ii) would otherwise become due during those proceedings; or

b) apply urgently to a court to entirely, partially or conditionally cancel, on any terms that are just and reasonable in the circumstances, any obligation of the company contemplated in paragraph (a);

Section 136(2A): When acting in terms of subsection (2) –

a) a practitioner must not suspend any provision of (i) an employment contract; or (ii) an agreement to which Section 35(A) or 35(B) of the Insolvency Act, 1936, would have applied had the company been liquidated;

b) a court may not cancel any provision of (i) an employment contract, except as contemplated in subsection (1); (ii) an agreement to which section 35(A) or 35(B) of the Insolvency Act, 1936 would have applied had the company been liquidated, and

c) if a practitioner suspends a provision of an agreement relating to security granted by the company, that provision nevertheless continues to apply for the purpose of Section 134, with respect to any proposed disposal of property by the company.

Section 136(3): Any party to an agreement that has been suspended or cancelled or any provision which has been suspended or cancelled, in terms of subsection (2), may assert a claim against the company only for damages.

The Amendment Act amends Section 136, with the aim of restricting the powers of practitioners in the cancellation of contracts. Practitioners must therefore submit to court all contracts, including security contracts that (s)he intends to cancel for comfirmation of his or her intentions.

Section 87 of the Amendment Act thus has the effect of subjecting the powers of the practitioner to judicial scrutiny – in that during business rescue proceedings, a practitioner must approach a court by way of an application for the cancellation or otherwise of any agreement – and in so doing prevents arbitrary cancellation of security or retroactive repudiation of contracts.

Effect on shareholders and directors (Section 137)

- During proceedings any alteration in the classification or status of any issued securities of a company – other than by way of transfer of securities in the ordinary course of business, is invalid except if the court otherwise directs or such alteration is contemplated in and approved in the business rescue plan;
- The Board and directors (a) must continue to perform and exercise their functions and powers – subject to the authority of the practitioner, and (b)

have a duty to the company to exercise any management function within the company in accordance with the express instructions of the practitioner, to the extent that it is reasonable to do so, and (c) remains bound by the requirements of Section 75 concerning personal financial interests of the director or a related person, and (d) to the extent that the director acts in accordance with paragraphs (b) and (c), is relieved from the duties of a director as set out in Section 76 (codified regime of directors duties), and the liabilities set out in Section 77, other than Section 77(3)(a), (b) and (c) – see pages 20 and 21;

Sections 139 to 143 (Part B) deal with the removal and replacement of practitioners, general powers and duties, investigation of affairs of the company, directors co-operation with the practitioner and remuneration of the practitioner.

Section 144 – Part C – Rights of employees during business rescue

- Section 144 (2) of the Act protects the interests of employees by recognising them as preferred unsecured creditors in regard to any monies (remuneration, reimbursement for expenses or other amount of money relating to employment) which became due and payable by the company at any time before the beginning of the company's business rescue proceedings and which have not been paid to that employee before the beginning of those proceedings;
- During proceedings each employee may elect to exercise any rights set out in Chapter 6 either collectively through their trade union (if represented by a registered trade union), and in accordance with applicable labour law, or if not so represented by a registered trade union, then directly or by proxy through an employee organisation or representative, and are entitled to:
  a) notice of each court proceeding, decision, meeting or other relevant event concerning the business rescue proceedings – which notice must be given in the prescribed manner and form to employees at their workplace and served at the head office of the relevant trade union, and
  b) to participate in court proceedings arising during business rescue proceedings;
  c) to form a committee of employee's representatives, and
  d) to be consulted by the practitioner during the development of the business rescue plan and be afforded sufficient opportunity to review any such plan and prepare a submission contemplated in Section 152(1)(c) – which provides for employees to address a meeting convened to determine the future of the company;
  e) to be present and make a submission to the meeting as referred to in Section 152(1)(c) above, of holders of voting interests before a vote is taken on any proposed business plan;
  f) to vote with creditors on a motion to approve a proposed business plan to the extent that the employee is a creditor, and
  g) if the proposed plan is rejected, to (i) propose the development of an alternative plan or to (ii) present an offer to purchase the interests of one or more affected persons, both (i) and (ii) as contemplated in Section 153.

Section 145 – participation by creditors

- Each creditor is also entitled to the same rights as per (a), (b) and (g) listed above for employees and to formally participate in the proceedings to the extent provided for in Chapter 6 and also informally by making

proposals for a business rescue plan to the practitioner. In addition each creditor has the right to vote to amend, approve or reject a plan in a manner contemplated in Section 152, and if the plan is rejected, each creditor has a further right to (i) propose the development of an alternative plan, or (ii) present an offer to acquire the interests of any or all of the other creditors – both (i) and (ii) in the manner contemplated in Section 153;

- The creditors are entitled to form a creditors committee and through it, are entitled to consult the practitioner during the development of the plan.

Section 146 – participation by holders of company securities

- Each holder of an issued security of the company is entitled to participate as per items (a) and (b) above and to formally participate in the proceedings to the extent provided for in Chapter 6 and is entitled to vote to approve or reject a plan in a manner contemplated in Section 152, if the plan would alter the rights associated with the class of securities held by that person and if the plan is rejected, to propose the development of an alternative plan or to present an offer to purchase the interests of any or all the creditors or other holders of the company's securities in the manner contemplated in Section 153.

Section 147 and 148 – first meeting of creditors and employees representatives

- Within ten business days after being appointed, the practitioner must convene and preside over a first meeting of creditors (S147) and first meeting of employee's representatives (S148) at which meetings the practitioner must inform the creditors/employees whether the practitioner believes that there is a reasonable prospect of rescuing the company and may receive proof of claims by creditors and the creditors and employees respectively may determine whether or not a committee of creditors/ employees (whichever is applicable) should be appointed and if so, may appoint members to such a committee.

The Business Rescue Plan (Part D)

Sections 150 to 154 deal with the Development and Approval of the Business Rescue Plan.

- The practitioner, (after consulting with creditors, other affected persons and management of the company) must prepare a Business Rescue Plan for consideration and possible adoption at a meeting to determine the future of the company;
- Sections 150(2) and (3) and (4) sets out the list of information and Annexure that the plan should comprise of, which information be sufficient to facilitate affected persons in deciding whether or not to accept or reject the plan. It is divided into three parts, namely :
  - Part A – Background
  - Part B – Proposals
  - Part C – Assumptions and conditions;
- The plan must be published by the company within 25 business days after the date on which the Practitioner was appointed, or such longer time as may be allowed by (a) the court on application by the company or (b) the holders of the majority of the creditors' voting interests.

Meeting to determine future of company

- Section 151: The Practitioner must convene and preside over a meeting of creditors and any other holders of a voting interest, for the purpose of considering the proposed plan within ten business days after the publication of the plan, (and deliver notice thereof at least 5 days before the meeting to all affected persons).

Consideration of business rescue plan:

- Section 152: At the meeting the plan will either be preliminarily adopted or rejected. It will be preliminarily approved if it is supported by the holders of more than 75% of the creditors' voting interests that were voted and the votes in support of the plan included at least 50% of the independent creditors voting interests, if any, that were voted;
- If the proposed plan is not approved on a preliminary basis, the plan is rejected and it may be considered further only in terms of Section 153;
- If the proposed plan does not alter the rights of the holders of any class of the company's securities, approval of that plan on a preliminary basis constitutes also the final adoption of that plan, subject to satisfaction of any conditions on which that plan is contingent;
- If the plan does alter the rights of any class of holders of the company's securities, then (i) the practitioner must immediately hold a meeting of holders of that class whose rights will be affected and call for a vote by them to approve the adoption of the proposed plan, and (ii) if in such a vote, a majority of the voting rights that were exercised (aa) support adoption of the plan it will have been finally adopted (subject to conditions), or (bb) oppose adoption of the plan, the plan is rejected and may be considered further only in terms of Section 153;
- Section 152(4): If adopted, the plan is binding on the company and on each of the creditors and every holder of the company's securities of the company whether or not such a person was present at the meeting, or voted in favour of adoption of the plan or in the case of creditors, whether or not they proven their claims against the company;
- The company, under the direction of the practitioner must take all necessary steps to satisfy the conditions on which the plan is contingent and to implement the plan as adopted;
- Section 152(8): When the plan has been substantially implemented, the practitioner must file with the Commission, a "Notice of the Substantial Implementation of the Business Rescue Plan".

Discharge of Debts and Claims (Section 154)

- The plan might provide that if it is implemented in accordance with its terms and conditions, a creditor who has acceded to the discharge of the whole or part of a debt owing to them will lose the right to enforce the relevant debt or part of it;
- If a business rescue plan has been approved and implemented a creditor is not entitled to enforce any debt owed by the company immediately before the beginning of the business rescue process except to the extent provided for in the business rescue plan.

12. WINDING-UP OF SOLVENT COMPANIES AND DEREGISTRATION

– (Part G of Chapter 2 of the Act)

Despite the repeal of the 1973 Companies Act, winding up of insolvent companies will remain governed by Chapter 14 thereof, (until the Bankruptcy Act is a reality) and subject to the provision that if any conflict arises between Chapter 14 and the Act, the provisions of the Act will prevail.

The new Act governs the winding up of solvent companies and the deregistration of companies.

WInding-up of Solvent Companies:

- Section 79: A solvent company may be dissolved by: *(A) voluntary winding up – initiated by the company and conducted either by the company or by its creditors as determined by special resolution of the shareholders of the company (Section 80) or (B) by court order (Section 81)*;
- The procedure for applying for its dissolution as per the above 2 methods is set out in Part G of Chapter 2 and Item 9 of Schedule 5 of the Act;

Voluntary winding up of solvent company:

- Section 80: A solvent company may be wound up voluntarily if the company has adopted a special resolution to do so, which may provide for the winding-up to be by the company, or by its creditors, and such resolution must be filed with the Commission with the prescribed fee;
- Despite any provision to the contrary in a company's MOI, the company remains a juristic person and retains all powers as such while it is being wound up (voluntarily) however from the beginning of the process, it must stop carrying on its business except to the extent required for the beneficial winding up of the company, and all of the directors powers cease except to the extent specifically authorised in the case of winding up by the company, by the liquidator or the shareholders in a general meeting or in the case of a winding up by creditors, the liquidator or the creditors.

Winding-up of solvent companies by court order:

Section 81: Applicants can be:

- **The company** – if the company has resolved by special resolution that it be wound up by the court, or has applied to the court to have its voluntary winding up continued by the court;
- **The Business Rescue Practitioner** – when it becomes apparent that there is no reasonable prospect of the business being rescued;
- **Creditors** – one or more of the company's creditors apply to the court for an order to wind up the company on the grounds that the company's business rescue proceedings have ended either because the business rescue practitioner has filed with the Commission a notice of termination of the business rescue proceedings or a business rescue plan has been proposed or rejected [Sections 132(2)(b) and (c)(i)];
- **the company, one or more directors, one or more shareholders apply to court on the grounds that:**
  - (i) **Director(s)** – on basis of deadlock in the management of the company, and the shareholders are unable to break the deadlock,

and irreparable injury to the company is resulting or the company's business cannot be conducted to the advantage of shareholders generally as a result;

(ii) the shareholders are deadlocked in voting power and have failed for a period that includes at least two consecutive annual general meeting dates, to elect successors to directors whose terms have expired, or

(iii) it is otherwise just and equitable for the company to be wound up;

- **a shareholder applies, with leave of the court, for an order to wind up the company on the grounds that:**

  (i) the directors, prescribed officers or other persons in control of the company are acting in a manner that is fraudulent or otherwise illegal, or

  (ii) the company's assets are being misapplied or wasted; or

The Commission or the Take-over Regulation Panel – where the directors, prescribed officers or other persons in control of the company are acting in a manner that is fraudulent or otherwise illegal and a compliance issue has been issued and the company has failed to comply and within the previous five years enforcement proceedings in terms of the Act or the CC's Act were taken against the company its directors, prescribed officers or other persons in control of the company for substantially the same conduct resulting in an administrative fine, or conviction for an offence;

If at any time after the company has adopted a special resolution contemplated herein (relating to the voluntary winding up) or after application to court, it is determined that the company is or may be insolvent, a court on application by an interested person may order that the company be wound up as an insolvent company;

The Master must file a Certificate of winding-up of a company in the prescribed form when the affairs of the company have been completely wound up to the Commissioner, who then records the dissolution and removes the company name from the Register.

Dissolution of companies and removal from the register:

The Commission **may** deregister (i.e remove the company's name from the companies register) if:

a) (i) the company has transferred its registration to a foreign jurisdiction in terms of subsection 5;

   (ii) The company did not file an annual return for two or more years in succession and on demand by the Commission has either failed to give satisfactory reasons for the failure or has failed to show satisfactory cause for the company to remain registered or;

b) Where the Commissioner has –

   (i) determined in the prescribed manner that the company appears to have been inactive for at least seven years and no person has demonstrated a reasonable interest in, or reason for, its continued existence, or

   (ii) has received a request in the prescribed manner and form as determined by the company that it has ceased to carry on business and has no assets or, because of the inadequacy of the assets, there is no reasonable probability of the company being liquidated, it will deregister the company;

- Section 82(5) inserted by the Amendment Act: A company may apply to be deregistered upon the transfer of its registration to a foreign jurisdiction;
- Once the company is dissolved and deregistered, its name is removed from the Companies Register;
- The removal of its name does not affect the liability of any former director or shareholder (or any other person) in respect of any act or omission that took place before deregistration, which may be enforced as if the company's name was never so removed from the register.

Note: *specific requirements that apply when upon the winding up of an NPC – see page 7.*

13. REMEDIES AND ENFORCEMENT

– (Chapter 7 of the Act)

Remedies

The Act introduces a new regime to protect "whistle-blowers" and in addition to retaining certain existing remedies, introduces the remedies as contained in paragraphs A, B and C in the sections on pages 45 to 46. There is a move towards the establishment of administrative bodies (the Company Tribunal, Commission, Take-Over Regulation Panel) for the effective enforcement of company law, rather than enforcement by criminal prosecution.

Extended standing to apply for remedies:

Section 157:

- When in terms of this Act, an application is made to, or a matter can be brought before, a court, the Companies Tribunal, the Panel or the Commission, the right to make application or bring the matter may be exercised by a person –
  a) directly contemplated in the particular provision of the Act;
  b) a person acting on behalf of a person contemplated in (a) who cannot act in their own name;
  c) acting as a member of or in the interest of, a group or class of affected persons or an association acting in the interest of its members; or a person acting in the public interest, (with leave of the court);

  - Therefore minority shareholders and other stakeholders, such as employees have better protection, powers and remedies under the Act, including the ability to bring class actions;

- The Commission or Panel acting in either case on its own motion and in its absolute discretion may also –
  a) commence any proceedings in a court in the name of a person who when filing a complaint with the Commission or Panel, in respect of the matter giving rise to those proceedings, also made a written request that the Commission or Panel do so, or
  b) apply for leave to intervene in any court proceedings arising in terms of this Act, in order to represent any interest that would not otherwise be adequately represented in those proceedings.

- Such person may bring an application to:
  - Attempt to resolve any dispute with or within a company through alternative dispute resolution, or
  - apply to a **Companies Tribunal**, – in any matter arising under the Act, or
  - apply to the **High Court** for appropriate relief in terms of the Act, or
  - file a complaint with the Commission or Takeover Regulation Panel (Part D).

Protection of whistle-blowers

(Section 159 of Chapter 7 of the Act)

- Any shareholder, director, company secretary, prescribed officer, employee, a registered trade union or other representative of the employees, supplier of goods or services to the company, or employee of such a supplier – who has reasonable grounds to suspect that the company or any of its directors or employees have contravened the Act, or a law mentioned in Schedule 4 or any statutory obligation or is engaged in conduct that has or is likely to endanger the health and safety of any individual or had harmed or was likely to harm the environment or has unfairly discriminated or condoned unfair discrimination in contravention of the Constitution or Unfair Discrimination Act 2000 or has contravened any other legislation that could expose the company to an actual or contingent risk of liability or is inherently prejudicial to the interests of the company and in good faith discloses this information to the Commission, Companies Tribunal, Panel a regulatory authority, an exchange, legal adviser, a director, prescribed officer, company secretary, auditor, a person performing the function of an internal audit, board or committee of the company concerned, then that person (the whistle-blower), has qualified privilege in respect of that disclosure and will be immune from any civil, criminal or if the conditions set out in Section 159 are met;
- If a person who has made such a disclosure is subjected to express or implied threats or conduct that causes detriment to him/her by any other person, then (s)he will be entitled to compensation for damages suffered;
- *Any provision of a company's MOI or an agreement is void to the extent it purports to limit or negate this Section 159;*
- *A public company and SOC Ltd must establish a system for confidential disclosures [see page 33 (enhanced accountability section)].*

Rights to seek specific remedies [Part B]

(A) Section 160: Company Names

See page 10 relating to company names and applications to Companies Tribunal or Human Rights Commission.

Section 161: Rights of Securities holders

A holder of issued securities may apply to Court for an order regarding any rights of the securities holder in terms of the Act or MOI, or rules or any applicable debt instrument or an appropriate order to protect any such right or to rectify any harm done to the securities holder by the company as a consequence of an act or omission that contravened the Act or the company's MOI, rules or applicable debt instrument, or violated any right contemplated herein, or any of the director(s) to the extent that they are or may be held liable in terms of Section 77.

Section 162: Directors

See page 17 (directors), relevant stakeholder may apply to Court for an order declaring a person delinquent or under probation see also Table A and B on pages 53 and 54.

Section 163: Relief from oppressive or prejudicial conduct:

A shareholder,or director of a company may apply to Court for relief if (a) any act or omission of the company or related person has had the result that it is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of the applicant or (b) the business of the company or related person is being carried out or conducted in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of the applicant, or (c) the powers of a director prescribed officer or a person related to the company are being or have been exercised in a manner that is oppressive or unfairly prejudicial to or unfairly disregards the interests of the applicant.

Section 164: Dissenting shareholders appraisal rights:

If a company has given notice to shareholders of a meeting to consider adopting a resolution to amend its MOI by altering preferences, rights, limitations or other terms of any class of its shares, notice must be given to the shareholders of their rights-and a dissenting shareholder may object to the proposed resolution by written notice at any time before the resolution is voted on;

Section 165: Derivative actions (see page 23);

(B) Section 166: Voluntary resolution of disputes (Part C) [Company Tribunal]

As an alternative to applying for relief to a court or filing a complaint with the Commission in terms of Part D, person would be entitled to apply for relief, or file a complaint in terms of this Act, may refer a matter that could be the subject of such an application or complaint, for resolution by mediation, conciliation or arbitration, to: (a) the Company Tribunal or (b) an accredited entity as defined in subsection (3) [alternative dispute resolution agent (ADR)], (c) or (c) any other person. The decision by the Tribunal re a notice, order or decision taken by the Commission or Panel is binding on the Commission or Panel. Dispute resolution may result in a consent order between the parties which would then be confirmed by the court. If so confirmed the order may include an award for damages, which will not preclude that person applying for an award of civil damages unless the consent order includes an award for damages to that person. The Companies Tribunal is self funded – the person applying for relief may thus do so at very little cost.

(C) Complaints to Commission or Take-over Regulation Panel ("the Panel") (Part D)

Any person can file a complaint in writing with (a) the Panel in respect of a matter contemplated in Part B or C of Chapter 5 or in the Take-over Regulations, or (b) the Commission in respect of any provision of the Act not referred to in paragraph (a);

alleging that a person has acted in a manner inconsistent with the Act, or that the complainant's rights under the Act, or under a company's MOI or rules have been infringed;

Section 168(2): A complaint may also be initiated directly by the Commission or Panel as the case may be on its own motion or on the request of another regulatory authority;

Section 168(3): The Minister may direct the Commission or Panel investigate an alleged contravention of the Act, or other specified circumstances. On receiving a complaint, the Commission or Panel may direct that (a) an investigator conducts an investigation or (b) may issue a notice to the complainant that it will NOT investigate further (if the grounds appear frivolous or vexatious) – however this cannot be done in the case where the Minister directs the Commission as per Section 168(3), or (c) may if they think it expedient as a means of resolving the matter, refer the matter to the Tribunal or to an accredited entity with a recommendation that the complainant seek to resolve the matter with assistance of that agency. After receiving the report from the Investigator, the Panel or Commission may issue a report and either (a) excuse the respondent or (b) issue a notice of non-referral to the complainant or (c) refer the matter to the Tribunal or another ADR agent to resolve OR (d) in re the Commission, propose a meeting with relevant parties with a view to resolving the matter by consent order or (e) commence proceedings in Court or (f) refer the matter to the National Prosecuting Authority (if an alleged offence has been committed) OR (g) in the case of the Commission issue a compliance notice in terms of Section 171, or in the case of the Panel, refer the matter to the Executive Director of the Panel, who may among other things, issue a compliance notice in terms of Section 171. If the respondent complies a Compliance Certificate is issued. Failure to comply may result in a Court (on application by the Commission or Panel) imposing an administrative fine not exceeding the greater of: 10% of the respondents turnover for the period during which the company failed to comply with the compliance notice, and the maximum amount for an administrative fine – prescribed in terms of Section 175(5) – which states that the Minister may make a regulation prescribing the maximum amount – which amount must not be less than R1 million, or in referral of the matter to the National Prosecuting Authority for prosecution as an offence in terms of Section 214(3). Note: the Commission or Panel cannot do both in respect of any particular compliance notice.

Anti-Avoidance – Section 6

A court on application by the Commission, Panel or an exchange in respect of a company listed on that exchange, may declare any agreement, transaction, arrangement, resolution or provision of a company's MOI or rules (a) to be primarily or substantially intended to defeat or reduce the effect of a prohibition or requirement established by or in terms of an **unalterable** provision of the Act and (b) void to the extent that it defeats or reduces the effect of a prohibition or requirement established by or in terms of an unalterable provision of the Act. Note – see page 23 (Section 218).

Enforcement

- The Act aims to decriminalise sanctions where possible and rather to enforce company law administratively via the appropriate bodies listed in paragraphs A, B and C above;
- There are very few remaining offences – only those arising out of a refusal to respond to a summons, to give evidence, perjury and the situation where, in order to improve corporate accountability, the Act states that it will be an offence, punishable by a fine or up to ten years imprisonment (or both) for a director to commit a breach of confidence (Section 213) or sign or agree to a false or misleading financial statement or prospectus, or to be reckless in the conduct of the company's business (Section 214) (see pages 20 to 23 – directors liability). Section 216(2) – in all other cases where a person is convicted of an offence in terms of the Act, that person would be liable to a fine or to imprisonment for a period not exceeding 12 months or to both.

14. TRANSITIONAL ARRANGEMENTS

– (Schedule 5)

Companies

- Item 2(1): As at the general effective date, every pre-existing company incorporated under the Companies Act 1973 or recognised as an existing company will continue as if incorporated and registered under the new Act with the existing name and registration number, subject to Item 4 of Schedule 5.

Shares

- Item 2(4): as inserted by the Amendment Act:

  Despite the repeal of the previous Act, a pre-existing company retains all the powers set out in that Act in respect of its shares that were issued and outstanding immediately before the effective date, to the extent necessary to give full effect to (a) Section 35(6) and (b) Item 6(2) of Schedule 5. The Minister, in consultation with the member of the Cabinet responsible for national financial matters, must make regulations to take effect as at the general effective date of the Act, providing for the optional conversion and transitional status of any nominal or par value shares and capital accounts of a pre-existing company, but any such regulations must preserve the rights of shareholders associated with such shares as at the effective date;

  Regulation 31 has been published in this regard.

Annual financials and audit

- Item 2(7): If, immediately before the general effective date, a particular pre-existing company has passed its financial year end, but has not completed the requirements in terms of the previous Act for publishing, audit and approval of its annual financial statements for that financial year –
  a) the provisions of the previous Act continue to apply with respect to the publishing, audit and approval of those statements, and
  b) the provisions of this Act will apply to each subsequent financial year end and annual financial statements of that company.
- Item 2(5): If as a consequence of the coming into effect of the Act and the repeal of the previous Act, a conflict, dispute or doubt arises within two years after the effective date concerning the particular manner or form in which, or time by which, a pre-existing company is required to –
  a) prepare its annual financial statements, convene and annual general meeting, provide to its shareholders copies of its annual financial statements, any notice or other document;
  b) file any particular document with the Commission;
  c) take any other particular action required in terms of this Act or the company's MOI;
- the company may apply to the Tribunal for directions, and a member of the Tribunal may make an administrative order that is appropriate and reasonable in the circumstances.

Item 4 Schedule 5:

- Item 4(2): At any time within two years immediately following the general effective date of the new Act, a pre-existing company may file, without

charge, an amendment to its MOI to harmonise it with the Act a pre-existing company may file, without charge, and if necessary a notice of name change and copy of a special resolution under Section 16 to alter its name to meet the requirements of the Act;

- A Section 21 and Section 53(b) company will be deemed to have amended its MOI from the general effective date of the new Act to expressly state that it is an NPC or personal liability company respectively, and is deemed to have changed its name in so far as required to comply with Section 11(3);
- A company falling within the definition of a SOC in terms of new Act, will be deemed to have amended its MOI from the general effective date of the new Act to have changed its name (SOC Ltd);
- A company limited by guarantee (other than a Section 21 company) may file a notice within 20 business days after the general effective date electing to become a For Profit company. If not, it is deemed to have amended its MOI from the effective date to expressly state that it is a "NPC" and to change its name accordingly.

Binding Provisions/Rules

Item 4(3): If, before the general effective date, a pre-existing company had adopted any binding provisions under whatever style and title, [similar to rules relating to the governance of the company as per Section 15(3) of the Act], then those provisions continue to have the same force and effect (a) as of the effective date, for a period of two years or until changed by the company, and (b) after the two years the extent that they are consistent with the Act;

Such "binding provisions" could be located in the pre-existing company's Articles of Association, shareholders agreement or agreement between the director and the company.

Shareholder Agreements

[Schedule 5, Item 4(3A) inserted by Amendment Act]

If, before the general effective date, the shareholders of a pre-existing company had adopted any agreement between or amongst themselves under whatever style or title, comparable in purpose and effect to an agreement contemplated in section 15(7) –[i.e a shareholders agreement concerning any matter relating to the company],– then any such agreement continues to have the same force and effect as of the general effective date for a period of two years despite Section 15(7) {which states that it would be void to the extent of its inconsistency with the Act or the company's MOI}, or until changed by shareholders who are parties to the agreement, and after the two year period, to the extent that the agreement is consistent with the Act and the company's MOI.

Close Corporations (CC's)

- CC's continue to exist for an indefinite period or until such time as their members may determine that it is in their interest to convert to a company;
- No further registrations of CC's and no company can be converted to a CC, as of the effective date of the Act.

Conversion of CC to Company

- From the date of operation of the Act, existing CC's may convert to a company by filing a Notice of Conversion, together with required documentation to the Commission;
- Every member of a converted CC is entitled to become a shareholder of the company.

Financial Statements and accounting records of CC's

- The same requirements as per Sections 28, 29, 30 apply to CC's;
- The CC may also voluntarily make the enhanced accountability and transparency provisions of Chapter 3 applicable.

Business Rescue and winding up of CC's

- Chapter 6 will also apply to CC's (Business Rescue).

15. APPLICATION AND INTERPRETATION OF THE ACT

- Where there are conflicts with the Companies Act 2008 and a provision of any other national legislation:
  a) the provisions of both Acts will apply concurrently to the extent that its is possible to apply and comply with one of the inconsistent provisions without contravening the second, and
  b) to the extent that it is impossible to apply or comply with one of the inconsistent provisions without contravening the second –
     (i) any applicable provisions of the –
        - The Promotion of Access to Information Act 2 of 2000;
        - The Auditing Profession Act 26 of 2005;
        - The Labour Relations Act 66 of 1995;
        - The Public Finance Management Act 1 of 1999;
        - The Promotion of Administrative Justice Act 3 of 2000;
        - The Banks Act;
        - The Securities Services Act 36 of 2004 [except in re S49(4)];
        - Local Government: Municipal Finance Management Act 56 of 2003;
        - Section 8 of the National Payment System Act 78 of 1998.
  c) In all other instances, the Companies Act 2008 will apply [except in re 118(4)] or where there is a conflict between a provision of Chapter 8 and a provision of the Public Service Act 1994, the provisions of that Act will prevail];
  d) In addition, Section 5(6) – as inserted by the Amendment Act: – if there is a conflict between any provisions of the Companies Act 2008 and a provision of the listing requirements of an exchange –
     (i) the provisions of both the Companies Act and the listing requirements apply concurrently to the extent that it is possible to apply and comply with one of the inconsistent provisions without contravening the second, and
     (ii) to the extent that it is impossible to apply and comply with one of the inconsistent provisions without contravening the second, the provisions of the Companies Act will prevail, except to the extent that it expressly provides otherwise.

16. DEFINITIONS

SOME IMPORTANT DEFINITIONS IN THE ACT

(Section 1 of the Act, as amended by the Amendment Act)

accounting records

means information in written or electronic form concerning the financial affairs of a company as required in terms of this Act, including but not limited to, purchase and sales records, general and subsidiary ledgers and other documents and books used in the preparation of financial statements;

all or greater part of the assets or undertaking

when used in respect of a company, means – (a) in the case of the company's assets, more than 50% of its gross assets fairly valued, irrespective of its liabilities, or (b) in the case of the company's undertaking, more than 50% of the value of its entire undertaking, fairly valued;

audit and auditor

has the meaning set out in the Auditing Profession Act, but "audit" does not include an independent review of annual financial statements as contemplated in S30(2)(b)(ii)(bb);

beneficial interest

when used in relation to a company's securities, means the right or entitlement of a person through ownership, agreement, relationship or otherwise, alone or together with another person to –

a) receive or participate in any distribution in respect of the company's securities;

b) exercise or cause to be exercised, in the ordinary course, any or all of the rights attaching to the company's securities; or

c) dispose or direct the disposition of the company's securities, or any part of a distribution in respect of the securities but does not include any interest held by a person in a unit trust or collective investment scheme in terms of the Collective Investment Schemes Act 2002;

debt instrument

includes any securities other than the shares of a company irrespective of whether they are issued in terms of a security document or not such as a trust deed, but does not include promissory notes and loans whether constituting an encumbrance on the assets of the company or not;

knowing, knowingly or knows

when used with respect to a person, and in relation to a particular matter, means that the person either (a) had actual knowledge of the matter, or (b) was in a position in which the person reasonably ought to have (i) had actual knowledge (ii) investigated the matter to an extent that would have provided the person with actual knowledge, or (iii) taken other measures which, if taken, would reasonably be expected to have provided the person with actual knowledge of the matter;

securities

means any shares, debentures or other instruments irrespective of their form or title issued or authorised to be issued by a profit company;

shareholder

subject to section 57(1) means the holder of a share issued by a company and who is entered as such in the certificated or uncertificated securities register as the case may be.

17. REQUIREMENTS TO QUALIFY AS MEMBER OF AN AUDIT COMMITTEE AND INDEPENDENT ACCOUNTING PROFESSIONAL

Regulation 26(d)(iii) relating to independent accounting professional requirements, Section 94 relating to audit committee member requirements – such persons in order to qualify as such (together with other listed qualifications particular to each Section): must not be:

(aa) involved in the day to day management of the company's business nor have been so involved at any time during the previous three financial years (Reg 26(d)) and the previous financial year (Section 94);

(bb) a prescribed officer or full time executive employee of the company or another related or inter-related company or have been such an officer or employee at any time during the previous three financial years, or

(cc) a material supplier or customer of the company such that a reasonable and informed third party would conclude in the circumstances that the integrity, impartiality or objectivity of that professional is compromised by that relationship;

Note: the requirement per (cc) does not apply to an independent accounting professional [Regulation 26(d)], but does apply to a member of an audit committee. In addition, no person related to any person listed in (aa) to (cc) can act on an audit committee of any company.

Regulation 42: For the purposes contemplated in Section 94(5), at least one third of the members of a company's audit committee at any particular time must have academic qualifications, or experience, in economics, law, corporate governance, finance, accounting, commerce, industry, public affairs or human resource management;

In addition, Section 94(4)(c) states that no person related to any person who falls within the criteria stated herein, will qualify to act on the audit committee for that particular company.

Table A

PROBATIONARY DIRECTORS
Section 162(7): A court may make an order placing a person under probation if: a) while serving as a director (s)he (i) improperly supported a resolution despite the inability of the company to satisfy the solvency and liquidity test (ii) acted in a manner materially inconsistent with the duties of a director (iii) acted in a manner or supported the company in an action contemplated in section 163 (oppressive or prejudicial conduct or abuse of separate juristic personality of company), or b) within a period of **10 years** after the effective date, (s)he had been a director of more than one company or managing member of more than one CC and two or more of such companies or CC's (concurrently, sequentially or unrelated) which failed to fully pay all of its creditors or meet any of its obligations (except under a business rescue plan or a compromise with creditors) during the time (s)he was a Director or member.
an order made re (a) and (b) above shall be made subject to the court's being satisfied that certain circumstances existed to justify the declaration
an order made re (a) and (b) above may be subject to any conditions the court considers appropriate including limiting the application of the declaration to one or more category of company and subsists for a period not exceeding five years from the date of the order
a person on probation may apply to court to set aside the order at any time more than two years after it was made
a court may order as a condition applicable to the declaration that the person be supervised by a mentor in any future participation as a director/member of CC while the order remains in force or be limited to serving as a director of a private company or a company of which that person is sole shareholder

Table B

DELINQUENT DIRECTORS
A court may make an order declaring a person a delinquent director if: a) (s)he consented to serve as a director or acted as director or prescribed officer while ineligible or disqualified as contemplated in Section 69 unless (s)he was acting as per a court order; b) while under a court order of probation, acted as a director in a manner contravening that order.
an order made re (a) and (b) above is unconditional and subsists for the lifetime of the person declared delinquent
c) while a director, grossly abused that position, took personal advantage of information, contrary to Section 76(2)(a), intentionally or by gross negligence inflicted harm on the company or a subsidiary of the company, acted in a manner amounting to gross negligence, willful misconduct, breach of trust in relation to the performance of the directors functions within and duties to the company, or acted in a manner as set out in Section 77(3)(a)(b) or (c); d) has repeatedly been personally subject to a compliance notice or similar enforcement mechanism for similar conduct i.t.o any legislation; e) has at least twice been personally convicted of an offence or subjected to an administrative fine or similar penalty in terms of any legislation; f) within a period of five years was a director of one or more companies or participated in the control of a juristic person subject to administrative fines and (s)he was a director of each such company at the time of the contravention and the court is satisfied that the declaration of delinquency is justified having regard to the nature of the contraventions.
an order made re (c) – (f) above may be subject to any conditions the court considers appropriate and subsists for seven years, or a longer period, as the court deems appropriate, from the date of the order
a person declared delinquent i.t.o (c) to (f) may apply to court to suspend the order and substitute an order of probation at any time more than three years after the order or to set aside the order at any time more than two years after it was so suspended

For both Probationary and Delinquent directors:

A court may order as a condition applicable to the declaration that the person undertake a designated program of remedial education relevant to the conduct of a director and/or do community service and/or pay compensation to any person adversely affected by his/her conduct as a director/member;

Note: all references to director apply equally to members of CC's who are participating in the management thereof in this section dealing with probation and delinquency, and all references to a company applies equally to CC's.

Table C

CODIFIED REGIME OF DIRECTORS DUTIES
Section 76(2): CONFLICT OF INTEREST S76(2)(a): a director must not use the position of director or any other info obtained while acting in such capacity (i) to gain advantage for himself or any other person other than the company or a wholly owned subsidiary of the company or (ii) knowingly cause harm to the company or its subsidiary, and (b) must communicate to the board at the earliest any information that comes to his attention unless the director (i) reasonably believes the information is immaterial to the company or generally available to the public or known to other directors or (ii) is bound not to disclose the information by legal or ethical obligation of confidentiality. **Section 76(3): DEGREE OF CARE AND SKILL AND GOOD FAITH** S76(3)(a): a director is required to act in good faith and for proper purpose and S76(3)(b) in the best interests of the company; S76(3)(c) each director is subject to a duty to exercise a **degree of care, skill and diligence** that would reasonably be expected of a person with general knowledge skill and experience reasonably expected of that person when carrying out the functions of a director; • the director's judgement as to whether an action or decision is in the best interests of the company is reasonable (i) if the director has taken diligent steps to become informed about the subject matter of the decision (ii) either does not have a material personal financial interest in the subject matter of the decision (and had no reasonable basis to know that any related person had a personal financial interest in the matter)(and it is a decision that a reasonable person in a similar position could hold in comparable circumstances) and the director has complied with Section 75 (disclosure of financial interests – see above) and (iii) the director made a decision or supported the decision of a committee and had a rational basis for believing that the decision was in the best interests of the company; • in discharging any duty contemplated in this section the director is entitled to rely on the performance by any of the persons to whom the board may have delegated formally or informally duties to perform one or more of the board's functions that are delegable under law, prepared or presented by any of the following persons: one or more employees of the company whom the director reasonably believes to be reliable and competent, legal counsel, accountants or professional persons, a committee of the board of which the director is not a member and is entitled to rely on any information, opinions, recommendations, reports or statements including financial statements and other financial data presented or prepared by any of these persons.

Table D

SOLVENCY AND LIQUIDITY TEST
Section 4(1): a company satisfies the solvency and liquidity test at a particular time if, considering all reasonably foreseeable financial circumstances of the company at that time – a) the assets of the company as fairly valued, and equal or exceed the liabilities of the company, as fairly valued, and b) it appears that the company will be able to pay its debts as they become due in the course of business for a period of – (i) twelve months after the date on which the test is considered; or (ii) in the case of a distribution contemplated in para (a) of the definition of "distribution" in section 1, twelve months following that distribution.
Section 4(2): for the purposes contemplated in (1) a) any financial information to be considered concerning the company must be based on – (i) accounting records which satisfy requirements of S28; (ii) financial statements which satisfy requirements of S29; b) subject to para (c) the board or any other person applying the solvency and liquidity test to a company must (i) consider a fair valuation of the company's assets and liabilities including any reasonably foreseeable contingent assets and liabilities irrespective of whether or not arising as a result of the proposed distribution and (ii) may consider any other valuation of the company's assets and liabilities that is reasonable in the circumstances, and c) unless the MOI provides otherwise, when applying the test in re of a distribution contemplated in para (a) of the definition of "distribution" in S1 a person is not to include as a liability any amount that would be required if the company were to be liquidated at the time of the distribution to satisfy the preferential rights upon liquidation of shareholders whose preferential rights on liquidation are superior to the preferential rights on liquidation of those receiving the distribution.

Table E

RELATED AND INTER-RELATED PERSONS AND CONTROL
Section 2(1)(a): an individual is related to another individual if (i) they are married or live together in a relationship similar to marriage (ii) are separated by no more than two degrees of natural or adopted consanguinity or affinity;
Section 2(1)(b): an individual is related to a juristic person if the individual directly or indirectly controls the juristic person [as determined in accordance with subsection (2)] – see below*
Section 2(1)(c): a juristic person is related to another juristic person if (i) either of them directly or indirectly controls the other or the business of the other – see below* (ii) either is a subsidiary of the other or (iii)a person directly or indirectly controls each of them or the business of each of them – see below*
* ***control****: a person controls a juristic person (JP) or its business if* *a) in the case of a JP that is a company, (i) that JP is a subsidiary of that 1st person (ii) that 1st person together with any related or inter-related person is (aa)directly or indirectly able to exercise or control the exercise of a majority of voting rights associated with the securities of that company whether pursuant to a shareholder agreement or otherwise, (bb)or has the right to appoint or elect or control the appointment or election of directors of that company who control the majority of votes at a meeting of the Board;* *b) in the case of a JP that is a CC, the 1st person owns the majority of members interest or controls/has right to control majority of members votes in the CC;* *c) in the case of a JP that is a trust, the 1st person has the ability to control the majority of votes of trustees or appoint majority of trustees or appoint or change the majority of beneficiaries of the trust; or* *d) that 1st person has the ability to materially influence the policy of the JP in a manner comparable to a person who in ordinary commercial practice, would be able to exercise an element of control referred to in (a), (b) or (c).*
Definition of "inter-related" – per Section 1(1)(o) of the Amendment Act: when used in respect of three or more persons, means persons who are related to one another in a linked series of relationships, such that two of the persons are related in a manner contemplated in Section 2(1) and one of them is related to the third in any such manner, and so forth in an unbroken series.

Table F

LENIENCY RE GOVERNANCE FOR CERTAIN COMPANIES – (S57)

A for Profit company (other than SOC)

- **has only one shareholder)**

S57(2)(a) that shareholder may exercise any or all of the voting rights pertaining to that company on any matter at any time without notice or compliance with any other internal formalities except to the extent the company's MOI provides otherwise and

a) less onerous reporting requirements;

b) no notice requirements (simplified decision making);

c) S59–65 do not apply to the governance of the company (re shareholders meetings – notice, conduct, quorum, resolutions) ie no need for compliance with internal formalities;

- **where there is only one director who is also the sole shareholder**

d) no notice requirements for board meeting;

e) **S75(2)(b):** requirement for disclosure of directors personal financial interest does not apply if one person holds all the beneficial interests of all of the issued securities of the company and is the only director of that company(however where the only director of a company does not hold all the securities, (s)he may only enter into a contract in which he/she or a related person has a personal financial interest after obtaining an ordinary resolution of shareholders);

Section 78(3) – *as amended by the Amendment Act* – ***Payment of fine for director***

Subject to Subsection (3A) – A company may not indirectly or directly pay any fine that may be imposed on the director or on a director of a related company as a consequence of that director having been convicted of an offence unless the conviction was based on strict liability.

S78(3A) – inserted by Amendment Act

Subsection (3) (above) does not apply to a private or personal liability company if:

a) a single individual is the sole shareholder and sole director of that company, or

b) two or more related individuals are the only shareholders of that company and there are no directors of the company other than one or more of those individuals.

- **where there is only one director in a profit company (not a SOC)**

Section 57(3(a) – That director may exercise any power or perform any function of the board at any time without notice or compliance with any other internal formalities except to the extent that the company's MOI provides otherwise, and

Sections 71(3)–(7), S73, S74 not applicable to the governance of that company ie (i) may enter a contract in which (s)he or a related person has a personal financial interest after obtaining an ordinary resolution of shareholders.

- **and where every director is also a shareholder of a particular company [other than a SOC]**

g) no notice or other internal formalities re referral by Board for shareholders decisions unless the MOI provides otherwise [Section 57(4)(a)];

h) when acting in capacity as shareholders, no need to comply with S73–78 relating to meetings, duties, obligations, standards of conduct, liabilities and indemnification of directors;

i) S30(2A) – exempted from audit or independent review of FS or AFS (unless voluntarily decides to do so);

j) diminished need to seek shareholder approval for certain board actions.

Table G

CONDITIONS FOR LENDING FINANCIAL ASSISTANCE

Despite any provision in a Company's MOI to the contrary, the board may not authorise financial assistance unless:

a) the particular provision of financial assistance is –

   (i) pursuant to an employee share scheme that satisfies the requirements of Section 97; or

   (II) pursuant to a special resolution of the shareholders adopted in the previous two years which approved such assistance for the specific recipient or generally for a category of potential recipients and the specific recipient falls within that category, and

b) the board is satisfied that –

   (i) immediately after giving the financial assistance, the company would be in compliance with the solvency and liquidity test, and

   (ii) the terms under which the financial assistance is proposed to be given are fair and reasonable to the company;

In addition to these requirements, the Board must ensure that any conditions or restrictions respecting the granting of financial assistance set out in the company's MOI have been satisfied.

CONSEQUENCES OF LENDING FINANCIAL ASSISTANCE CONTRARY TO PROVISIONS OF THE ACT

Any resolution by the Board or agreement to provide financial assistance that is inconsistent with Section 44 OR Section 45 or any prohibition, restriction or requirement in the company's MOI is VOID and any director who voted in favour of such a resolution or approved an agreement providing the assistance is liable to the extent set out in section 77(3(e)(iv) in re Section 44 and Section 77(3)(e)(v) in re Section 45 – if the director (a) was present at the meeting when the board approved the resolution or agreement, or participated in the making of such a decision in terms of section 74; and (b) failed to vote against the resolution or agreement despite knowing that the provision of financial assistance was inconsistent with this section or a prohibition, condition or requirement contemplated in the MOI.

Table H

FINANCIAL REPORTING STANDARDS SCORING SYSTEM – REGULATIONS						
TYPE	**SCORE**	**AUDIT ☻ / REVIEW ☺**	**PROFESSIONAL**	**FRAMEWORK**		
				IFRS	**IFRS FOR SME**	**SA GAAP**
State owned companies / Public companies listed on exchange Non-Profit companies that require audit in terns of Reg 28 (2)(b)	Irrelevant	☻	◈	■		
Public companies not listed on exchange	Irrelevant	☻	◈	■	■ ◎	
Profit or Non-Profit Companies if in the ordinary course of its primary activities holds assets in a fiduciary capacity exceeding R5 million*	Irrelevant	☻	◈	■		
Profit companies, other that state owned or public companies and Non-Profit companies	At least 350	☻	◈	■	■ ◎	
	At least 100 but less than 350 and statements internally compiled	☻	◈	■	■ ◎	■
	At least 100 but less than 350, and statements independently compiled	☺ ★★	◈ ■	■	■ ◎	■
	less than 100 and statements independently compiled	☺ ★★	◈ ■ ◆	■	■ ◎	■
	less than 100 and statements internally compiled	☺ ★★	◈ ■ ◆	NO PRESCRIBED FINANCIAL REPORTING		

★★: Sec 30 (2A) A Private owner managed company is exempt from the requirements in this section to have its financial statements audited or reviewed

"Independent Accounting Professional"

- Registered Auditor
- Member in good standing of a professional body accredited in terms of Section 33 of the Auditing Professions Act
- a person qualified to be an accounting officer of a close corporation in terms of Section 60 of the CC's Act
- Provided that company meets requirements

☺ Independent Review to be conducted in accordance with ISRE 2400

*held in a fiduciary capacity for persons who are not related to the company and the aggregrate value of such assets held at any time during the financial year exceeds R5 million

Table I

SPECIAL AND ORDINARY RESOLUTIONS OF SHAREHOLDERS
Ordinary resolution Section 65(7): means a resolution adopted with the support of more than 50% of the voting rights exercised on the resolution, or a higher percentage as contemplated in the MOI, or one or more higher percentages of voting rights to approve ordinary resolutions concerning one or more particular matters, respectively, – provided there must at all times be a margin of at least 10 percentage points between the highest established requirement for approval of an ordinary resolution on any matter, and the lowest established requirement for approval of a special resolution on any matter – a) at a shareholders meeting or (b) by holders of the company's securities acting other than at a meeting, as contemplated in Section 60.
Special resolution special resolution means, a) in the case of a company, a resolution adopted with the support of at least 75% of the voting rights exercised on the resolution or a different percentage as contemplated in section 65(10); (i) at a shareholders meeting, or (ii) by holders of the company's securities acting other than at a meeting, as contemplated in Section 60; OR b) in the case of any other juristic person a decision by the owner or owners of that person or by another authorised person that requires the highest level of support in order to be adopted in terms of the relevant law under which that juristic person was incorporated; A company's MOI may permit (a) a different percentage of voting rights to approve a special resolution or (b) one or more different percentages of voting rights to approve special resolutions concerning one or more particular matters respectively – provided there must at all times be a margin of at least 10 percentage points between the requirements for approval of an ordinary resolution and a special resolution on any matter.

Table J

BUSINESS RESCUE PRACTITIONERS (BRP) – REGULATION 126
Issue of Licences to practice as a BRP: Section 138(1)(a) – The Commission may issue a licence to a member of good standing of the accounting, legal or business management profession accredited by the Commission; OR Regulation 126(2) – a person may apply to the Commission for a licence on a prescribed form, and if the Commission is satisfied that the applicant is of good character and integrity and his/her education and experience are sufficient to equip the applicant to perform the functions of a BRP.

Table K

SPECIAL RESOLUTIONS REQUIRED IN TERMS OF THE ACT SECTION 65(11) (AS AMENDED IN THE AMENDMENT ACT)
A special resolution is required to – a) amend the company's MOI to the extent required by section 16(1)(c) and section 36(2)(a); (authorisation and classification of shares); b) ratify a consolidated revision of a company's MOI as contemplated in section 18(1)(b); c) ratify actions by the company or directors in excess of their authority as contemplated in section 20(2); d) approve an issue of shares or grant of rights in the circumstances contemplated in section 41(1); e) approve an issue of shares or securities as contemplated in section 41(3); f) authorise the board to grant financial assistance in the circumstances contemplated in section 44(3)(a)(ii) or 45(3)(a)(ii); g) approve a decision of the board for re-acquisition of shares in the circumstances contemplated in section 48(8); h) authorise the basis for compensation to directors of a profit company as required by section 66(9); i) approve the voluntary winding up of the company as contemplated in section 80(1); j) approve the winding up of a company in the circumstances contemplated in section 81(1); k) approve an application to transfer the registration of the company to a foreign jurisdiction as contemplated in section 82(5); l) approve any proposed fundamental transaction to the extent required by Part A of Chapter 5, or m) revoke a resolution contemplated in section 164(9)(c).

Table L

REGULATION 126: PERSONS ELIGIBLE TO BE APPOINTED AS PRACTITIONERS PER CLASS OF COMPANY FOR BRP PURPOSES	
Classification of companies for purposes of BRP	**Eligible persons**
large companies – being any company other than a SOC Ltd whose most recent public interest score as calculated in terms of Reg 26(2) is 500 or more;	**senior practitioner –** being a person qualified in terms of Section 138(1)* and who immediately before being appointed as a practitioner for a particular company, has actively engaged in business turnaround practice before the effective date of the Act or a BRP in terms of the Act, for a combined period of at least 10 years;
medium companies – (aa) any public company whose most recent public interest score as calculated in terms of Reg 26(2) is less than 500, or (bb) any other company other than a SOC Ltd whose most recent public interest score as calculated in terms of Reg Reg 26(2) is at least 100 but less than 500;	**senior practitioner –** as defined above; **experienced practitioner –** same requirements as senior practitioner except only required to have practiced as such for a combined period of at least 5 years;
small companies – being any company other than a SOC Ltd or public company, whose most recent public interest score as calculated in terms of Reg 26(2) is less than 100;	**senior practitioner** **experienced practitioner** } same definition as above **junior practitioner –** being a person qualified in terms of Section 138(1) and who immediately before being appointed as a practitioner for a particular company, has not previously engaged in business turnaround practice before the effective date of the Act or acted as a BRP or has done so but for a combined period of less than 5 years before the effective date of the Act.

*A junior practitioner may only assist a senior or experienced practitioner for a medium or large company or SOC Ltd;

*An experienced practitioner may only assist a senior practitioner for a large company or SOC Ltd.

*Refer to page 36 for qualifications in terms of Section 138(1);