

REPUBLIC OF SOUTH AFRICA

Department of Trade and Industry

COMPANIES BILL, 2007

BILL

To provide for the incorporation, registration, capitalization, organization and management of for profit, and not for profit, companies; to define the relationships between companies and their respective shareholders or members and directors; to provide for equitable and efficient mergers, amalgamations and takeovers of companies, and for efficient rescue of failing companies; to provide appropriate legal redress for investors and third parties with respect to companies; to establish a Commission and a Takeover Regulation Panel to administer the requirements of the Act with respect to companies, and a Companies Ombud to facilitate alternative dispute resolution and to review decisions of the Commission and the Takeover Regulation Panel, and a Financial Reporting Standards Council to advise on requirements for financial record keeping and reporting by companies; to repeal the Companies Act, 1973 (Act No. 61 of 1973) and provide for the possible future repeal of the Close Corporations Act, 1984 (Act No. 69 of 1984); and to provide for incidental matters –

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows: -

Explanatory Memorandum :

Section 0

Explanatory Memorandum

Background

In 2004, **the dti** published a policy paper, *Company law for the 21st century*, which promised the development of a “clear, facilitating, predictable and consistently enforced law” to provide “a protective and fertile environment for economic activity”.

The policy paper proposed “that company law should promote the competitiveness and development of the South African economy” by -

1. Encouraging entrepreneurship and enterprise development, and consequently, employment opportunities by -
 - (a) **simplifying** the procedures for forming companies; and
 - (b) reducing costs associated with the formalities of forming a company and maintaining its existence.
2. Promoting innovation and investment in South African markets and companies by providing for –
 - (a) **flexibility** in the design and organisation of companies; and
 - (b) a **predictable and effective regulatory environment**.
3. Promoting the **efficiency** of companies and their management.
4. Encouraging **transparency** and high standards of corporate governance.
5. Making company law compatible and harmonious with best practice jurisdictions internationally.

The policy paper promised an “overall review of company law” to develop a “legal framework based on the principles reflected in the Companies Act, 1973, the Close Corporations Act, 1984, and the common law”. The review “would be broadly consultative”, drawing on the experience of existing company law institutions, professional

expertise within the Republic, and advisors on “best practice internationally and the possibilities for their adaptation to the South African context”.

Over the ensuing two years, **the dti** has convened and engaged with a reference group of South African practitioners, academics and other experts, consulted with NEDLAC, and sought the advice of a small panel of international experts drawn from South Africa’s major trading and investment partners, as well as commonwealth jurisdictions, which share many of our company law traditions.

At every stage, the consultation process endorsed the five-point statement of economic growth objectives, as set out above. In addition, the process generated specific goal statements related to each of those five objectives, best reflected in the following summary of points set out in the report of the NEDLAC consultations.

1. Simplification

- (a) The law should provide for a company structure that reflects the characteristics of close corporations, as one of the available options.
- (b) The law should establish a simple and easily maintained regime for not for profit companies.
- (c) Co-operatives and Partnerships should not be addressed in the reformed company law.

2. Flexibility

- (a) Company law should provide for “an appropriate diversity of corporate structures”.
- (b) The distinction between listed and unlisted companies should be retained.

3. Corporate efficiency

- (a) Company law should shift from a capital maintenance regime based on par value, to one based on solvency and liquidity.

Explanatory Memorandum :

Section 0

- (b) There should be clarification of board structures and director responsibilities, duties and liabilities.
- (c) There should be a remedy to avoid locking in minority shareholders in inefficient companies.
- (d) The mergers and takeovers regime should be reformed so that the law facilitates the creation of business combinations.
- (e) The judicial management system for dealing with failing companies should be replaced by a more effective business rescue system.

4. Transparency

- (a) Company law should ensure the proper recognition of director accountability, and appropriate participation of other stakeholders.
- (b) Public announcements, information and prospectuses should be subject to similar standards for truth and accuracy.
- (c) The law should protect shareholder rights, advance shareholder activism, and provide enhanced protections for minority shareholders.
- (d) Minimum accounting standards should be required for annual reports.

5. Predictable Regulation

- (a) Company law sanctions should be de-criminalized where possible.
- (c) Company law should be enforced through appropriate bodies and mechanisms, either existing or newly introduced.
- (d) Company law should strike a careful balance between adequate disclosure, in the interests of transparency, and over-regulation.

With those objectives and goals in mind, and drawing on the expertise offered through its consultations, **the dti** has prepared this discussion draft of a proposed new Companies Act for South Africa. As promised in the policy document in 2004 –

*“It is not the aim of **the dti** simply to write a new Act by unreasonably jettisoning the body of jurisprudence built up over more than a century. The objective of the review is to ensure that the new legislation is appropriate to the legal, economic and social context of South Africa as a constitutional democracy and open economy. Where current law meets these objectives, it should remain as part of company law.”*

Overall plan for company legislation

The reform strategy set out in this discussion draft proposes the wholesale repeal and replacement of the Companies Act, 1973, with a new Companies Act. However, in accordance with the undertaking set out above from the policy document, the new Act retains many of the provisions of the current law, which, on analysis, proved to meet the goal of being *“appropriate to the legal, economic and social context of South Africa as a constitutional democracy and open economy”*.

In addition, the strategy envisioned in this draft provides for the possible eventual repeal of the Close Corporations Act, following a 10-year experimental period, during which both laws would be concurrently in force. **The dti** believes that the regime in the new Companies Act for forming and maintaining small companies, which has drawn on the characteristics of the Close Corporations Act, is sufficiently streamlined and simplified as to render it unnecessary to retain that Act. However, it is recognised that time and experience with the alternative regimes will afford the best indication of which best meets the needs of the South African economy. Accordingly, the transition provisions, as set out in Schedule 6, require a review of the experience under the concurrent regime before a final decision may be taken on repealing or retaining the Close Corporations Act.

During the consultation process, **the dti** was made aware of proposals within the Department of Justice to develop uniform insolvency legislation which, if brought to fruition, would overlap and may conflict with the regime set out in the current Companies Act for dealing with and winding up insolvent companies. In order to avoid any future conflict, **the dti** proposes a transitional arrangement that will retain the current regime, as set out in Chapter 14 of the Companies Act, 1973 without alteration, on an interim basis until such time as any new uniform insolvency law may be enacted and brought into operation.

Explanatory Memorandum :

Section 0

Finally, the draft incorporates recent amendments to the Companies Act, 1973, and introduces new provisions, as necessary, to ensure harmonization with other legislation, notably, the Security Services Act, 2004 (Act No. 36 of 2004) and the Auditing Profession Act, 2005 (Act No. 26 of 2005).

Institutional reform in the draft Companies Act

The discussion draft proposes the establishment of one new institution, and the transformation of three existing company law entities, which together will provide for a more predictable regulatory and enforcement system.

Under the current Companies Act, regulatory responsibility is variously assigned to the Minister, the Registrar, the Securities Regulation Panel (SRP), and most recently, the Financial Reporting Standards Council (FRSC). In practice, many of the functions of the Minister and the Registrar have long since been exercised by the Companies and Intellectual Property Registration Office (CIPRO), within **the dti**.

Chapter 8 of this draft proposes the migration of CIPRO, as well as the enforcement functions currently within **the dti**, into a newly established organ of state, with significantly expanded functions and powers, to be known as the Companies and Intellectual Property Commission. In particular, most of the administrative functions currently assigned to the Minister under the Companies Act, apart from the appointment of members of the institutions, and the making of regulations, are placed within the jurisdiction of the Commission, although the Minister would retain the ability to issue policy directives to the Commission, and to require the Commission to conduct an investigation in terms of the Act.

The draft further proposes the transformation of the existing SRP into an independent organ of state, the Takeover Regulation Panel, with powers similar to those currently vested in the SRP, although its current authority to prescribe rules must now be exercised in consultation with the Minister, who alone would have final authority to make regulations under the proposed Act.

The FRSC is re-established as an advisory committee to the Minister, with responsibilities to advise on regulations governing the form, content and maintenance of companies' financial records and reports.

Finally, the draft proposes one new body, a Companies Ombud, which will be an independent organ of state, with a dual mandate -

- (a) First, to serve as a forum for voluntary alternative dispute resolution in any matter arising under the Act; and
- (b) Second, to carry out reviews of administrative decisions made by the Commission or the Takeover Regulation Panel, on an optional basis. Those decisions of the Ombud will be binding on the Commission or the Panel, but not on the other party, which has a constitutional right of access to a court for further review.

As is the case under the current Companies Act, the High Court remains the primary forum for resolution of disputes, interpretation and enforcement of the proposed Company Act.

Scope and categorization of companies

The draft creates three categories of companies, as follows:

- (a) Not for profit companies, which are the successor to the current section 21 companies, and which are subject to -
 - (i) a varied application of the Act, as set out in section 10; and
 - (ii) a special set of fundamental rules, set out in section 11.
- (b) For profit companies that are widely held, as determined in accordance with criteria set out in section 8; and
- (c) All remaining for profit companies, which are known as “closely held companies”.

The draft introduces public interest companies, which have greater responsibility to a wider public, and therefore are subject to more demanding disclosure and transparency provisions. The “public interest” criteria, which are set out in section 9, overlay the three

Explanatory Memorandum :

Section 0

categories of company outlined above, so that it is possible for a company in any of the three categories to be subject to the “public interest” regime, if that company meets the criteria by virtue of its size or the nature of its activities.

In a further effort to create an appropriately flexible regime, a few provisions of the draft make exceptions for companies that operate under the exceptional circumstances that –

- (a) all of their shares are owned by related persons, which results in diminished need to protect minority shareholders; or
- (b) all of the shareholders are directors, which results in a diminished need to seek shareholder approval for certain board actions.

Unlike the current Act, the draft does not require the registration of external companies operating within the Republic, but they will be required to have a registered office, and the provisions regulating the public offering of securities of those companies within the Republic will apply with respect to them.

The transitional provisions set out in Schedule 6 provide for -

- (a) the continuation of existing companies incorporated and registered in terms of the current Act, and provides for them to be governed henceforth in terms of the new proposed Act. Allowances are made for time for them to amend their Articles to conform to the requirements of the new Act; and
- (b) the conversion of existing or newly created close corporations into companies under the proposed new Act.

Company formation, naming and dissolution

The reform consultations recognised and articulated as a core essential principle that formation of a company is an action by persons in the exercise of their constitutional right to freedom of association combined their common law right to freedom of contract. That being the case, the draft reflects, in both its language and its substance, the principle that incorporation of a company is a right, rather than a privilege bestowed by the state. As such, the draft provides for incorporation as of right, places minimal requirements on the

act of incorporation, allows for maximum flexibility in the design and structure of the company, and significantly restricts the ambit of regulatory oversight on matters relating to company formation and design.

Under Chapter 2 of the draft, a company is incorporated by the adoption of a Memorandum of Incorporation, which is the sole governing document of the company. The Act imposes certain specific requirements on the content of a Memorandum of Incorporation, as necessary to protect the interests of shareholders in the company, and provides a number of default rules, which companies may accept or alter as they wish to meet their needs and serve their interests. In addition, the Act allows for companies to add to the required or default provision to address matters not addressed in the Act, but every provision of every Memorandum of Incorporation must be consistent with the Act, except to the extent that the Act expressly contemplates otherwise. In other words, a company cannot fundamentally “contract out” of the proposed Act.

For companies wishing to, the Act will provide for the simplest possible form of incorporation by use of a standard form Memorandum of Incorporation, to be set out in Schedule 1 (but not included in this discussion draft), which will permit the incorporators to accept the required provisions, and the default provisions without alteration.

This draft retains the broad outlines of the existing regime for company names, in particular continuing the practice of name reservation and registration, with some significant alterations. In particular, name reservation will be available to protect one or more names, but it will not be required. In addition, the draft proposes reforming the criteria for acceptable names in a manner that seeks to give maximum effect to the constitutional right to freedom of expression. Specifically, the draft will restrict a company name only as far as necessary to -

- (a) protect the public from misleading names which falsely imply an association that does not in fact exist;
- (b) protect the interests of the owners of names and other forms of intellectual property from other persons passing themselves off, or coat-tailing, on the first person’s reputation and standing; and

Explanatory Memorandum :

Section 0

- (c) protect the society as a whole from names that would fall within the ambit of expression that does not enjoy constitutional protection because of its hateful or other negative nature.

Beyond those purposes, there will be no further administrative discretion to reject names, as is found in the existing Act.

Transitional provisions will allow for names registered or reserved under the current regime to continue to be so registered or reserved under the new Act.

As noted above, the winding up of insolvent companies will remain as currently governed by Chapter 14 of the Companies Act, on an interim basis. Apart from that, Chapter 2 retains a number of the existing grounds for dissolving a company, adds additional grounds not found in the current law, and more narrowly restricts the grounds on which the Commission may seek to have a company dissolved.

Company finance

Chapter 3 addresses all matters of company finance, giving effect to the goals outlined above by creating a capital maintenance regime based on solvency and liquidity and abolishing the concept of par value shares and nominal value (although the transitional provisions continue any existing par value shares as such for so long as they are extant).

In addition, the interests of minority shareholders continue to be protected by requiring shareholder approval for share and option issues to directors and other specified persons, or financial assistance for share purchase.

Part B of Chapter 3 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 categorization of the debt instrument they hold.

Part D of Chapter 3 retains the existing scheme for registration and transfer of uncertificated securities as found in section 91A of the current Act.

Similarly, Part E of Chapter 3, read together with Schedule 3, presents a simplified and modernised scheme with respect to the primary and secondary offering of securities to the public, based on the principles of the current Act.

Company governance

Chapter 4 addresses all matters relating to company governance, introducing changes to enhance flexibility, while retaining much of the existing regime designed to promote transparency and accountability.

In particular, the draft introduces flexibility in the manner and form of shareholder meetings, the exercise of proxy rights, and the standards for adoption of ordinary and special resolutions.

The draft retains existing qualifications and disqualifications for directors, with some enhanced flexibility, particularly for very small companies where the sole shareholder may be the only director.

A major innovation of the draft is the introduction of a regime allowing for a court, on application, to declare a director either delinquent (and thus prohibited from being a director) or under probation (and restricted to serving as a director within the conditions of that probation). The core of the regime is set out in Chapter 7, as one of the remedies available to shareholders and other stakeholders to hold directors accountable.

Part B of Chapter 4 introduces new law in the form of a codified regime of directors' duties, which includes both a fiduciary duty, and a duty of reasonable care, which operate in addition to existing common law duties.

The provisions governing directors' duties are supplemented by new provisions addressing conflict of interest, and directors' liability, indemnities and insurance.

The remaining parts of Chapter 4 largely retain existing law with respect to financial records and statements, auditors, audit committees and company secretaries.

Explanatory Memorandum :

Section 0

Takeovers and fundamental transactions

Under Chapter 5, the transformed Takeover Regulation Panel (currently the SRP) retains its status as the regulator of affected transactions, and it is intended that the current Takeover Code will be re-enacted as a regulation, subject to any changes the Panel may advise.

The chapter makes significant changes to the existing law governing the required notification of share purchases, and introduces a remedy for compulsory acquisition of minority shareholding in a takeover scenario, fulfilling one of the reform goals.

The regime for approval of transactions that fundamentally alter a company - the disposal of substantially all of its assets or undertaking, a scheme of arrangement, or a merger or amalgamation - is also significantly reformed, and is supported by a remedy of appraisal rights for dissenting minority shareholders.

In particular, such fundamental transactions will require court approval only if there was a significant minority (at least 15%) opposed to the transaction, or the court grants leave to a single shareholder on the grounds of procedural irregularity or a manifestly unfair result.

Finally, as implied above, the draft introduces the concept of amalgamation of companies to provide flexibility and enhance efficiency in the economy.

Business rescue

In accordance with the reform objectives and specific goals, Chapter 6 proposes replacing the existing regime of judicial administration of failing companies with a modern business rescue regime, largely self-administered by the company, under independent supervision within constraints set out in the chapter, and subject to court intervention at any time on application by any of the stakeholders.

In particular, the Chapter recognises the interests of shareholders, creditors and employees, and provides for their respective participation in the development and approval of a business rescue plan.

Notably, the chapter protects the interests of workers by -

-
- (a) recognising them as creditors of the company with a voting interest to the extent of any unpaid remuneration,
 - (b) requiring consultation with them in the development of the business rescue plan,
 - (c) permitting them an opportunity to address creditors before a vote on the plan, and
 - (d) according them, as a group, the right to buy out any dissenting creditor who has voted against approving a rescue plan.

Remedies

As noted above, the High Court remains the principal forum for remedies in terms of the proposed Act. Chapter 7 establishes certain new general principles, including an extended right of standing to commence an action on behalf of an aggrieved person, and a regime to protect “whistle blowers” who disclose irregularities or contraventions of the Act.

As well as retaining certain existing remedies, the Chapter introduces -

- (a) A new general right to seek a declaratory order as to a shareholder’s rights, and seek an appropriate remedy.
- (b) A right to apply to have a director declared delinquent or under probation, as noted above.
- (c) A right for dissenting shareholders in a fundamental transaction to have their shares appraised and purchased.
- (d) A codification and streamlining of the right to commence or pursue legal action in the name of the company, which replaces any common law derivative action.

Enforcement

In accordance with the objectives and goals, the proposed Act de-criminalizes company law. There are very few remaining offences, those arising out of refusal to respond to a summons, give evidence, perjury, and similar matters relating to the administration of

Explanatory Memorandum :

Section 0

justice in terms of the Act. Any such offences must be referred by the Commission to the National Public Prosecutor for trial in the Magistrate's Court.

Generally, the Act uses a system of administrative enforcement in place of criminal sanctions to ensure compliance with the Act. The Commission, or the Takeover Panel, may receive complaints from any stakeholder, or may initiate a complaint itself. Following an investigation into a complaint, the Commission or Panel may -

- (a) end the matter;
- (b) urge the parties to attempt voluntary alternative resolution of their dispute;
- (c) advise the complainant of any right they may have to seek a remedy in court;
- (d) commence proceeding in a court on behalf of a complainant, if the complainant so requests;
- (e) refer the matter to another regulator, if there is a possibility that the matter falls with their jurisdiction; or
- (f) issue a compliance notice – but only in respect of a matter for which the Act does not provide a remedy in court.

A compliance order may be issued against a company, or against an individual if the contravention of the Act was by that individual, or if the Act holds them equally liable with a company for the contravention.

A person who has been issued a compliance notice may of course challenge it in court, but failing that, is obliged to satisfy the conditions of the notice. If they fail to do so, the Commission may either apply to the court for an administrative fine, or refer the failure to the National Prosecuting Authority as an offence. In the case of a recidivist company that has failed to comply, been fined, and continues to contravene the Act, the Commission may apply to the Court for an order dissolving the company.

Finally, to improve corporate accountability, the draft proposes that it will be an offence, punishable by a fine or up to 10 years imprisonment, for a director to sign or agree to a

false or misleading financial statement or prospectus, or to be reckless in the conduct of a company's business.

 Arrangement of the Bill :

Section 0

Arrangement of the Bill

<i>Explanatory Memorandum</i>	3
Background.....	3
Overall plan for company legislation.....	6
Institutional reform in the draft Companies Act.....	7
Scope and categorization of companies.....	8
Company formation, naming and dissolution.....	9
Company finance.....	11
Company governance.....	12
Takeovers and fundamental transactions.....	13
Business rescue.....	13
Remedies.....	14
Enforcement.....	14
Public Comment	Error! Bookmark not defined.
<i>Arrangement of the Bill</i>	17
<i>Chapter 1 - Interpretation, Purpose and Application</i>	28
Part A - Interpretation	28
1. Definitions	28
2. Related and inter-related persons, and actions in concert	40
3. Controlling and subsidiary relationships	42
4. Solvency and liquidity test.....	43
5. General interpretation of the Act.....	44
Part B – Purpose and Application	46
6. Purposes of this Act.....	46
7. Application of Act.....	47
8. Categories of for profit companies.....	48
9. Public Interest Companies.....	49
10. Specific application of Act to not for profit companies	51
11. Fundamental principles of not for profit companies	52
<i>Chapter 2 - Formation and Registration of Companies</i>	55
Part A – Incorporation and Legal Status	55
12. Legal status of companies	55

13. Right to incorporate a company	55
14. Memorandum of Incorporation of a company	56
15. Filing the Memorandum of Incorporation	60
16. Registration of company	61
17. Validity of company actions	63
18. Pre-incorporation contracts	65
Part B – Company Names.....	67
19. Criteria for names of companies	67
20. Reservation of name for later use.....	69
21. Change of name	71
22. Commissioner’s decisions with respect to names	72
23. Power of court on review concerning company names	73
24. Required use of company name and registration number	74
Part C – Registered Office and Records.....	75
25. Registered office.....	75
26. Form and location of company records	75
27. Shareholder rights to information	77
Part D – Dissolving and De-registering Companies	78
28. Modes of dissolving companies	78
29. Voluntary winding up of company	78
30. Winding up by court order	80
31. Dissolution of companies and removal from register.....	83
32. Effect of removal of company from register	84
Chapter 3 - Corporate Finance.....	86
Part A – Company Shares	86
33. Legal nature of company shares.....	86
34. Authorizing and issuing shares	86
35. Preferences, rights, limitations and other share terms	88
36. Pre-emptive right to be offered shares	91
37. Consideration for shares	91
38. Shareholder approval for issuing shares in certain cases	92
39. Options for purchase of shares	95
40. Financial assistance for purchase of shares	96
41. Beneficial interest in shares.....	98

 Arrangement of the Bill :

Section 0

Part B – Debentures and Similar Instruments	101
42. Application of this Part.....	101
43. Directives on debentures	101
44. Conversion	103
45. Trustees.....	103
46. Meetings and voting rights.....	104
47. General conditions.....	105
Part C – Distributions by the Company	107
48. Distributions must be authorised by the board	107
49. Liability with respect to distributions	107
50. Capitalization shares.....	108
51. Company or subsidiary acquiring company’s shares	109
52. Status of shares redeemed or purchased by company	111
Part D – Securities Registration and Transfer	112
53. Securities to be evidenced by certificates or uncertificated	112
54. Securities register and numbering.....	113
55. Registration and transfer of certificated securities	114
56. Registration of uncertificated securities.....	116
57. Transfer of uncertificated securities.....	117
58. Substitution of certificated for uncertificated securities.....	118
59. Liability relating to uncertificated securities	119
Part E – Public Security Offerings.....	121
60. Application and interpretation of this Part.....	121
61. Actions that are not an offer to the public.....	123
62. Standards for qualifying employee share schemes.....	126
63. Advertisements relating to offers	127
64. General restrictions on offers to the public.....	128
65. Requirements concerning a prospectus.....	130
66. Secondary offers to the public.....	132
67. Consent to use of name in prospectus.....	135
68. Variation of contract mentioned in prospectus	136
69. Liability for untrue statements in prospectus.....	136
70. Liability of experts and others.....	139
71. Responsibility for untrue statements in prospectus	140
72. Time limit as to allotment or acceptance	142

73. Restrictions on allotment.....	142
74. Voidable allotment	143
75. Minimum interval before allotment or acceptance.....	144
76. Conditional allotment if prospectus states securities to be listed.....	144
Chapter 4 - Corporate Governance and Financial Accountability	146
Part A - Shareholders.....	146
77. Shareholder right to be represented by proxy	146
78. Record date for determining shareholder rights	147
79. Shareholder meetings	148
80. Notice of meetings.....	151
81. Meeting conduct, quorum and adjournment	152
82. Shareholder resolutions	154
83. Shareholders acting other than at a meeting	156
Part B – Board and Directors.....	157
84. Board and directors.....	157
85. Board meetings	157
86. Directors acting other than at a meeting	159
87. Board committees	159
88. Election and removal of directors	159
89. Disqualified person may not act as director.....	161
90. Vacancies on the board.....	164
91. Standards of director’s conduct.....	165
92. Director’s use of information and conflicting interests	167
92A Loans or other financial assistance to directors.....	169
93. Liability of directors and officers.....	171
94. Register of directors, auditors and secretaries	173
Part C – Financial Year, Records and Reporting.....	175
95. Financial year of company	175
96. Accounting records and statements.....	175
97. Annual financial statements	178
98. Disclosure of directors' remuneration and benefits	179
99. Right to copies of financial statements and reports	180
Part D – Financial Accountability.....	182
100. Audit committees.....	182
101. Appointment and rotation of auditor.....	184

 Arrangement of the Bill :

Section 0

102.	Rights, duties and functions of auditors.....	187
103.	Resignation of auditors and filling of casual vacancies	191
Part E – Secretary for Widely Held Companies.....		193
104.	Mandatory appointment of secretary	193
105.	Body corporate or partnership may be appointed secretary	193
106.	Duties of secretary.....	194
107.	Name of secretary to be publicized.....	195
108.	Notice to be given of resignation or removal of secretary	195
Chapter 5 –Takeovers, Offers and Fundamental Transactions		196
Part A – Authority of the Takeovers Regulation Panel and Takeovers Regulations		196
109.	Application and definitions	196
110.	Panel regulation of affected transactions	197
111.	Takeover Regulations.....	198
Part B – Regulation and Implementation of Certain Transactions		200
112.	Restricted application of this Part	200
113.	Required disclosure concerning certain share transactions	200
114.	Mandatory offers	202
115.	Compulsory acquisitions and squeeze out	203
116.	Proposals to dispose of substantially all assets or undertaking	205
117.	Proposals for merger or amalgamation	206
118.	Proposals for scheme of arrangement	208
119.	Required approval for transactions contemplated in this Part.....	210
120.	Implementation of amalgamation or merger	212
Part C – Conduct of Bids and Offers.....		216
121.	Application and Interpretation of this Part	216
122.	Secrecy of offers and announcements.....	216
123.	Announcement and making of offer	216
124.	Conditional offers	218
125.	Public disclosure of dealings during an offer period.....	218
126.	Prohibited dealings before and during an offer	219
127.	Fair dealing in acquisitions	220
128.	Restrictions on frustrating action	220
129.	Restrictions following offers.....	221
Chapter 6 - Business Rescue		223

Part A – Business Rescue Proceedings	223
130. Definitions applicable only to this Chapter	223
131. Insolvency of a company.....	224
132. Company resolution to begin business rescue	225
133. Objections to company resolution.....	227
134. Court order to begin business rescue proceedings.....	228
135. Duration of business rescue proceedings.....	230
136. General moratorium on legal proceedings against company	231
137. Protection of property interests	232
138. Post-commencement finance	233
139. Effect of business rescue on suppliers and employees.....	234
140. Effect on shareholders and directors.....	235
Part B – Supervisor’s functions and Terms of Appointment	237
141. Qualifications of supervisors.....	237
142. Removal and replacement of supervisor.....	237
143. Powers and duties of supervisors	238
144. Investigation of the affairs of the company	239
145. Directors of company to co-operate with and assist supervisor.....	240
146. Remuneration of supervisor	241
Part C – Rights of Affected Persons During Business Rescue.....	242
147. Rights of employees	242
148. Participation by creditors	244
149. Participation by shareholders	246
150. First meeting of creditors	247
151. First meeting of employees representatives.....	248
152. Functions, duties and membership of committees of affected persons.....	248
Part D – Development and Approval of Business Rescue Plan.....	250
153. Proposal of a business rescue plan.....	250
154. Meeting to determine future of company.....	252
155. Consideration of the business rescue plan	253
156. Failure to adopt business rescue plan.....	255
157. Discharge of debts and claims.....	256
Chapter 7 - Remedies and Enforcement.....	257
Part A – General Principles.....	257

 Arrangement of the Bill :

Section 0

158.	Alternative procedures for addressing complaints or securing rights	257
159.	Extended standing to apply for remedies	257
160.	Remedies to promote the purpose of the Act	258
161.	Protection for whistle-blowers	259
Part B – Rights to seek specific remedies		262
162.	Application to declare or protect shareholders’ rights.....	262
163.	Application to declare director delinquent or under probation	262
164.	Relief from oppressive or prejudicial conduct.....	267
165.	Dissenting shareholders’ appraisal rights	269
166.	Derivative actions	274
Part C – Voluntary resolution of disputes.....		280
167.	Alternative dispute resolution	280
168.	Dispute resolution may result in consent order	280
Part D – Complaints to the Commission or the Takeover Regulation Panel.....		282
169.	Initiating a complaint to Commission.....	282
170.	Investigation by Commission or Takeover Regulation Panel	282
171.	Outcome of investigation	284
172.	Issuance of compliance notices	285
173.	Objection to notices	287
174.	Consent orders	288
175.	Referral of complaints to court	288
176.	Administrative fines	288
Part E – Powers to support investigations and inspections		290
177.	Summons	290
178.	Authority to enter and search under warrant	291
179.	Powers to enter and search	292
180.	Conduct of entry and search.....	294
Part F – Companies Ombud Arbitration Procedures.....		296
181.	Arbitration hearings before Ombud	296
182.	Right to participate in hearing.....	296
183.	Powers of Ombud arbitration hearing.....	297
184.	Rules of procedure.....	297
185.	Witnesses	297
Chapter 8 - Regulatory Agencies and Administration of the Act.....		299

Part A - Companies and Intellectual Property Commission	299
186. Establishment of Companies and Intellectual Property Commission	299
187. Commission objectives.....	299
188. Functions of Companies and Intellectual Property Commission	300
189. Reporting, research, public information and relations with other regulators.....	303
190. Appointment of the Commissioner	305
191. Minister may direct policy and require investigation	306
192. Establishment of Advisory Committees	307
193. Constitution of Committees	307
Part B - The Companies Ombud.....	308
194. Establishment of Companies Ombud.....	308
195. Appointment of the Companies Ombud	309
196. Functions of the Companies Ombud.....	309
Part C – Takeover Regulation Panel	311
197. Establishment of Takeover Regulation Panel.....	311
198. Composition of the Takeover Regulation Panel.....	311
199. Chairperson and Deputy Chairpersons	312
200. Meetings of the Takeover Regulation Panel.....	313
201. Executive of the Takeover Regulation Panel.....	314
202. Functions of the Takeover Regulation Panel.....	314
203. The Takeover Special Committee.....	315
Part C – Financial Reporting Standards Council.....	317
204. Composition of Council	317
205. Functions of Financial Reporting Standards Council.....	318
Part E – Administrative Provisions Applicable to Agencies.....	319
206. Qualifications for membership.....	319
207. Conflicting interests of agency members.....	320
208. Resignation, removal from office and vacancies.....	322
209. Conflicting interests	322
210. Appointment of inspectors and investigators.....	323
211. Finances	324
212. Reviews and reports to Minister	325
213. Confidential information	325
Chapter 9 - Offences, Miscellaneous Matters and General Provisions	327

 Arrangement of the Bill :

Section 0

Part A – Offences and Penalties	327
214. Breach of confidence	327
215. Reckless conduct and non-compliance	327
216. Hindering administration of Act	328
217. Penalties	329
218. Magistrate’s Court jurisdiction to impose penalties	329
Part B – Miscellaneous matters.....	330
219. Civil actions	330
220. Limited time for initiating complaints	330
221. Serving documents	330
222. Proof of facts	331
223. Substantial Compliance.....	331
224. State Liability	332
Part C – Regulations, Consequential matters and Commencement.....	334
225. Regulations	334
226. Consequential amendments, repeal of laws and transitional arrangements.....	335
227. Short title and commencement.....	335
<i>SCHEDULE 1.....</i>	<i>336</i>
Forms of Memorandum of Incorporation.....	336
<i>SCHEDULE 2.....</i>	<i>337</i>
Members and Directors of Not For Profit Companies.....	337
1. Incorporators of a not for profit company.....	337
2. Members	337
3. Directors	338
<i>SCHEDULE 3.....</i>	<i>340</i>
Public Offerings of Shares and other Securities.....	340
1. Interpretation	340
2. Rights offers	340
3. General requirements for a prospectus.....	341
4. Contracts and translations thereof to be attached to prospectus.....	342
5. Where the issue is underwritten	342
6. Signing, date and date of issue, of prospectus	343
7. Registration of prospectus.....	344

8. Name, address and incorporation.....	345
9. Directors and management.....	345
10. Auditor.....	346
11. Attorney, banker, stockbroker, trustee and underwriter.....	346
12. Secretary.....	346
13. History, state of affairs and prospects of company.....	346
14. Purpose of the offer.....	348
15. Share capital of the company.....	348
16. Loans.....	349
17. Options or preferential rights in respect of shares.....	350
18. Shares issued or to be issued otherwise than for cash.....	351
19. Property acquired or to be acquired.....	351
20. Amounts paid or payable to promoters.....	352
21. Commissions paid or payable in respect of underwriting.....	352
22. Preliminary expenses and issue expenses.....	352
23. Material contracts.....	353
24. Interest of directors and promoters.....	353
25. Particulars of the offer.....	354
26. Time and date of the opening and of the closing of the offer.....	354
27. Issue price.....	354
28. Minimum subscription.....	355
29. Statement as to adequacy of capital.....	356
30. Statement as to listing on stock exchange.....	356
31. Requirements for prospectus of mining company.....	356
32. Report by auditor of company.....	357
33. Report by auditor where business undertaking to be acquired.....	359
34. Report by auditor where body corporate will become a subsidiary.....	359
35. Auditor not qualified to make reports.....	360
36. Qualification in respect of references to period of five years.....	360
37. Adjustment of figures in reports.....	361
38. Report by directors as to material changes.....	361
SCHEDULE 4.....	362
Consequential Amendments.....	362
SCHEDULE 5.....	363
Legislation to be enforced by Commission.....	363

Arrangement of the Bill :

Section 0

SCHEDULE 6..... 364

Transitional Arrangements 364

1. Interpretation	364
2. Delayed repeal of Close Corporations Act	365
3. Pending filings.....	366
4. Continuation of pre-existing companies	366
5. Conversion of close corporations.....	367
6. Continued application of Companies Act, 1973 to winding up and liquidation.....	369
7. Memorandum of Incorporation and Rules.....	369
8. Pre-incorporation contracts	370
9. Company finance and governance	371
10. Company names and name reservations	372
11. Preservation and continuation of court proceedings and orders.....	372
12. General preservation of regulations, rights, duties, notices and other instruments	373
13. Transition of regulatory agencies.....	373
14. Continued investigation and enforcement of previous Acts.....	375
15. Regulations	376

Companies Bill, 2007

Chapter 1 - Interpretation, Purpose and Application

Part A - Interpretation

1. Definitions

In this Act -

“**act in concert**” means to act with a common purpose or under common control;

“**advertisement**” means any direct or indirect communication transmitted by any medium, or any representation or reference written, inscribed, recorded, encoded upon or embedded within any medium, by means of which a person seeks to bring any information to the attention of all or part of the public;

“**agreement**” includes an arrangement or understanding between or among two or more parties that purports to establish a relationship in law between those parties;

“**alterable provision**” means a provision of this Act in which it is expressly contemplated that its effect on a particular company may be negated, restricted, limited, qualified, extended, or otherwise altered in substance or effect by that company’s Memorandum of Incorporation;

“**amalgamation**” means a transaction, or series of transactions, involving two or more companies, resulting in the formation of one or more new companies, which together hold all of the assets and liabilities previously held by the several amalgamating companies;

“**amalgamated company**” means a company that –

- (a) was incorporated in terms of an amalgamation agreement;

- (b) holds all or part of the assets and liabilities of any of the amalgamating companies; and
- (c) has applied for, or been issued a certificate of incorporation in terms of section 120;

“**beneficial interest**” when used in relation to a share, means the right or entitlement of a person, through ownership, contract, management, understanding, agreement, relationship or otherwise, alone or together with another person -

- (d) to receive any dividend payable in respect of that share;
- (e) to exercise or cause to be exercised, in the ordinary course, any or all of the rights attaching to that share; or
- (f) to dispose or direct the disposition of that share,

but does not include any interest held by a person in a unit trust or collective investment scheme in terms of the Unit Trusts Control Act, 1981 (Act 54 of 1981);

“**board**” means the board of directors of a company;

“**business rescue plan**” means a plan referred to in section 153;

“**Cabinet**” means the body of the national executive described in section 91 of the Constitution;

“**central securities depository**” has the meaning set out in the Security Services Act, 2004 (Act No. 36 of 2004);

“**closely held company**” means a for profit company that is not a widely held company, as determined in accordance with section 8;

“**Commission**” means the Companies and Intellectual Property Commission, established by section 186;

“**Commissioner**” means the person appointed to, or acting in the office of that name as contemplated in section 190;

“Companies Register” means the register required to be established by the Commissioner in terms of section 188 (4);

“company” means a juristic person to the extent that it is, or its activities are, regulated by this Act in terms of section 7;

“company records” means –

- (g) any information that a company is required to keep in terms of this Act or any other public regulation; and
- (h) any accounts, books, writings, documents or electronic device on which any such information is recorded;

“consideration”, when used in respect of an exchange of any kind, means anything of value given and accepted in exchange for any property, service or any other thing of value, including without limitation -

- (a) money, property, a cheque, a token, a ticket, electronic credit, credit, debit or electronic chip, or similar object;
- (b) labour, barter or similar exchange of one thing for another; or
- (c) any other thing, undertaking, promise, agreement or assurance, irrespective of its apparent or intrinsic value, or whether it is transferred directly or indirectly;

“Constitution” means the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996);

“control”, in relation to a juristic person, has the meaning determined in accordance with section 3;

“conversion”, in relation to a debenture, means a straight conversion or a redemption and subsequent subscription as established in the relevant debenture document.

“convertible shares” means –

- (i) any non-voting shares in a company that -
 - (i) are reasonably likely in future to become voting shares, or
 - (ii) become voting shares if the holder of those shares so elects at some time after acquiring the shares; or
- (j) options in voting shares in the company;

“director” means a member of the board of a company, as contemplated in section 84;

“distribution” means a direct or indirect –

- (a) transfer, by a company in respect of its shares, of money or other property of the company, other than its own shares, whether in the form of a dividend, as consideration for the acquisition of any of its shares, a payment in lieu of a capitalization share, or otherwise; or
- (b) incurrence or forgiveness of a debt by a company to or for the benefit of one or more holders of any of its shares, in respect of any of its shares;

“debenture” -

- (k) includes debenture stock, debenture bonds, common notes and any other debt security of a company; but
- (l) does not include promissory notes and loans, whether constituting a charge on the assets of the company or not;

“debenture document” includes any document by which a debenture is offered or enabled, embodying the terms and conditions of the debenture including, but not limited to, a trust deed or certificate.

“effective date”, with reference to any particular provision of this Act, means the date on which that provision came into operation in terms of section 227;

“electronic communication” includes communication by telephone, email, fax, sms, satellite transmission, fibre optic connection, broadband internet connection, wireless computer access, Bluetooth, video conference facility and any similar technology or device;

“employee share scheme” means a scheme established by a company, whether by means of a trust or otherwise, for the purpose of offering participation therein to employees and officers of the company or of its subsidiary, either-

(a) by means of the sale of shares in the company; or

(b) by the grant of options on shares in the company,

solely to employees and officers of the company or of its subsidiary;

“exchange” when used as a noun, has the meaning set out in the Security Services Act, 2004 (Act No. 36 of 2004);

“Executive Director” means the person appointed to the office of that name within the Takeover Regulation Panel, in terms of section 201;

“exercise”, when used as a verb in relation to voting rights, means a person’s actual or potential -

(c) voting at a meeting of security holders of a company, whether as a security holder, proxy, nominee, trustee or in any other capacity, or

(d) causing another person to vote according to the directive or wishes of the first mentioned person;

“external company” means an entity incorporated outside the Republic and which –

(e) is carrying on business within the Republic; and

(f) would be a public interest company in terms of section 9 if it had been incorporated within the Republic;

“file”, when used as a verb, means to deliver an acceptable document to the Commission in the manner and form, if any, prescribed for that document;

“financial report” includes any financial statement or financial information in a circular, prospectus or provisional announcement of results, that an actual or prospective security holder or creditor, or the Commission, Takeover Regulation Panel or other regulatory authority may reasonably be expected to rely on;

“financial reporting standards” means statements as prescribed in terms of section 96 (7) (a);

“financial statements” includes annual financial statements, provisional annual financial statements, interim or preliminary reports and, if applicable, group and consolidated financial statements;

“for profit company” means a company incorporated for the purpose of financial gain for its shareholders;

“general meeting”, when used with respect to the holders of securities other than shares, includes an equivalent meeting of debenture holders if the context requires;

“holding company” in relation to a subsidiary, means a juristic person or undertaking that controls that subsidiary;

“Human Rights Commission” means the South African Human Rights Commission established by and in terms of Chapter 9 of the Constitution;

“incorporator”, when used -

- (a) with respect to a company incorporated in terms of this Act, means a person who incorporated that company, as contemplated in section 13; or
- (b) with respect to a pre-existing company, means a person who took the relevant actions comparable to those contemplated in section 13 to bring about the incorporation of that company;

“individual” means a natural person;

“insolvency event” means an event contemplated in section 131;

“inspector” means a person appointed as such in terms of section 210;

“investigator” means a person appointed as such in terms of section 210;

“inter-related”, when used in respect of three or more persons, means persons who are related to one another in a series of relationships, as contemplated in section 2 (1)(d);

“juristic person” includes -

- (g) an external company; and
- (h) a trust irrespective whether it was established within or outside the Republic;

“licence” means the authority, regardless of its specific title or form, issued to a person and in terms of which that person is authorised to conduct business;

“listed security” has the meaning set out in the Security Services Act, 2004 (Act No. 36 of 2004);

“Master” means the person holding the office of that name in terms of the Superior Courts Act;

“member” means a person who holds membership in, and specified rights in respect of, a not for profit company, as contemplated in Item 2 of Schedule 2;

“Memorandum of Incorporation” means the document, as amended from time to time, -

- (a) by which -
 - (i) a company has been incorporated in terms of this Act, as contemplated in section 13; or
 - (ii) a pre-existing company was structured and governed before the effective date; and

- (b) which sets out rights, duties and responsibilities of shareholders, directors and others within and in relation to the company, and other matters contemplated in section 14;

“merger” means a transaction, or series of transactions, involving two or more companies, resulting in one or more of those companies together holding all of the assets and liabilities previously held by the several merging companies;

“merged company” means a company that was a party to a merger, and –

- (i) continued in existence after the implementation of the merger agreement; and
(j) holds all or part of the assets and liabilities of any of the merging companies;

“Minister” means the member of the Cabinet responsible for companies;

“nominee” has the meaning set out in the Security Services Act, 2004 (Act No. 36 of 2004);

“not for profit company” means a company incorporated for a public benefit purpose, as set out in its Memorandum of Incorporation, and the income and property of which are not distributable to its incorporators, members, directors, officers or persons related to any of them except as reasonable compensation for services rendered;

“Notice of Incorporation” means the notice to be filed in terms of section 13(1)(b), by which the incorporators of a company inform the Commission of the incorporation of that company, for the purpose of having it registered;

“official language” means a language mentioned in section 6 (1) of the Constitution;

“ordinary resolution” means a resolution adopted -

- (a) at a meeting of shareholders of a company, by the affirmative vote of the holders of at least a majority of the shares voted on the resolution, or a higher percentage as contemplated in section 82 (6)(b); or

- (b) by shareholders of a company acting other than at a meeting, as contemplated in section 83;

“organ of state” has the meaning set out in section 239 of the Constitution;

“participant” has the meaning set out in section 1 of the Security Services Act, 2004 (Act No. 36 of 2004);

“person” includes a juristic person;

“personal financial interest” when used with respect to any person, means a direct material interest of that person, or a related person, of a financial, monetary or economic nature, or to which a monetary value may be attributed;

“pre-existing company” means a juristic person that was -

- (a) incorporated in terms of any law in the Republic before the effective date; and
(b) in existence immediately before the effective date;

“pre-incorporation contract” means an agreement entered into before the incorporation of a company by a person who purports to contract in the name of, or on behalf of, the company, with the intention or understanding that the company will be incorporated, and will thereafter be bound by the agreement;

“premises” includes land, or any building, structure, vehicle, ship, boat, vessel, aircraft or container;

“prescribed” means determined, stipulated, required, authorized, permitted or otherwise regulated by a regulation or notice made in terms of this Act;

“present at a meeting” means to be present in person, or by electronic communication, or to be represented by a proxy who is present in person or by electronic communication;

“private dwelling” means any part of a formal or informal structure that is occupied as a residence, or any part of a structure or outdoor living area that is accessory to, and used wholly for the purposes of, a residence;

“prospective voting rights”, when used in relation to calculating a person’s voting share, means the sum of -

- (c) the person’s voting rights;
- (d) votes that the person may in future exercise as a result of convertible shares; and
- (e) votes that other persons may in future exercise as a result of convertible shares that are in all respects identical to those mentioned in paragraph (b);

“public interest company” means –

- (a) a widely held company; or
- (b) a closely held company, or not for profit company, that, in either case, satisfies the criteria set out in section 9 (1);

“public regulation” means any national, provincial or local government legislation or subordinate legislation, or any license, tariff, directive or similar authorisation issued by a regulatory authority or pursuant to any statutory authority;

“registered auditor” has the meaning set out in the Auditing Profession Act, 2005 (Act No. 26 of 2005);

“registered trade union” means a trade union registered in terms of section 96 of the Labour Relations Act, 1995 (Act No. 66 of 1995);

“Registration Certificate”, when used -

- (f) with respect to a company incorporated on or after the effective date, means the certificate, or amended certificate, issued by the Commissioner in terms of section 16 as evidence of the incorporation and registration of that company;
- (g) with respect to a pre-existing company incorporated in terms of -
 - (i) the Companies Act, 1973, Act No. 61 of 1973, means the certificate of incorporation issued to the company in terms of that Act;

- (ii) the Close Corporations Act, 1984, Act No. 69 of 1984, and converted in terms of Item 5 of Schedule 6 of this Act, means the certificate of incorporation issued to the company in terms of that Item, read with section 16; or
- (iii) any other law in the Republic, means any document issued in terms of any law to the company as evidence of its incorporation;

“Registry” means a depository of documents required to be kept by the Commission in terms of section 188 (4);

“regulated entity” means a person that has been licensed by a regulatory authority;

“regulation” means a regulation made under this Act;

“regulatory authority” means an entity established in terms of national or provincial legislation responsible for regulating an industry, or sector of an industry;

“related”, when used in respect of two persons, means persons who are connected to one another in any manner contemplated in section 2 (1)(a) to (c);

“repealed law” means legislation repealed by this Act, or a public regulation made in terms of any such legislation;

“rules of a company” means any rules made by a company as contemplated in section 14 (5);

“security”, when used other than in respect of any court proceedings or matters before the Master, has the meaning set out in the Security Services Act, 2004 (Act No. 36 of 2004);

“share” means one of the units into which the proprietary interest in a company is divided;

“sms” means a short message service provided through a telecommunication system;

“solvency and liquidity test” means the test set out in section 4 (1);

“special resolution” means a resolution adopted -

- (a) at a meeting of security holders of a company, by the affirmative vote of the holders of at least 75% of the securities voted on the resolution, or a lower percentage as contemplated in section 82 (6)(a); or
- (b) by shareholders of a company acting other than at a meeting, as contemplated in section 83;

“subsidiary” has the meaning determined in accordance with section 3;

“Takeover Regulations” means the regulations made by the Minister in terms of sections 110 and 225;

“this Act” includes the Schedules and regulations;

“unalterable provision” means a provision of this Act that is not an alterable provision;

“uncertificated securities” means any securities -

- (a) defined as such in section 29 of the Securities Services Act, 2004; and
- (b) that are entered in the relevant company's securities register as such in terms of Part D of Chapter 3;

“uncertificated securities register” means the record of uncertificated securities administered and maintained by a participant or central securities depository, as determined in accordance with the rules of a central securities depository, and which forms part of the relevant company's securities register established and maintained in terms of Part D of Chapter 3;

“voting power” means the right of a share holder to vote generally or in an election of directors;

“voting share”, when used in relation to a person, means that person's percentage of the voting rights or prospective voting rights in a company;

“**voting shares**” means -

- (c) shares that carry voting rights;
- (d) non-voting shares that are convertible to voting securities; and
- (e) when applicable, preference shares that are not convertible into voting shares, and do not confer voting rights.

“**wholly-owned subsidiary**” has the meaning determined in accordance with section 3; and

“**widely held company**” means a company that satisfies any of the criteria set out in section 8 (2).

2. Related and inter-related persons, and actions in concert

(1) For all purposes of this Act -

- (a) an individual is related to another individual if they-
 - (i) are married, or live together in a relationship similar to marriage; or
 - (ii) are separated by no more than three degrees of natural or adopted consanguinity or affinity, unless, in respect to any matter arising under this Act, there is sufficient evidence to conclude that the two persons act independently of one another;
- (b) an individual is related to a juristic person if the individual directly or indirectly controls the juristic person, as determined in accordance with section 3;
- (c) a juristic person is related to another juristic person if –
 - (i) either of them directly or indirectly controls the whole or part of the business of the other;
 - (ii) either is a subsidiary of the other; or

- (iii) a person directly or indirectly controls the whole or part of the business of both of them; and
 - (d) three or more persons are inter-related if the first and second such persons are related, the second and third such persons are related, and so forth in an unbroken series.
- (2) Two or more persons are presumed to act in concert if -
 - (a) they are related or inter-related; or
 - (b) one of those persons is a juristic person, and the other is –
 - (i) a director or trustee of the juristic person; or
 - (ii) a juristic person in which one or more of the first juristic person's directors or trustees can exercise 35% or more of the voting rights;

unless, in respect to any matter arising under this Act, there is sufficient evidence to conclude that they act independently of one another.
- (3) In addition to the presumptions set out in subsection (2), a court or Tribunal may conclude that two or more persons are acting, have acted, or presumably will act in concert if -
 - (a) one of those persons is -
 - (i) an individual, and the other is a trust of which the individual is a trustee, beneficiary or contingent beneficiary; or
 - (ii) a juristic person, and the other is -
 - (aa) a pension, provident or benefit fund, or share incentive scheme for the benefits of the past or present employee's of that juristic person; or
 - (bb) a trust of which one or more of the juristic person's directors or trustees is a beneficiary or trustee; and

- (b) there is sufficient evidence in the circumstances to conclude that they are not acting, have not acted, or likely will not act independently of one another.

3. Controlling and subsidiary relationships

- (1) For all purposes of this Act, a person controls a juristic person, or all or part of its business, if the first person, directly or indirectly, has the power to substantially determine the policy and direction of the juristic person or its business, irrespective of the right, authority or other means by which that power is derived.
- (2) For the purpose of determining whether a person controls a juristic person by reason of holding a majority of the voting rights in that juristic person -
 - (a) voting rights that are exercisable only in certain circumstances are to be taken into account only-
 - (i) when those circumstances have arisen, and for so long as they continue;
or
 - (ii) when those circumstances are under the control of the person holding the voting rights;
 - (b) voting rights that are exercisable only on the instructions or with the consent or concurrence of another person are to be treated as being held by a nominee for that other person; and
 - (c) voting rights held by -
 - (i) a person as nominee for another person are to be treated as held by that other person; or
 - (ii) a person in a fiduciary capacity is to be treated as held by the beneficiary of those voting rights.
- (3) For the purposes of subsection (2) -

- (a) 'hold' or any derivative of it, refers to the registered or direct or indirect beneficial holder of shares conferring a right to vote; and
 - (b) "voting rights" means the aggregate votes attaching to all classes of shares of a company, but excluding shares in a company held by a subsidiary of that company;
- (4) A juristic person is -
- (a) a subsidiary of another juristic person if more than 50% of the shares of the first such juristic person are held, alone or in any combination, by -
 - (i) the second such juristic person;
 - (ii) one or more other wholly owned subsidiaries of the second such juristic person; or
 - (iii) one or more nominees of a person contemplated in paragraph (a) or (b);
and
 - (b) is a wholly owned subsidiary of another juristic person if all of the shares of the first such juristic person are held, alone or in any combination, by persons contemplated in paragraph (a).
- (5) An undertaking other than a juristic person is a subsidiary of a juristic person or other undertaking if the first such undertaking is controlled by -
- (a) the juristic person or second such undertaking; or
 - (b) any combination of the juristic person or undertaking, and any of its other subsidiaries, acting together.

4. Solvency and liquidity test

- (1) For any purpose of this Act, 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 company's total assets equal or exceed its total liabilities; and
 - (b) it appears that the company will be able to pay its debts as they became due in the course of business for a period of –
 - (i) 12 months after the date on which the test is considered; or
 - (ii) in the case of a distribution contemplated in section 48, 12 months following that distribution.
- (2) For the purposes contemplated in subsection (1) -
- (a) the board or any other person applying the solvency and liquidity test to a company may consider –
 - (i) only financial information that satisfies financial reporting standards; and
 - (ii) any fair valuation of the company's assets and liabilities, or other valuation that is reasonable in the circumstances, subject to paragraph (b); and
 - (b) unless the Memorandum of Incorporation of the company provides otherwise, a person applying the test in respect of a distribution contemplated in section 48 is not to regard 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 are superior to those receiving the distribution.

5. General interpretation of the Act

- (1) This Act must be interpreted in a manner that gives effect to the purposes set out in section 6.
- (2) A person, court or Tribunal interpreting or applying this Act may consider, to the extent appropriate, foreign company law.

- (3) When, in this Act, a particular number of ‘business days’ is provided for between the happening of one event and another, the number of days must be calculated by –
- (a) excluding the day on which the first such event occurs;
 - (b) including the day on or by which the second event is to occur; and
 - (c) excluding any public holiday, Saturday or Sunday that falls on or between the days contemplated in paragraphs (a) and (b) respectively.
- (4) If there is a conflict between a provision of Chapter 8, and a provision of the Public Finance Management Act, 1999 (Act No. 1 of 1999) or the Public Service Act, 1994 (Proclamation 103 of 1994), the provisions of the Public Finance Management Act, 1999 or of the Public Service Act, 1994, as the case may be, prevail.
- (5) If there is an inconsistency between any provision of this Act, and a provision of any Act not contemplated in subsection (4) -
- (a) the provisions of both Acts apply concurrently, to the extent that it is possible to apply and comply with one of the inconsistent provisions without contravening the second; and
 - (b) the provisions of this Act prevail to the extent that it is impossible to apply or comply with one of the inconsistent provisions without contravening the second.

Part B – Purpose and Application

6. Purposes of this Act

The purposes of this Act are to -

- (a) promote the development of the South African economy by –
 - (i) encouraging entrepreneurship and enterprise efficiency;
 - (ii) creating flexibility and simplicity in the formation and maintenance of companies;
 - (iii) encouraging transparency and high standards of corporate governance, recognising the broader social role of enterprises;
- (b) promote the development of companies within all sectors of the economy, and in particular, among those South Africans who have historically been excluded from active participation in economic organization, management and productivity;
- (c) promote innovation and investment in South African markets by providing a predictable and effective regulatory environment;
- (d) re-affirm the company as a means of achieving economic and social benefits, and to continue to provide for the creation and use of companies, in a manner that enhances the economic welfare of South Africa;
- (e) create optimum conditions for the aggregation of capital for productive purposes, and for the investment of that capital in enterprises and the spreading of economic risk;
- (f) encourage the efficient and responsible management of companies;
- (g) balance the rights and obligations of shareholders and directors within enterprises; and

- (h) provide for the formation, operation and accountability of not for profit companies in a manner designed to promote, support and enhance the capacity of such companies to perform their functions.

7. Application of Act

- (1) This Act applies with respect to -
 - (a) the incorporation, registration and regulation of every company incorporated in terms of this Act;
 - (b) the continued registration and regulation of every pre-existing company that, immediately before the effective date –
 - (i) was registered in terms of the –
 - (aa) Companies Act, 1973 (Act No. 61 of 1973); or
 - (bb) The Close Corporations Act, 1984 (Act No. 69 of 1984), if, since the effective date, it has been converted in terms of Item 5 of Schedule 6; or
 - (ii) was recognised as an ‘existing company’ in terms of the Companies Act, 1973 (Act No. 61 of 1973); and
 - (c) any offering to the public within the meaning of Part E of Chapter 3 -
 - (i) of any shares of a company; or
 - (ii) within the Republic, of any shares of a juristic person incorporated outside the Republic.
- (2) The application of this Act to a not for profit company is subject to the provisions, limitations, alterations or extensions set out in section 10 and in Schedule 2.

-
- (3) Sections 97 to 103 and 115 to 118 do not apply to a closely held company if all of the shares of that company are owned by one person, or by two or more related or inter-related persons.
 - (4) Sections 38 and 39 (4) do not apply to a company if every shareholder of the company is also a director of the company.
 - (5) Sections 89, 91 to 93, 163, and 215 do not apply with respect to the directors of -
 - (a) a bank, as defined in the Banks Act, 1990 (Act No. 94 of 1990);
 - (b) a mutual bank, as defined in the Mutual Banks Act, 1993 (Act No. 124 of 1993); or
 - (c) any other financial institution that is similarly licensed and authorised to conduct business and take deposits from the public in terms of any national legislation.
 - (6) A regulatory authority may apply to the Minister for an industry-wide exemption from one or more provisions of this Act on the grounds that those provisions overlap or duplicate a regulatory scheme administered by that regulatory authority in terms of any other national legislation.
 - (7) The Minister, by notice in the Gazette after receiving the advice of the Commission, may grant an exemption contemplated in subsection (6) -
 - (a) only to the extent that the relevant regulatory scheme ensures the achievement of the purposes of this Act at least as well as the provisions of this Act; and
 - (b) subject to any limits or conditions necessary to ensure the achievement of the purposes of this Act.

8. Categories of for profit companies

- (1) For the purposes of this Act, every for profit company is either a widely held company, or a closely held company.

- (2) A for profit company is a widely held company if -
- (a) the company's Memorandum of Incorporation -
 - (i) permits it to offer any of its shares to the public, within the meaning of sections 60 and 61;
 - (ii) limits, negates or restricts the pre-emptive right of every shareholder set out in section 36 (1); or
 - (iii) provides for the unrestricted transferability of any of its shares; or
 - (b) a majority of its shares are held by another widely held company, or collectively by two or more related or inter-related persons, any one of which is a widely held company.

9. Public Interest Companies

- (1) For all purposes of this Act, a company is a public interest company if it is -
- (a) a widely held company, as determined in accordance with section 8 (2); or
 - (b) a closely held company, or a not for profit company, that
 - (i) is predominately engaged in activities within one or more categories prescribed in terms of subsection (2); or
 - (ii) at the time a determination is made, satisfies any two of the following three criteria, subject to subsection (7):
 - (aa) its average asset value, combined with the average asset value of any related or inter-related juristic person, over the preceding three years exceeds the threshold asset value prescribed in terms of subsection (3)(a);
 - (bb) its average annual turnover, combined with the average annual turnover of any related or inter-related juristic person, over the

preceding three years exceeds the threshold annual turnover value prescribed in terms of subsection (3)(b); or

- (cc) its average number of employees, combined with the average number of employees of any related or inter-related juristic person, over the preceding three years exceeds the threshold annual turnover value prescribed in terms of subsection (3)(c).

- (2) For the purposes of subsection (1)(b)(i), the Minister, by notice in the Gazette, may prescribe categories of economic activity that fall within the public interest because they -
 - (a) take deposits from the public or exercise a public trust;
 - (b) have a substantial or significant impact on the environment;
 - (c) contribute to public health; or
 - (d) supply or maintain essential goods, services or infrastructure.
- (3) On the effective date, and at intervals of not more than five years, the Minister, by notice in the Gazette, must determine -
 - (a) a monetary asset value of not less than R 25 000 000 in the case of a for profit company or R 10 000 000 in the case of a not for profit company, for the purpose of subsection (1)(b)(ii)(aa);
 - (b) an annual turnover threshold of not less than R 50 000 000 in the case of a for profit company or R 20 000 000 in the case of a not for profit company, for the purpose of subsection (1)(b)(ii)(bb); and
 - (c) an employment threshold of not less than 200 employees in the case of a for profit company, or 50 employees in the case of a not for profit company, for the purposes of subsection (1)(b)(ii)(cc).
- (4) When determining categories in terms of subsection (2), or thresholds in terms of subsection (3), the Minister may determine different categories or thresholds applicable to for profit, and not for profit, companies, respectively.

- (5) The initial thresholds determined by the Minister in terms of this section take effect on the effective date, and each subsequent threshold takes effect six months after the date on which it is published in the Gazette.
- (6) Despite the periods of time set out in subsection (3), each successive threshold determined by the Minister in terms of this section continues in effect until a subsequent threshold in terms of this section takes effect.
- (7) For the purposes of applying the thresholds contemplated in subsection 1(b)(ii), if a particular natural person is related -
 - (a) to one or more related or inter-related juristic persons; and
 - (b) to another natural person, who in turn is also related to one or more other related or inter-related juristic persons,

the assets, annual turnover and employees of the related or inter-related juristic persons contemplated in paragraph (a) are not to be combined with the assets, annual turnover and employees of the related or inter-related juristic persons contemplated in paragraph (b), unless there is satisfactory evidence that the two natural persons act in concert in controlling their respective related or inter-related juristic persons.

10. Specific application of Act to not for profit companies

- (1) The following provisions of this Act do not apply to a not for profit company:
 - (a) Chapter 3 - Corporate Finance
 - (b) Section 88 (1) to (3) - Election of Directors
 - (c) Chapter 5 –Takeovers, Offers and Fundamental Transactions, except sections 115, 116, 118 and 119
 - (d) Sections 149 (d), and 155 (2)(b) and (3) – Rights of shareholders to approve business rescue plan
 - (e) Section 165 – Dissenting shareholders’ appraisal rights

- (f) Schedule 3 – Public offerings of shares and other securities
- (2) Part A of Chapter 4, read with the changes required by the context -
 - (a) applies to a not for profit company only if the company has voting members, subject to subsection (3); and
 - (b) when applied to a not for profit company, is subject to the provisions of Item 2 of Schedule 2.
- (3) The requirements of section 79 (3) and (4) to hold at least one annual general meeting, and the related requirements of sections 80 and 81, apply to a not for profit company that qualifies as a public interest company, even if it has no voting members.
- (4) With respect to a not for profit company that has any voting members, a reference in this Act to “a shareholder”, or to “a holder of shares entitled to be voted”, is a reference to the voting members of the not for profit company.

11. Fundamental principles of not for profit companies

- (1) Incorporation as a not for profit company in terms of this Act, and compliance with its provisions, does not necessarily qualify that not for profit company for any particular status, category, classification or treatment in terms of the Income Tax Act, 1962 (Act No. 58 of 1962) or any other legislation, except to the extent that any such legislation provides otherwise.
- (2) A not for profit company -
 - (a) must apply all of its assets and income, however derived, to advance its stated objects, as set out in its Memorandum of Incorporation; and
 - (b) subject to paragraph (a), may directly or indirectly, alone or in concert with any other person carry on any business, trade or undertaking consistent with or ancillary to its stated objects.

- (3) An incorporator, member or director, or person appointing a director, of a not for profit company may not directly or indirectly receive any financial benefit or gain from the company, other than reasonable remuneration for work done, or compensation for expenses incurred, to advance the stated objects of the company.
- (4) A not for profit company may not -
- (a) merge or amalgamate with, or convert to, a for profit company; or
 - (b) dispose of any part of its assets, undertaking or business to a for profit company, other than for fair value, except to the extent that such a disposition of an asset occurs –
 - (i) in the ordinary course of the activities of the not for profit company; and
 - (ii) as part of a general offering of similar assets at comparable price to –
 - (aa) the members of the not for profit company; or
 - (bb) all or part of the public generally.
- (5) Despite any provision in any law or agreement to the contrary, upon the winding up or liquidation of a not for profit company -
- (a) no past or present member or director of that company, or person appointing a director of that company, is entitled to any part of the net value of the company after its obligations and liabilities have been satisfied; and
 - (b) the entire net value of the company must be -
 - (i) distributed to one or more not for profit companies, voluntary associations or not for profit trusts, in accordance with the liquidated company's Memorandum of Incorporation; or
 - (ii) transferred to the State, to the extent that the scheme of distribution provided for by or in terms of the company's Memorandum of Incorporation fails for any reason.

- (6) An entity incorporated outside the Republic and comparable to a not for profit company incorporated under this Act -
 - (a) may register with the Commission as an external not for profit company, in which case its activities in the Republic are subject to the provisions of this Act governing not for profit companies;
 - (b) together with the required number of other persons, may be an incorporator of a company under this Act; and
 - (c) in accordance with the Memorandum of Incorporation of a not for profit company, may be a member of, or appoint one or more directors to the board of, that company.

Chapter 2 - Formation and Registration of Companies

Part A – Incorporation and Legal Status

12. Legal status of companies

- (1) From the date and time that the incorporation of a company is registered, as stated in its Registration Certificate, the company -
 - (a) is a juristic person, which exists continuously until it's name is removed from the Companies Register in accordance with this Act; and
 - (b) has all of the legal powers and capacity of an individual, except to the extent that a juristic person is incapable of exercising any such powers, or having any such capacity.
- (2) A person is not, solely by reason of being an incorporator, shareholder or director of a company, liable for any liabilities or obligations of the company, except to the extent that this Act, or the company's Memorandum of Incorporation, expressly provide otherwise.

13. Right to incorporate a company

- (1) One or more persons may incorporate a for profit company, or three or more persons may incorporate a not for profit company, by -
 - (a) completing, and each signing in person or by proxy, a Memorandum of Incorporation that satisfies the requirements of this Act; and –
 - (b) filing a Notice of Incorporation, in accordance with subsection (2).
- (2) The Notice of Incorporation of a company must be –
 - (a) in the prescribed form, subject to section 223; and
 - (b) filed at the office of the Commission, with the prescribed filing fee.

- (3) The Commission -
- (a) may reject a Notice of Incorporation if the notice, or any thing required to be filed with it, is incomplete, or improperly completed in any respect; and -
 - (b) must reject a Notice of Incorporation if –
 - (i) the initial directors of the company, as set out in the Notice, are fewer than required by or in terms of section 84; or
 - (ii) any of the initial directors of the company, as set out in the Notice, are disqualified in terms of section 89 and the remaining qualified directors are fewer than required by or in terms of section 84.

14. Memorandum of Incorporation of a company

- (1) If the Memorandum of Incorporation of a company, as signed by the incorporators, or as subsequently amended by the company, is -
- (a) in the form set out in -
 - (i) Part A of Schedule 1, in the case of a not for profit company; or
 - (ii) Part B of Schedule 1, in the case of a for profit company

the company is constituted in accordance with the applicable provisions of this Act, without negation, restriction, limitation, qualification, extension, or other alteration;
 - (b) in any other form -
 - (i) it must include at least all of the information contemplated in Part A or B of Schedule 1, as the case may be; and
 - (ii) the company is constituted in accordance with -
 - (aa) the unalterable provisions of this Act;

- (bb) the alterable provisions of this Act, subject to any negation, restriction, limitation, qualification, extension, or other alteration set out in the company's Memorandum of Incorporation; and
 - (cc) any further provisions of the company's Memorandum of Incorporation.
- (2) The Memorandum of Incorporation of a not for profit company, as signed by the incorporators, and as subsequently amended at any time by the company, must -
 - (a) state that the company is a not for profit company;
 - (b) set out one or more public benefit objects of the company, which may not include any object that seeks directly or indirectly to realize financial gain for the incorporators, or for any member or director of the company; and
 - (c) either –
 - (i) name a particular not for profit company or trust, or voluntary association, or one or more categories of such companies, trusts or associations, to receive any net assets upon the winding up of the company; or
 - (ii) set out the manner in which the directors at the time of the winding up of the company may determine which not for profit company or trust, or voluntary association, will receive any net assets upon the winding up of the company.
- (3) Each provision of a company's Memorandum of Incorporation -
 - (a) must be consistent with this Act; and
 - (b) has no effect to the extent that it contravenes, or is inconsistent with, this Act.
- (4) Unless a company's Memorandum of Incorporation is in the form of Part A or B of Schedule 1, it may include any provision dealing with a matter that this Act -
 - (a) does not address; or

-
- (b) expressly contemplates being negated, restricted, limited, qualified, extended, or otherwise altered.
- (5) A company's Memorandum of Incorporation may permit the board of that company to make, amend or repeal any necessary or incidental rules relating to the governance of the company in respect of matters that are not addressed in this Act or the Memorandum of Incorporation, by -
- (a) publishing a copy of the rules to the shareholders, in any manner required or permitted by the Memorandum of Incorporation, or the rules of the company; and
 - (b) filing a copy of the rules, if the company's Memorandum of Incorporation has been filed.
- (6) A rule contemplated in subsection (5) -
- (a) must be consistent with this Act and the company's Memorandum of Incorporation;
 - (b) takes effect on a date that is the later of –
 - (i) 30 days after the rule is published in terms of subsection (5)(a); or
 - (ii) the date, if any, specified in the rule; and
 - (c) is binding -
 - (i) on an interim basis from the time it takes effect until the next general meeting of the company's shareholders; and
 - (ii) on a permanent basis only if it has been ratified by an ordinary resolution at the meeting contemplated in paragraph (i).
- (7) Any purported rule that is inconsistent with this Act or the company's Memorandum of Incorporation is void to the extent of the inconsistency.

- (8) A company's Memorandum of Incorporation, and any rules of the company, are binding -
- (a) between the company and each shareholder; and
 - (b) between or among each of the several shareholders of the company.
- (9) The board of a company, or an individual authorised by the board, may alter the company's Memorandum of Incorporation in any manner necessary to correct a patent error in spelling, punctuation, reference, grammar or similar defect on the face of the document, by -
- (a) publishing a notice of the alteration to the shareholders, in any manner required or permitted by the Memorandum of Incorporation, or the rules of the company; and
 - (b) filing a Notice of Alteration, if the company's Memorandum of Incorporation has been filed.
- (10) A company's Memorandum of Incorporation may be amended –
- (a) in the manner contemplated in section 23 (3); or
 - (b) at any time if -
 - (i) a resolution to amend it is proposed by -
 - (aa) the board of the company; or
 - (bb) the holders of at least 10% of the shares entitled to be voted on such a resolution; and
 - (ii) the shareholders, by special resolution, approve the proposed amendment, subject to subsection (12).
- (11) A company's Memorandum of Incorporation may provide different requirements than those set out in subsection (10) (b) (i) with respect to proposals for amendments.

-
- (12) The requirements of subsection (10)(b)(ii) do not apply in the case of a not for profit company that has no voting members.
 - (13) If, after being incorporated, a company amends its Memorandum of Incorporation, the Memorandum of Incorporation as previously adopted by the company has no force or effect with respect to any right, cause of action, or matter occurring or arising after the date on which the amended Memorandum of Incorporation takes effect.

15. Filing the Memorandum of Incorporation

- (1) Unless it is a public interest company, the Memorandum of Incorporation of a not for profit or closely held company is not required to be filed, but a certified copy may be filed by -
 - (a) the incorporators, when they file the Notice of Incorporation; or
 - (b) the company, at any time.
- (2) A certified copy of the Memorandum of Incorporation of a public interest company must be filed –
 - (a) with the Notice of Incorporation of the company if, at that time, it satisfies any of the criteria of a widely held company, or another public interest company;
or
 - (b) by the company within–
 - (i) 20 business days after first becoming a widely held company; or
 - (ii) 60 business days after first becoming a public interest companywhichever is earlier.
- (3) If, after filing a certified copy of a Memorandum of Incorporation as contemplated in subsection (1) or (2), a company amends or repeals it, the company must file with the Commissioner –

- (a) a notice of the amendment or repeal; and
 - (b) a certified copy of any amendment to the Memorandum of Incorporation.
- (4) A person is not deemed to have notice or knowledge of the contents of any document relating to a company merely because the document –
- (a) has been filed with the Commissioner; or
 - (b) is accessible for inspection at an office of the company.

16. Registration of company

- (1) As soon as practicable after accepting a filed Notice of Incorporation in terms of section 13, the Commissioner must –
- (a) assign to the company a unique registration number; and
 - (b) subject to subsection (2) –
 - (i) enter the prescribed information concerning the company in the Companies Register;
 - (ii) endorse the Notice of Incorporation, and, if applicable, the certified copy of the Memorandum of Incorporation filed with it, in the prescribed manner; and
 - (iii) issue and deliver to the company a Registration Certificate in the prescribed manner and form, dated as of the later of -
 - (aa) the date on, and time at, which the Commissioner issued the Certificate; or
 - (bb) the date, if any, stated by the incorporators in the Notice of Incorporation.

-
- (2) If the name of a company, as entered on the Notice of Incorporation, is the same as a registered name of another company, or is reserved in terms of section 20 for another person, or does not satisfy the requirements of section 19 (2), the commissioner -
- (a) must take the steps set out in subsection (1)(b), using the company's registration number, followed by "NPC", "Ltd.", or "CHC Ltd", as appropriate, as the interim name of the company in the register and on the Registration Certificate;
 - (b) if the proposed name failed to satisfy the requirements of section 19 (2), may reserve a satisfactory name, or form of the name as shown on the Notice of Incorporation, for the use of the company, as if the company had applied for that reservation in terms of section 20;
 - (c) must invite the company to file an amended Notice of Incorporation using a satisfactory name including, if applicable, the name as reserved in terms of paragraph (b); and
 - (d) if the company files such an amended Notice of Incorporation within the prescribed time, must –
 - (i) enter the company's amended name in the Companies Register; and
 - (ii) issue and deliver to the company an amended Registration Certificate showing the amended name of the company.
- (3) If the Commissioner, after complying with the requirements of subsection (1), believes on reasonable grounds that the company's name may be inconsistent with the requirements of -
- (a) section 19 (1)(c) or (d), the Commissioner may require the applicant to serve a copy of the Notice of Incorporation on any person whom the Commissioner believes may have an interest in the use of the name; or
 - (b) section 19 (1)(e), the Commissioner may refer the Notice of Incorporation to the Human Rights Commission.

- (4) A Registration Certificate issued in terms of subsection (1) is conclusive evidence that –
- (a) all the requirements for the incorporation of the company have been complied with; and
 - (b) the company is incorporated under this Act as from the date, and the time if any, stated in the Certificate.
- (5) A company that falls within any prescribed category of companies for the purpose of this subsection must file an information return in the prescribed manner and form, and at the prescribed intervals.
- (6) For the purposes of subsection (5), the Minister may make regulations prescribing -
- (a) the categories of companies that are required to file information returns;
 - (b) the frequency of filing any such returns, which -
 - (i) may not be more frequent than once per year; and
 - (ii) may be at different frequencies for different categories of companies; and
 - (c) the manner and form for filing any such returns.

17. Validity of company actions

- (1) An act of a company, other than an act that is in contravention of this Act, is not void solely because -
- (a) the company did not have the capacity to do the act; or
 - (b) the directors did not have the authority to perform that act on behalf of the company, solely because the company itself did not have the capacity or power to do the act.

-
- (2) No person may assert or rely on a lack of capacity, power or authority contemplated in subsection (1) in any legal proceedings, except proceedings -
 - (a) between a company and its shareholders or directors;
 - (b) between the shareholders and directors of a company; or
 - (c) arising as a result of an act in contravention of this Act.
 - (3) If a company's Memorandum of Incorporation limits, restricts or qualifies the purposes, powers, or activities of that company –
 - (a) the shareholders, by a special resolution, may ratify any action by the company that is inconsistent with any such limit, restriction or qualification, subject to subsection (4); and
 - (b) one or more shareholders, directors or other interested persons may take proceedings to restrain the company from doing anything inconsistent with any such limit, restriction or qualification, without prejudice to any rights to damages of a third party who -
 - (i) obtained those rights in good faith; and
 - (ii) did not have actual knowledge of the limit, restriction or qualification.
 - (4) An action contemplated in subsection (3) may not be ratified if it is in contravention of this Act.
 - (5) Each shareholder of a company has a claim for damages against any person who causes the company to do anything inconsistent with a limit, restriction or qualification contemplated in this section, unless that action has been ratified by the shareholders in terms of subsection (3)(a).

18. Pre-incorporation contracts

- (1) In a pre-incorporation contract, unless a contrary intention is expressed in the contract, there is an implied warranty by the person who purports to contract in the name of, or on behalf of, a company –
 - (a) that the company will be incorporated within any period specified in the contract or, if no period is specified, then within a reasonable time after the making of the contract; and
 - (b) that, once incorporated, the company will not repudiate the contract.
- (2) A company may repudiate a pre-incorporation contract purported to have been made in its name or on its behalf, unless the company has received any benefit in terms of the contract.
- (3) Upon its incorporation, a company is deemed to have repudiated any provision of a pre-incorporation contract to the extent that it is inconsistent with this Act or otherwise illegal.
- (4) A pre-incorporation contract that has not been, or is not deemed to have been, repudiated in terms of subsection (2) or (3) is as valid and enforceable as if the company had been a party to the contract when it was made.
- (5) A party to a pre-incorporation contract that has been repudiated, or is deemed to have been repudiated by the company after its incorporation, may apply to the Court for an order –
 - (a) directing the company to return to that party any property, whether movable or immovable, acquired by the company under the contract;
 - (b) for any other relief in favour of that party relating to any such property; or
 - (c) validating the contract in whole or in part, except in the case of a provision contemplated in subsection (3).
- (6) In proceedings against a company in terms of subsection (5), or on application by an interested person in respect of an alleged breach of a pre-incorporation contract that

has not been, or is not deemed to have been, repudiated, the Court may make any order or grant any relief required in the interests of justice.

- (7) The amount of damages recoverable in an action for breach of a warranty implied by subsection (1) is the same as the amount of damages that would be recoverable in an action against the company for damages for breach by the company of any unperformed obligation under the contract.
- (8) If, after its incorporation, a company enters into a contract in the same terms as, or in substitution for, a pre-incorporation contract, the liability of a person under subsection (1) in respect of the substituted contract is discharged.
- (9) A person who -
 - (a) knows that a company does not exist; and
 - (b) purports to act in the name of, or on behalf of, that company,

is jointly and severally liable with any other such person for all liabilities created while so acting, if the company is not incorporated, or after being incorporated, repudiates, or is deemed to have repudiated, those acts.

Part B – Company Names**19. Criteria for names of companies**

- (1) A company name, or a translation of a company name into any official language,
 - (a) may be the registration number of the company, unless it is a not for profit company;
 - (b) may comprise words, whether real or invented, letters, numbers, or commonly reproducible symbols, alone or in any combination; and
 - (c) must not be the same as, or confusingly similar to -
 - (i) the name of another company; or
 - (ii) a name registered for use by any person in terms of the Business Names Act, 1960 (Act No. 27 of 1960), Co-operatives Act, 2005 (Act No. 14 of 2005), or Close Corporations Act, 1984 (Act No. 69 of 1984); or
 - (iii) a registered trade mark belonging to another person, or a mark in respect of which an application has been filed in the Republic for registration as a trade mark;
 - (d) must not be misleading, or falsely imply or suggest, that the company –
 - (i) is part of, or associated with, any other person or entity;
 - (ii) is an organ of state or a court, or is operated, sponsored, supported or endorsed by the state or by any organ of state or a court;
 - (iii) is owned, managed or conducted by persons having any particular educational designation or professional qualifications, standards, skills or capacity;
 - (iv) is owned, operated, sponsored, supported or endorsed by, or enjoys the patronage of -

-
- (aa) any foreign state, head of state, head of government, government or administration or any department of such a government or administration; or
 - (bb) any international organization; and
 - (e) must not include any words, expression or symbol that, in isolation or in context within the name, -
 - (i) fall into the category of expression contemplated in section 16 (2) of the Constitution; or
 - (ii) may reasonably be considered generally to offend persons of a particular race, ethnicity, gender or religion.
- (2) A company name –
- (a) may be predominantly in any official language; and
 - (b) in addition to complying with the requirements of subsection (1), must end with the relevant following English expression, irrespective whether the name otherwise comprises only the company’s registration number, or other words, letters, numbers or symbols, or any combination of them:
 - (i) The expression “NPC”, in the case of a not for profit company.
 - (ii) The word “Limited” or its abbreviation, “Ltd.”, in the case of a widely held company.
 - (iii) The expression “CHC Limited” or its abbreviation, “CHC Ltd.”, in the case of a closely held company.
- (3) If -
- (a) a widely held company amends its Memorandum of Incorporation in such a manner that it no longer meets the criteria set out in section 8 (2); or

- (b) a closely held company amends its Memorandum of Incorporation in such a manner that it meets any of the criteria set out in section 8 (2),

the company must file a Notice of Name Change, altering the ending expression as appropriate to its new status in terms of subsection (2).

20. Reservation of name for later use

- (1) A person may reserve one or more names to be used at a later time, either for a newly incorporated company, or as an amendment to the name of an existing company, by filing -

- (a) an application in the prescribed manner and form; and
- (b) any prescribed application fee.

- (2) Unless the Commissioner believes that a company name applied for in terms subsection (1) is -

- (a) the registered name of another company;
- (b) reserved in terms of this section for another person; or
- (c) inconsistent with the requirements of section 19 (2),

the Commissioner must reserve each name applied for in the name of the applicant for an initial period of 6 months, which the Commissioner may extend, from time to time, on good cause shown.

- (3) If the Commissioner, upon reserving a name in terms of subsection (2), believes on reasonable grounds that the name may be inconsistent with the requirements of -

- (a) section 19 (1) (c) or (d), the Commissioner may require the applicant to serve a copy of the application and name reservation on any person whom the Commissioner believes may have an interest in the use of the proposed name by the applicant; or

-
- (b) section 19(1)(e), the Commissioner may refer the application and name reservation to the Human Rights Commission.
- (4) A person for whom a name has been reserved in terms of subsection (2) may transfer that reservation to another person by delivering to the Commissioner –
- (a) a signed notice of the transfer in the prescribed manner and form; and
 - (b) any prescribed transfer fee.
- (5) The Commissioner may issue a notice -
- (a) requiring an applicant for name reservation, or person for whom a name is reserved, to show cause why that name should be reserved, or continue to be reserved, if –
 - (i) the applicant has requested the reservation of more than one name in a single application or a series of applications;
 - (ii) the applicant, having reserved more than one name in a single application or series of applications, has used one of the names so reserved; or
 - (iii) has repeatedly applied to reserve the same name;
 - (b) refusing to extend a name reservation upon its expiry if the person for whom the name is reserved fails to show good cause for the reservation period to be extended; and
 - (c) rejecting an application, or cancelling a name reservation contemplated in this subsection if the Commissioner reasonably believes that the applicant is attempting to abuse the name reservation system for the purpose of selling access to names, or trading in or marketing names.

21. Change of name

- (1) A company may change its name in the manner required by section 19 (3) or 23 (3), or by -
 - (a) filing with the Commissioner -
 - (i) a Notice of Name Change; and
 - (ii) a copy of a special resolution amending its Memorandum of Incorporation to change its name, as contemplated in section 14 (10); and
 - (b) paying any prescribed filing fee.
- (2) If the amended name of a company, as reported in a Notice of Name Change filed in terms of subsection (1),
 - (a) is reserved in terms of section 20 for that company, the Commissioner must -
 - (i) issue to the company an amended Registration Certificate; and
 - (ii) alter the name of the company on the Companies Register; or
 - (b) is not reserved in terms of section 20 for that company, the Commissioner must take the steps set out in paragraph (a), unless -
 - (i) the name is the registered name of another company;
 - (ii) the name is reserved in terms of section 20 for another person; or
 - (iii) the amended name of the company is inconsistent with the requirements of section 19 (2).
- (3) If the commissioner, after complying with the requirements of subsection (2), believes on reasonable grounds that the company's name, as amended, may be inconsistent with the requirements of -

-
- (a) section 19 (1) (c) or (d), the Commissioner may require the applicant to serve a copy of the notice of amendment on any person who the Commissioner believes may have an interest in the use of the name by the applicant; or
 - (b) section 19(1)(e), the Commissioner may refer the notice to the Human Rights Commission.
- (4) A change of name of a company –
- (a) takes effect from the later of –
 - (i) the date on, and time at, which the Commissioner enters the new name on the Companies Register; or
 - (ii) the date, if any, set out in the Notice of Name Change; and
 - (b) does not affect the rights or obligations of the company, or legal proceedings by or against the company.
- (5) After a company has changed its name, any legal proceedings that might have been continued or commenced by or against the company under its former name may be continued or commenced by or against it under its new name.

22. Commissioner's decisions with respect to names

- (1) A person to whom a notice is delivered in terms of section 20 (3) or 21 (3), or any other person with an interest in the name of a company, may apply to the Commissioner in the prescribed manner and form for a determination whether the name satisfies the requirements of section 19.
- (2) After considering an application made in terms of subsection (1), and any submissions by the applicant and the company whose name or proposed name is the subject of the application, the Commissioner must make a determination whether that name satisfies the requirements of section 19.
- (3) An application in terms of subsection (1) may be made -

- (a) within 3 months after the date of a notice contemplated in subsection (1), if the applicant received such a notice; or
 - (b) on good cause shown at any time after the date of the reservation or registration of the name that is the subject of the application, in any other case.
- (4) An incorporator of a company, a company, a person who received a notice in terms of section 20 (5), or an applicant under subsection (1), as the case may be, may apply to –
- (a) The Companies Ombud to review a notice issued by the Commissioner contemplated in section 19 or 20; or
 - (b) the High Court to review a determination or notice issued by the Commissioner, or a decision of the Companies Ombud, in terms of this section.

23. Power of court on review concerning company names

- (1) The court hearing an application for review in terms of section 22 (4) may make an order –
- (a) requiring the Commissioner to -
 - (i) reserve a disputed name for the applicant;
 - (ii) register the incorporation of a company under a disputed name, or the amendment of a company's name;
 - (iii) cancel a reservation granted in terms of section 20, if the reserved name has not been used by the person entitled to it; or
 - (b) directing a company to choose a new name, and to file a notice of an amendment to its Memorandum of Incorporation, to change its name, within a period, and on any terms, that the court considers just, equitable and expedient in the circumstances.

-
- (2) A company is not required to pay any filing fee in respect of a notice that it has changed its name in compliance with an order contemplated in this section, if the Commissioner had reserved the disputed name of or for that company.
 - (3) An amendment to a company's Memorandum of Incorporation required by an order contemplated in subsection (1) –
 - (a) may be effected by a resolution of the company's board; and
 - (b) does not require a special resolution of the shareholders, as contemplated in section 14 (10).

24. Required use of company name and registration number

- (1) A company must ensure that its registered name and registration number are clearly stated on or in every document issued or signed by, or on behalf of, the company, if the document evidences or creates a legal obligation of the company.
- (2) If the Commissioner has issued a Registration Certificate with an interim name, as contemplated in section 16 (2)(a), the company must comply with subsection (1) by stating its interim name.
- (3) If -
 - (a) a document contemplated in subsection (1) is issued or signed by or on behalf of the company, and does not include the name or, if applicable, the interim name, of the company; and
 - (b) a court concludes that another person was reasonably misled by the exclusion of the name or interim name from that document

the court may make any appropriate order allocating any liability in terms of that document to or among any of the shareholders or directors of the company, to the extent that it is reasonable and just to do so in the circumstances.

Part C – Registered Office and Records

25. Registered office

- (1) Each company or external company must -
 - (a) continuously maintain a registered office in the Republic; and
 - (b) register the address of that office by filing a Notice of Registered Office.
- (2) Subject to any conditions or requirements set out in a company's Memorandum of Incorporation, the company may change its registered office at any time by filing a revised Notice of Registered Office.
- (3) A change contemplated in subsection (2) takes effect as from the later of –
 - (a) the date, if any, stated in the revised Notice of Registered Office; or
 - (b) five business days after the date on which the notice was filed.

26. Form and location of company records

- (1) A company's records must be kept -
 - (a) in written form; or
 - (b) in a form or in a manner that allows the documents and information that comprise the records to be convertible into written form within a reasonable time.
- (2) Every company must maintain the following records, or make them accessible, at its registered office, or at another location within the Republic:
 - (a) a securities register or its equivalent, as required by section 54;
 - (b) a certified copy of its Memorandum of Incorporation, and any amendments to it, and any rules of the company made in terms of section 14;

-
- (c) copies of all -
 - (i) annual reports for the previous 7 years;
 - (ii) financial statements and group financial statements required to be completed by this Act for the previous 7 completed financial years of the company;
 - (iii) accounting records required by this Act for the current financial year and for the previous 7 completed financial years of the company;
 - (d) minutes of all shareholder meetings, including -
 - (i) all shareholder resolutions adopted within the previous 7 years, and
 - (ii) underlying documents that were necessary for the shareholders to make the decisions reflected in those resolutions;
 - (e) copies of any written communications sent generally to all shareholders, or all holders of the same class of shares, during the previous 7 years;
 - (f) the register of the company's directors, as required by section 94, including details of any person who has served as a director of the company within the previous 10 years; and
 - (g) minutes of all meetings and resolutions of directors, or directors' committees, within the previous 10 years.
- (3) If,
- (a) as contemplated in subsection (2), any prescribed records are not kept or made accessible, at the company's registered office; or
 - (b) any records are moved from one location to another -

the company must file a Notice of Location of Records, setting out the location at which those records are kept.

27. Shareholder rights to information

- (1) Each shareholder has a right, on request made in good faith, to access, inspect and copy any of the records of the company mentioned in section 26 (2) (a), (b), (c)(i) and (ii), (d), (e), (f) and (g) -
 - (a) in written form;
 - (b) at a reasonable time specified by the shareholder; and
 - (c) subject to payment of any search and copying fees that may be required by the company's Memorandum of Incorporation or rules.
- (2) A company's Memorandum of Incorporation may establish additional inspection rights of shareholders generally, or of holders of specified classes of shares.
- (3) If, at any time, a company's accounting records reveal that the company does not satisfy the solvency and liquidity test as set out in section 4 (1), and the board has not adopted a resolution to commence business rescue proceedings, the board must –
 - (a) within 10 business days deliver a notice of that fact to the shareholders in the prescribed manner and form, together with any further information the board considers relevant; and
 - (b) thereafter deliver a status report to the shareholders in the prescribed manner and form, together with any further information the board considers relevant, at intervals of no more than 60 business days, until the company does satisfy the solvency and liquidity test.

Part D – Dissolving and De-registering Companies

28. Modes of dissolving companies

- (1) A company may be dissolved by -
 - (a) voluntary winding up by the company or by creditors; or
 - (b) winding up and liquidation by court order.
- (2) The procedures for winding up and liquidation of a company, whether voluntary or by court order, are governed by this Part and the laws referred to in Item 6 of Schedule 6.

29. Voluntary winding up of company

- (1) A 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 the creditors.
- (2) A resolution providing for the voluntary winding-up must be filed, together with the prescribed notice and filing fee.
- (3) If a resolution contemplated in this section provides for winding up by the company, before the resolution and notice are filed the company must-
 - (a) arrange for security, satisfactory to the Master, for the payment of the company's debts within no more than 12 months after the start of the winding up of the company; or
 - (b) obtain the consent of the Master to dispense with security, which the Master may do only if the company has submitted to the Master -
 - (i) a sworn statement by the directors of the company that it has no debts;
and

- (ii) a certificate by the company's auditor, or if does not have an auditor, a person who meets the requirements set out in section 101 for appointment as a company's auditor, and appointed for the purpose, stating that to the best of the auditor's knowledge and belief and according to the required financial records of the company, it has no debts.
- (4) Any costs incurred in furnishing the security referred to in subsection (3) may be recovered from the company concerned.
- (5) A liquidator appointed in a voluntary winding up may exercise all powers given by this Act or a law contemplated in Item 6 of Schedule 6 to a liquidator in a winding up by the Court -
 - (a) without requiring specific order or sanction of the Court; and
 - (b) subject to any directions given by -
 - (i) the company in a general meeting, in the case of a winding up by the company; or
 - (ii) the creditors, in the case of a winding up by creditors.
- (6) A voluntary winding-up of a company begins when the resolution of the company has been filed in terms of subsection (2).
- (7) When a resolution has been filed in terms of subsection (2), the Commissioner must promptly deliver a copy of it to the Master.
- (8) Despite any provision to the contrary in a company's Memorandum of Incorporation -
 - (a) the company remains a juristic person and retains all its powers as such while it is being wound up voluntarily; but
 - (b) from the beginning of the company's winding-up –

- (i) it must stop carrying on its business except to the extent required for the beneficial winding up of the company; and
- (ii) all the powers of the company's directors cease, except to the extent specifically authorized –
 - (aa) in the case of a winding up by the company, by the liquidator or the shareholders in general meeting; or
 - (bb) in the case of a winding up by creditors, the liquidator or the creditors.

30. Winding up by court order

- (1) A court may order a company to be wound up if -
 - (a) the company has -
 - (i) by special resolution resolved that it be wound up by the Court; or
 - (ii) applied to the court to have its voluntary winding up continued by the court;
 - (b) one or more of the company's creditors have applied to the court for an order to wind up the company on the grounds that -
 - (i) an insolvency event has occurred, or the company appears to be insolvent;
 - (ii) the company's business rescue proceedings have ended in the manner contemplated in section 135 (2) (b) or (d); or
 - (iii) it is otherwise just and equitable for the company to be wound up;
 - (c) the supervisor of a company appointed during business rescue proceedings has applied for liquidation in terms of section 144 (2)(a), on the grounds that there is no reasonable prospect of the company being rescued;

- (d) the company, one or more directors, or one or more shareholders have applied to the court for an order to wind up the company on the grounds that –
 - (i) the directors are deadlocked in the management of the company, the shareholders are unable to break the deadlock, and –
 - (aa) irreparable injury to the company is resulting, or may result, from the deadlock; or
 - (bb) the company’s business cannot be conducted to the advantage of shareholders generally, as a result of the deadlock;
 - (ii) the shareholders are deadlocked in voting power, and have failed for a period that includes at least two consecutive annual 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;
- (e) a shareholder has applied to a court for an order to wind up the company on the grounds that –
 - (i) the directors, 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
- (f) the Commission or Takeover Regulation Panel has applied to the court for an order to wind up the company on the grounds that –
 - (i) the company, its directors, or other persons in control of the company are acting in a manner that is fraudulent or otherwise illegal; and
 - (ii) the Commission or Takeover Regulation Panel, as the case may be, has previously issued a compliance notice in respect of that conduct, and the company has failed to comply with that notice; and
 - (iii) the Court has imposed an administrative fine in respect of the failure to comply with the compliance notice; and

-
- (iv) the Commission or Takeover Regulation Panel, as the case may be, has issued a second compliance notice in respect of the continuing conduct, and the company has failed to comply with that second compliance notice.
- (2) A shareholder may not apply to the court as contemplated in subsection (1)(d) or (e) unless the shareholder -
- (a) has been a shareholder continuously for at least six months immediately before the date of the application; or
 - (b) became a shareholder as a result of the distribution of the estate of a former shareholder, and the present and former shareholder, in aggregate, satisfied the requirements of paragraph (a).
- (3) A court may not make an order applied for in terms of subsection (1)(e) or (f) if, before the conclusion of the court proceedings -
- (a) the board or the shareholders have removed from office every individual whose conduct was the subject of the compliance notices contemplated in subsection (1)(f), or each such individual has resigned;
 - (b) a majority of the directors have resigned or been removed by the shareholders; or
 - (c) one or more shareholders have applied to the court for a declaration in terms of section 163 to declare delinquent the directors, if any, responsible for the alleged misconduct, and
 - (i) the court is satisfied that the removal of those directors would bring the misconduct to an end; or
 - (ii) the directors concerned have resigned.
- (4) A winding up of a company by the Court begins when -
- (a) an application has been made to the Court in terms of subsection (1)(a), (b) or (c); or

- (b) the court has made an order applied for in terms of subsection (1)(d), (e) or (f).

31. Dissolution of companies and removal from register

- (1) When the affairs of a company have been completely wound up, and a court order of final liquidation has been made, the Master must promptly file a certificate to that effect, together with a copy of the court order.
- (2) Upon receiving a certificate in terms of subsection (1), the Commissioner must -
 - (a) record the dissolution of the company in the prescribed manner; and
 - (b) remove the company's name from the Companies Register.
- (3) In addition to the duty to de-register a company contemplated in subsection (2)(b), the Commissioner may otherwise remove a company from the Companies Register only if the Commissioner -
 - (a) has determined in the prescribed manner that the company appears to have been inactive for at least 10 years, and no person has demonstrated a reasonable interest in, or reason for, its continued existence; or
 - (b) has received a request in the prescribed manner and form and has determined that the company -
 - (i) has ceased to carry on business; and
 - (ii) has no assets or, because of the inadequacy of its assets, there is no reasonable probability of the company being liquidated.
- (4) If the Commissioner de-registers a company as contemplated in subsection (3) –
 - (a) any assets of the company, irrespective of the person holding those assets at the time –

- (i) are, for three years after the date of de-registration, trust property held for the joint benefit of the de-registered company, any person having an interest in its assets, and the state, and
 - (ii) thereafter forfeit to the state, unless they have been claimed in terms of paragraph (b); and
- (b) any interested person may apply -
 - (i) in the prescribed manner and form to the Commissioner to re-instate the registration of the company; and
 - (ii) apply to a court for an order transferring to the company any assets contemplated in paragraph (a).
- (5) The Commissioner may hold assets of a de-registered company in trust, as contemplated in subsection (4).

32. Effect of removal of company from register

- (1) A company is dissolved as of the date its name is removed from the Companies Register.
- (2) The removal of a company's name from the Companies Register –
 - (a) does not affect the liability of any former director or shareholder of the company or any other person in respect of any act or omission that took place before the company was removed from the Register; and
 - (b) any liability contemplated in paragraph (a) continues and may be enforced as if the company had not been removed from the Register.
- (3) Despite the fact that a company has been removed from the Companies Register, a liquidator for the company may be appointed in accordance with any law, as if the company had continued in existence.

- (4) After a company has been dissolved, the Court may at any time on an application by the liquidator of the company, or by any other person who appears to the Court to have an interest, make an order, declaring the dissolution to have been void, and thereupon any proceedings may be taken against the company as might have been taken if the company had not been dissolved.

Chapter 3 - Corporate Finance

Part A – Company Shares

33. Legal nature of company shares

A share issued by a company is movable property, transferable in any manner provided for or recognised by this Act or other legislation.

34. Authorizing and issuing shares

- (1) A company's Memorandum of Incorporation must—
 - (a) set out the classes of shares, and the number of shares of each class, that the company is authorized to issue; and
 - (b) set out, with respect to each class of shares –
 - (i) a distinguishing designation for that class; and
 - (ii) the preferences, rights, limitations and other terms associated with that class, subject to section 35;
- (2) A company's Memorandum of Incorporation may authorize the board absolutely or subject to express limits, to –
 - (a) increase or decrease the number of authorized shares of any class of shares;
 - (b) classify any unclassified shares that have been authorized but not issued; or
 - (c) re-classify any classified shares that have been authorized but not issued.
- (3) If the board of a company acts pursuant to an authorization contemplated in subsection (2) (b) or (c), the board -

- (a) must determine the preferences, rights, limitations and other terms of the shares that it has classified or re-classified, subject to section 35; and
 - (b) if the company has filed its Memorandum of Incorporation, must file a Notice of Amendment, setting out the preferences, rights, limitations and other terms determined in terms of paragraph (a).
- (4) A company may issue shares only within the classes, and to the extent, authorised by and set out -
 - (a) in the company's Memorandum of Incorporation; or
 - (b) a resolution of the board, to the extent permitted in terms of subsection (2).
- (5) If a company issues shares -
 - (a) without proper authorization by the board or shareholders, the issuance of those shares may be retroactively ratified by the board, or the shareholders, as the case may be; or
 - (b) in excess of the number of authorized shares of that class, the issuance of those shares may be retroactively ratified by an amendment to the company's Memorandum of Incorporation.
- (6) If a resolution seeking to ratify an issue of shares that was unauthorized, or that exceeded the authorized number, as contemplated in subsection (5), is not adopted by the shareholders or the board, as the case may be, when it is put to a vote –
 - (a) the share issue is a nullity to the extent that it exceeds any authorization;
 - (b) the company must return to any person the consideration paid to the company in respect of that share issue to the extent that it is nullified; and
 - (c) any certificate evidencing a share so issued and nullified, and any entry in a securities register in respect of such an issue, is void.

35. Preferences, rights, limitations and other share terms

- (1) Despite anything to the contrary in a company's Memorandum of Incorporation –
 - (a) every share issued by that company must have associated with it, at a minimum, the right of the shareholder to vote on any proposal to amend the rights associated with that share; and
 - (b) if that company has established -
 - (i) only one class of shares –
 - (aa) those shares have a right to be voted on every matter that may be decided by shareholders of the company; and
 - (bb) the holders of that class of shares are entitled to receive the net assets of the company upon its liquidation; or
 - (ii) more than one class of shares, the Memorandum of Incorporation must provide that –
 - (aa) at least one of those classes of shares has a right to be voted on every matter that may be decided by shareholders of the company; and
 - (bb) the holders of at least one of those classes of shares, which may be the same class or classes as contemplated in clause (aa), are entitled to receive the net assets of the company upon its liquidation.
- (2) Except to the extent that a company's Memorandum of Incorporation provides otherwise -
 - (a) all shares of any particular class must have preferences, rights, limitations and other terms that are identical with those of other shares of the same class; and

- (b) any of the preferences, rights, limitations and other terms of shares may vary among holders of the same class only to the extent that the variation is expressly set out in that company's Memorandum of Incorporation.
- (3) Except to the extent that this Act or a company's Memorandum of Incorporation provides otherwise, each issued share of that company, regardless of its class, is entitled to one vote on any matter to be decided by shareholders of the company.
- (4) Subject to subsections (1) to (3), the voting rights associated with any share of a company are as set out in that company's Memorandum of Incorporation.
- (5) Subject to any other law or the requirements of an exchange, a company's Memorandum of Incorporation may establish, for any particular class of shares, preferences, rights, limitations or other terms that -
 - (a) confer special, conditional, or limited voting rights, or no right to vote;
 - (b) provide for shares of that class to be redeemable, subject to the requirements of Part C of this Chapter, or convertible, as specified in the Memorandum of Incorporation -
 - (i) at the option of the company, the shareholder, or another person at any time, or upon the occurrence of any specified contingency;
 - (ii) for cash, indebtedness, securities, or other property;
 - (iii) at prices and in amounts specified, or determined in accordance with a formula; and
 - (iv) subject to any other terms set out in the company's Memorandum of Incorporation;
 - (c) entitle the holders to distributions calculated in any manner, including dividends that may be cumulative, noncumulative, or partially cumulative; or
 - (d) provide for shares of that class to have -

-
- (i) preference over any other class of shares with respect to distributions, including distributions upon the final liquidation of the company; or
 - (ii) have no specified preferences, rights, limitations or other terms, if the company's Memorandum of Incorporation –
 - (aa) permits the board to determine the preferences, rights, limitations or other terms associated with that class of shares; and
 - (bb) prohibits the issuing of any such shares before the board has determined the preferences, rights, limitations or other terms associated with those shares.
- (6) Except to the extent that a company's Memorandum of Incorporation provides otherwise, the preferences, rights, limitations and other terms of shares of that company may be made dependent upon facts objectively ascertainable outside -
- (a) the Memorandum of Incorporation; or
 - (b) the resolution to issue those shares.
- (7) For the purpose of subsection (6) –
- (a) “facts” includes the occurrence of any event, a determination or action by the company, its board, or any other person, any agreement to which the company is a party, or any other document; and
 - (b) the manner in which a fact operates on the preferences, rights, limitations or other terms of shares must be expressly set out in –
 - (i) the company's Memorandum of Incorporation; or
 - (ii) the resolution to issue those shares.

36. Pre-emptive right to be offered shares

- (1) Subject to subsection (2), every shareholder has a pre-emptive right to be offered or to purchase any shares issued or proposed to be issued, other than shares issued for at least fair value consideration other than money.
- (2) A company's Memorandum of Incorporation may limit, negate or restrict the right set out in subsection (1), with respect to any or all classes of shares of that company.

37. Consideration for shares

- (1) A share does not have a nominal or par value.
- (2) The board of a company may issue authorized shares only -
 - (a) for consideration or other benefit to the company, as determined in terms of subsection (3); or
 - (b) as a capitalization share without consideration as contemplated in section 50.
- (3) Before a company issues any particular shares, the board must determine the consideration or other benefit for which, and the terms on which, those shares will be issued.
- (4) A determination by the board of a company in terms of subsection (3) as to the adequacy of consideration or other benefit for any shares may not be challenged on any basis other than in terms of section 91.
- (5) When a company has received the consideration or other benefit approved by its board for the issuance of any shares –
 - (a) those shares are fully paid; and
 - (b) subject to subsection (6) to (8), the company must issue those shares and cause the name of the holder to be entered on the company's securities register in accordance with Part D of this Chapter.

-
- (6) If shares are issued in exchange for a contract for future services or benefits, or a promissory note, the company may –
- (a) transfer the shares to the other contracting party immediately; or
 - (b) place the issued shares in escrow, or make other arrangements to restrict the transfer of the shares, until the services are fully and satisfactorily performed, the note is fully paid, or the benefits to the company have been fully received, or any other condition set out in the contract, escrow agreement or other agreement has been satisfied.
- (7) If a company makes any distribution, or is called upon to make a payment in terms of section 165 -
- (a) in respect of any shares that were issued as contemplated in subsection (6); but
 - (b) before the relevant services have been fully performed, the note has been fully paid, or the benefits to the company have been fully received,
- the company may credit that distribution or payment against the remaining value at that time of the services still to be performed, the balance remaining due under the note, or the benefits still to be received by the company.
- (8) If a company has issued shares as contemplated in subsection (6), but the contracted services are not fully and satisfactorily performed, the note is not fully paid, or the benefits to the company are not fully received, the escrowed or restricted shares may be fully or partially cancelled to the extent of the non-payment or non-performance.

38. Shareholder approval for issuing shares in certain cases

- (1) This section does not apply to a closely held company, if every shareholder of that company is a director of that company.
- (2) Subject to subsection (3), an issue of shares, securities convertible into shares, or rights exercisable for shares must be approved by a special resolution of the shareholders of a company, if the shares, securities or rights are issued to –

- (a) a director of the company, person related to a director, or a nominee of a director; or
 - (b) a body corporate -
 - (i) that is, or the directors of which are, accustomed to act in accordance with the directions or instructions of a person contemplated in paragraph (a); or
 - (ii) at a general meeting of which a person contemplated in paragraph (a) is entitled to exercise or control the exercise of one-fifth or more of the voting power; or.
 - (c) to any subsidiary of a body corporate contemplated in paragraph (b).
- (3) Subsection (2) does not apply if -
- (a) the issue of shares, securities or rights is -
 - (i) under a contract underwriting the shares, securities or rights;
 - (ii) 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;
 - (iii) pursuant to an employee share scheme that satisfies the requirements of section 62; or
 - (iv) on the same terms and conditions as have been offered to members of the public.
- (4) An issuance of shares, securities convertible into shares, or rights exercisable for shares in a transaction, or a series of integrated transactions, requires approval of the shareholders by special resolution if -
- (a) the shares, securities, or rights are issued for consideration other than cash or cash equivalents, or are issued for less than fair market value; and

-
- (b) the voting power of shares that are issued or issuable as a result of the transaction or series of integrated transactions will comprise more than 30% of the voting power of all the shares of the company held by shareholders immediately before the transaction or series of transactions.
- (5) In subsection (4) -
- (a) for purposes of determining the voting power of shares issued and issuable as a result of a transaction or series of integrated transactions, the voting power of shares is the greater of -
- (i) the voting power of the shares to be issued; or
 - (ii) the voting power of the shares that would be issued after giving effect to the conversion of convertible shares and other securities and the exercise of rights to be issued;
- (b) a series of transactions is integrated if –
- (i) consummation of one transaction is made contingent on consummation of one or more of the other transactions; or
 - (ii) the transactions are completed within a 12 month period, and –
 - (aa) they involve the same parties, or related persons;
 - (bb) they involve the acquisition or disposal of an interest in one particular company or asset; and
 - (cc) taken together, they lead to substantial involvement in a business activity that did not previously form part of the company's principal activity.
- (6) Any director of a company who contravenes, or permits the contravention of subsection (2) or (4), -
- (a) is liable to compensate the company or any shareholder for any loss, damages or costs that the company or shareholder may have sustained or incurred in

relation to the transaction, if proceedings to recover any such loss, damages or costs are commenced within two years after the issuance of the shares, securities or other rights; and

- (b) may be held as responsible as the company, in terms of this Act, for the contravention.

39. Options for purchase of shares

- (1) A company may issue options for the purchase of shares or other securities of the company.
- (2) The board of a company must determine the consideration or other benefit for which, and the terms upon which –
 - (a) any options are issued; and
 - (b) the related shares or other securities are to be issued.
- (3) An authorization by the board to issue -
 - (a) any options constitutes the authorization to issue any shares or other securities for which the options may be exercised; or
 - (b) any securities convertible into shares of any class constitutes the authorization to issue the shares into which the securities may be converted.
- (4) Subject to subsection (6), an option or right given directly or indirectly to a director or future director of a company in terms of any scheme or plan, to purchase any shares of that company, or to take up any debentures convertible into shares of that company, on any basis other than in accordance with section 38, is invalid unless -
 - (a) it has been authorized in terms of a special resolution of the company;
 - (b) it is pursuant to an employee share scheme that satisfies the requirements of section 62; or

-
- (c) the director or future director -
 - (i) holds salaried employment or office in the company; and
 - (ii) is given the option or right in the capacity of an employee or office holder.
 - (5) In subsection (4), “future director” does not include a person who becomes a director of the company more than 6 months after acquiring the option or right.
 - (6) Subsection (4) does not apply to a closely held company, if every shareholder of that company is a director of that company.
 - (7) Any director of a company who contravenes, or permits the contravention of subsection (4) -
 - (a) is liable to compensate the company or any shareholder for any loss, damages or costs that the company or shareholder may have sustained or incurred in relation to the transaction, if proceedings to recover any such loss, damages or costs are commenced within two years after the issuance of the shares, securities or other rights; and
 - (b) may be held as responsible as the company, in terms of this Act, for the contravention.

40. Financial assistance for purchase of shares

- (1) A company must not give direct or indirect financial assistance to a person for the purpose of, or in connection with, the purchase of a share or option issued or to be issued by the company or a related or inter-related company -
 - (a) if the company’s Memorandum of Incorporation expressly prohibits giving such financial assistance, as contemplated in subsection (2)(b); or
 - (b) in any other circumstances, unless all of the applicable following conditions are satisfied:

- (i) Irrespective of the status or category of company concerned, the board must be satisfied that –
 - (aa) immediately after giving the financial assistance, the company would be in compliance with the solvency and liquidity test, and
 - (bb) the terms under which the assistance is proposed to be given are fair and reasonable to the company.
 - (ii) Any conditions or restrictions respecting the granting of such assistance set out in the company's Memorandum of Incorporation, as contemplated in subsection (2)(c), must be satisfied.
 - (iii) The financial assistance must be -
 - (aa) pursuant to an employee share scheme that satisfies the requirements of section 62; or
 - (bb) pursuant to a special resolution of the shareholders, adopted within the previous 5 years, which approved such assistance either for the specific recipient, or generally for a category of potential recipients, and the specific recipient falls within that category; or
 - (cc) in the case of a closely held company, pursuant to a specific authorization set out in the company's Memorandum of Incorporation.
- (2) A company's Memorandum of Incorporation may -
- (a) specifically authorize any financial assistance contemplated in subsection (1);
 - (b) prohibit any financial assistance contemplated in subsection (1); or
 - (c) impose additional conditions or requirements respecting the granting of any such assistance.

- (3) A resolution by the board of a company to provide financial assistance contemplated in subsection (1), or an agreement with respect to the provision of any such assistance, is void to the extent that the provision of that assistance would be inconsistent with -
- (a) this section; or
 - (b) a prohibition, condition or requirement contemplated in subsection (2).
- (4) Any director of a company who voted in favour of a resolution, or approved an agreement, that is void to any extent as contemplated in subsection (3) -
- (a) is liable to compensate the company or any shareholder for any loss, damages or costs that the company or shareholder may have sustained or incurred in relation to the transaction, if proceedings to recover any such loss, damages or costs are commenced within two years after the issuance of the shares, securities or other rights; and
 - (b) may be held as responsible as the company, in terms of this Act, for the contravention.

41. Beneficial interest in shares

- (1) A company's Memorandum of Incorporation, or the rules of that company, may permit the company's board to allow shares in the company to be held by, and registered to, one person for the beneficial interest of another person.
- (2) A person is deemed to have a beneficial interest in a share of a widely held company if the share is held *nomine officii* by another person on that person's behalf, or if that first person -
- (a) is married in community of property to a person who has a beneficial interest in that share;
 - (b) is the parent of a minor child who has a beneficial interest in that share;

- (c) acts in terms of an agreement with another person who has a beneficial interest in that share, and the agreement is in respect of the co-operation between them for the acquisition, disposal or any other matter relating to a beneficial interest in that share;
 - (d) is the holding company of a company that has a beneficial interest in that share;
 - (e) is entitled to exercise or control the exercise of the majority of the voting rights at general meetings of a body corporate or trust that has a beneficial interest in that share; or
 - (f) gives directions or instructions to a body corporate or trust that has a beneficial interest in that share, and its directors or the trustees are accustomed to act in accordance with that person's directions or instructions.
- (3) If a share of a widely held company is registered in the name of a person who is not the holder of the beneficial interest in all of the shares in the same company held by that person, that registered shareholder must disclose -
- (a) the identity of each person with a beneficial interest in the shares held by that person; and
 - (b) the number and class of securities held for each such person with a beneficial interest.
- (4) The information required in terms of subsection (3) -
- (a) must be disclosed in writing to the issuer within 5 business days after the end of every three month period; and
 - (b) may be provided on payment of a fee charged by the registered shareholder, subject to any prescribed maximum.
- (5) A company that knows or has reasonable cause to believe that any of its shares are held by one person for the beneficial interest of another, by notice in writing, may require either of those persons to –

- (a) confirm or deny that fact; and
 - (b) provide particulars of the extent of the beneficial interest held during the three years preceding the date of the notice.
- (6) The information required in terms of subsections (5) must be provided within a reasonable time specified in the notice, but not later than 10 business days after receipt of the notice.
- (7) A widely held company must -
- (a) establish and maintain a register of the disclosures made in terms of this section; and
 - (b) publish in its annual financial statements, if it is required to prepare such statements, a list of the persons who hold beneficial interests equal to or in excess of five per cent of the total number of securities of that class issued by the company, together with the extent of those beneficial interests.

Part B – Debentures and Similar Instruments

42. Application of this Part

This Part applies to a debenture, irrespective of whether it is issued in terms of a trust deed, or not.

43. Directives on debentures

- (1) A company may create and issue debentures, except to the extent that the company's Memorandum of Incorporation provides otherwise.
- (2) Before a company issues any particular debentures, its board must determine the consideration or other benefit for which, and the terms on which, those debentures will be issued.
- (3) A determination by the board of a company in terms of subsection (2) as to the adequacy of consideration or other benefit for any debentures may not be challenged on any basis other than in terms of section 91.
- (4) When a company has received the consideration or other benefit approved by the board for the issuance of any debentures –
 - (a) those debentures are fully paid; and
 - (b) subject to subsection (6), the company must issue those debentures and cause the name of the holder to be entered on the company's securities register in accordance with Part D of this Chapter.
- (5) A debenture document executed in favour of a debenture holder may provide that the debentures thereby established may be issued from time to time and at different dates, as the company may determine, but each such debentures, whenever issued, ranks in preference concurrently with every other such debenture as from the date on which the debenture document was constituted or registered.

-
- (6) If a debenture is repayable at a premium determined at a fixed or variable rate, at a specific time or at any time upon notice being given, the debenture must not provide for payment, if the company goes into voluntary liquidation, of an amount less than the face value and premium due at the time.
 - (7) If debentures are to be issued with special privileges regarding allotment of securities, attending and voting at general meetings and appointment of directors, those special privileges will be given only if -
 - (a) they are approved in the manner and form stipulated in the company's Memorandum of Incorporation; and
 - (b) approved by a special resolution of all shareholders present at a general meeting convened to approve such a resolution.
 - (8) If debentures are subject to periodic redemption, any such redemption may be total or partial.
 - (9) A debenture must provide for a fixed initial period of at least one year, from the date of issue, during which redemptions may not take place.
 - (10) Redemption rights and conditions must remain unaltered unless approved in accordance with section 46.
 - (11) If power is reserved to purchase redeemable debentures, purchases must not be made by the company or the trustee at a price that is higher than the nominal value, unless provided for otherwise in the debenture document.
 - (12) If a debenture has been purchased or redeemed as contemplated in subsection (7) and (8) -
 - (a) the debenture must be cancelled; and
 - (b) the company's obligation to redeem that debenture and pay off the debentures is reduced by the face value of the cancelled debenture.

- (13) Interest payments, conversions and redemptions must be effected in accordance with the debenture document and subject to the company's Memorandum of Incorporation.

44. Conversion

- (1) The earliest redemption date must be not earlier than the final conversion date unless provided for otherwise in the debenture document.
- (2) Conversion rights and conditions must remain unaltered, except to the extent approved in accordance with section 46.
- (3) A company may not issue capitalisation shares or options on securities before the final conversion dates, unless approved in general meeting by the holders of the convertible debentures.
- (4) The conversion period must be in accordance with the debenture document and subject to the company's Memorandum of Incorporation.
- (5) Debentures redeemed by a company must be cancelled and not re-issued.

45. Trustees

- (1) Any trustee or trustees for the holders of a company's debentures -
- (a) must be a corporation, or individuals of standing and repute;
 - (b) must have no interest in or relationship with the company that might conflict with the position of a trustee; and
 - (c) must not be a director or officer of the company that issued those debentures.
- (2) Any new trustee appointed under any statutory or other power must be approved by a majority of 75% of the debenture holders present at a general meeting.

-
- (3) Any provision contained in a trust deed for securing an issue of debentures, or in any contract with the holders of debentures secured by a trust deed, is void to the extent that it would exempting a trustee from, or indemnify a trustee against, liability for breach of trust, or failure to exercise the degree of care and diligence required of the prudent and careful person, having regard to the provisions of the trust deed respecting the powers, authorities or discretions of the trustee.
 - (4) Subsection (3) does not invalidate -
 - (a) any release otherwise validly given in respect of anything done or omitted to be done by a trustee before the giving of the release; or
 - (b) any provision enabling a release given –
 - (i) with the consent of the majority of not less than three fourths in value of the debenture holders present and voting at a meeting summoned for the purpose; and
 - (ii) with respect to a specific acts or omissions; or
 - (iii) on the trustee dying or ceasing to act.

46. Meetings and voting rights

- (1) The provisions of this section apply except to the extent otherwise stipulated in a company's Memorandum of Incorporation or the prescribed debenture document.
- (2) A meeting of debenture holders must be called on a requisition in writing signed by holders of at least one tenth of the nominal amount of the debentures for the time being outstanding;
- (3) A company must send a notice of any general meeting to debenture holders, and any other prescribed person, at least six weeks before each
 - (a) conversion date; or
 - (b) redemption date.

- (4) Section 77, read with the changes required by the context, applies with respect to any meeting of debenture holders.
- (5) A vote on a debenture special resolution may not be taken unless the holders of a clear majority in the value of the whole of the outstanding class of debentures are present at the meeting.
- (6) If a quorum is not achieved as required by subsection (5) –
 - (a) the general meeting must be adjourned for not less than 10 business days; and
 - (b) notice of the adjourned meeting must be sent to every debenture holder, stating that, if a quorum as above defined is not present at the adjourned meeting, the debenture holders then present will form the quorum.
- (7) A debenture special resolution will be adopted if it is supported by -
 - (a) not less than three-fourths of the persons voting at the meeting, on a show of hands; or
 - (b) not less than three-fourths of the votes given, in person and by proxy, if a poll is demanded;
- (8) On a poll, each holder of debentures is entitled to the number of votes represented by the number of rands in their debenture.

47. General conditions

- (1) Secured debentures must be secured to a substantial extent by a direct specific mortgage on freehold or long leasehold property or other immovable property or any other fixed assets that meet any requirements contained in the debenture document.
- (2) A debenture may not be expressed as a secured debenture unless it meets the requirements of subsection (1).
- (3) The first interest payment on debentures must be calculated from date of issue of the debentures.

- (4) If debentures are evidenced by certificates –
 - (a) Those certificates must be issued within 15 business days after the issue; and
 - (b) if the debentures are listed securities, prior approval of amendments to the original conditions of issue must be obtained -
 - (i) in accordance with section 46; and
 - (ii) from the applicable exchange.

Part C – Distributions by the Company

48. Distributions must be authorised by the board

- (1) No distribution may be made by a company unless -
 - (a) it has been authorised by the company's board; and
 - (b) immediately after giving effect to the authorization, the company would satisfy the solvency and liquidity test, as set out in section 4.

- (2) If, after being authorised in terms of subsection (1), or reconsidered in terms of this subsection, a distribution is not completed within 120 business days after –
 - (a) in the case of an authorization -
 - (i) the date on which the company announces the resolution authorizing the distribution, in the case of a widely held company; or
 - (ii) the date on which the company first makes a payment to a shareholder in terms of the resolution, in the case of a closely held company; or
 - (b) in the case of a re-consideration, the date of that re-consideration

the board must reconsider the solvency and liquidity test with respect to that distribution, and be satisfied that the company again satisfies that test before the company may proceed with or continue the distribution.

49. Liability with respect to distributions

- (1) If a director –
 - (a) voted for or assented to an authorization of a distribution that did not satisfy the requirements of section 48; and
 - (b) in so doing, failed to satisfy the duty of a director to the company, as set out in section 91,

the director is jointly and severally liable, with all other such directors, to reimburse the company the amount, if any, by which the value of the distribution exceeded the amount that could have been distributed without contravening section 48.

- (2) If a company re-acquires any shares contrary to section 48 or 51 –
 - (a) the company may apply to the Court for an order reversing the acquisition, and the court may order -
 - (i) the person from whom the shares were acquired to return the amount paid by the company; and
 - (ii) the company to issue to that person an equivalent number of shares of the same class as those acquired; and
 - (b) any director who would be liable in terms of subsection (1) is jointly and severally liable with all other such directors -
 - (i) to pay the costs of all parties in the court in a proceeding contemplated in this subsection; and
 - (ii) to restore to the company any amount paid for the acquisition, and not recovered from shareholders in terms of this subsection.
- (3) An action to enforce a liability imposed by this section -
 - (a) may not be instituted more than three years after the date of completion of the acquisition; and
 - (b) is subject to the power of the court to relieve a director of liability, as provided for in section 93 (4) and (5).

50. Capitalization shares

- (1) Unless a company's Memorandum of Incorporation provides otherwise, the company may issue capitalization shares for no consideration on a pro rata basis to the shareholders of one or more classes of shares.

- (2) Shares of one class may not be issued as a capitalization share in respect of shares of another class, unless –
 - (a) it is expressly authorized by -
 - (i) the company's Memorandum of Incorporation; or
 - (ii) a special resolution of the holders of shares of the class proposed to be issued; or
 - (b) there are no issued shares of the class proposed to be issued.
- (3) The record date and time for determining shareholders entitled to be issued any capitalization share is the close of business by the company on the later of -
 - (a) the date the board adopts a resolution authorizing the award of a capitalization share; or
 - (b) a date determined by the board.
- (4) When resolving to award a capitalization share, the board may at the same time resolve to permit any shareholder entitled to receive such an award to elect instead to receive a cash payment, at a value determined by the board, if -
 - (a) the company's Memorandum of Incorporation so permits; and
 - (b) immediately after giving effect to the resolution, on the assumption that every such shareholder elected to receive cash, the company would satisfy the solvency and liquidity test, as set out in section 4.

51. Company or subsidiary acquiring company's shares

- (1) Subject to subsection (2), a subsidiary of a holding company may acquire shares in the holding company.
- (2) Not more than 10%, in aggregate, of the number of any class of shares of a holding company may be held by, or for the benefit of, subsidiaries of that holding company.

-
- (3) A company may not acquire its shares, or cause its subsidiary to acquire the company's shares, from any or all of the holders of a particular class of shares unless, in addition to meeting the requirements set out in section 48, the acquisition is authorized by the company's or subsidiary's Memorandum of Incorporation, or has been—
- (a) authorised by a special resolution of the shareholders of the company or of its subsidiary, as the case may be, in the case of a purchase from one or more individual shareholders; or
 - (b) authorised by an ordinary resolution of the shareholders of the company or of its subsidiary, as the case may be, in the case of a general purchase from all holders of the class of shares concerned.
- (4) If, as a result of a re-acquisition by a company of any shares, or, the acquisition of the company's shares by its subsidiary, as contemplated in subsection (1) (a) or (b), there would no longer be any shares in issue other than convertible or redeemable shares, the company or subsidiary may not reacquire or acquire those shares, despite the authorization of that re-acquisition or acquisition, either in the Memorandum of Incorporation, or by shareholders' resolution.
- (5) Subsections (3) and (4) apply equally to the purchase of a company's shares by a person who –
- (a) is related to the company at the time of the purchase; or -
 - (b) is one of a group of inter-related persons, one of whom is related to the company at the time of the purchase.
- (6) If a company has acquired its own shares, as contemplated in this section, the company must reduce the stated capital for the class of shares so acquired by an amount derived by –
- (a) First, dividing the stated capital contributed by issued shares of that class by the number of those shares; and

- (b) Second, multiplying the result in paragraph (a) by the number of shares in that class so acquired.
- (7) A contract with a company providing for the acquisition by the company of shares issued by it is enforceable against the company, except if the company cannot execute the contract without being in breach of subsections (1) - (5).
- (8) In an action brought on a contract contemplated in subsection (7), the company has the burden of proving that execution of the contract is or will be in breach of subsections (1) - (5).
- (9) Until the company has fully performed its obligations in terms of a contract referred to in subsection (7), shareholders who dispose of their shares retain the status of claimants entitled to be paid as soon as the company is lawfully able to do so or, on liquidation, to be ranked subordinate to creditors and shareholders whose claims are in priority to the claims of the class of shares which they disposed of to the company, but in priority to the claims of the other shareholders.

52. Status of shares redeemed or purchased by company

Shares of a company that have been issued and subsequently -

- (a) re-acquired by that company; or
- (b) surrendered to that company in the exercise of appraisal rights in terms of section 165

must be returned to the same status as shares of the same class that have been authorized but not issued.

Part D – Securities Registration and Transfer**53. Securities to be evidenced by certificates or uncertificated**

- (1) Any security issued by a company must be either -
 - (a) evidenced by a certificate, in which case -
 - (i) section 55 applies to the registration and transfer of the security; and
 - (ii) sections 56 to 59 do not apply to that security; or
 - (b) uncertificated, in which case –
 - (i) the company must not issue a certificate evidencing or purporting to evidence title to that security, subject to subsection (3);
 - (ii) section 55 does not apply to that security; and
 - (iii) sections 56 to 59 apply to that security, and prevail in the case of any conflict between any such provision, and any other provision of this Act, any other law, the common law, the company’s Memorandum of Incorporation, or any agreement.
- (2) A security that is evidenced by a certificate may cease to so evidenced, and thereafter be uncertificated, in which case the provisions of subsection (1)(b) apply to that security from the date on which it ceased to be evidenced by a certificate.
- (3) In the manner set out in section 58 an uncertificated security may be withdrawn from the uncertificated securities register, and a certificate issued evidencing that security, in which case the provisions of subsection (1)(b) cease to apply to that security from the date on which it became evidenced by a certificate.
- (4) Subject only to subsection (1)(b)(iii), any provision of this Act, other than sections 56 to 59, applies to an uncertificated security in the same manner as it applies to a security that is evidenced by a certificate.

- (5) Unless this Act expressly provides otherwise, the rights and obligations of security holders are not different solely on the basis of their respective securities being uncertificated or evidenced by certificates.
- (6) The Minister may make regulations regarding matters that are supplementary and ancillary to the provisions of this Part.

54. Securities register and numbering

- (1) Every company must establish or cause to be established a register of its issued securities in the prescribed form, and -
 - (a) maintain it in accordance with prescribed standards; and
 - (b) in respect of every class of securities, enter in the register -
 - (i) the total number of those securities that are held in uncertificated form;
 - (ii) any disclosures made to the company as contemplated in section 41; and
 - (iii) any other prescribed information.
- (2) Every company that has issued uncertificated securities, or has issued securities that have ceased to be evidenced by a certificate, as contemplated in section 53(2), must establish, and maintain in the prescribed form, an uncertificated securities register, which -
 - (a) forms part of that company's securities register; and
 - (b) must contain, with respect to all securities contemplated in this subsection, any details –
 - (i) referred to in subsection (3) and section 55 (1); or
 - (ii) determined by the rules of the central securities depository.
- (3) As soon as practicable after issuing any securities, a company must cause to be entered in its securities register -

- (a) the names and addresses of the persons to whom the securities were issued;
 - (b) the number of securities issued to each of them;
 - (c) the number of, and prescribed circumstances relating to, any shares that have been placed in escrow or whose transfer has been otherwise restricted, as contemplated in section 37 (6)(b);
 - (d) the number of debentures issued and outstanding and whether or not they are payable to bearer and specifying the names and addresses of the holders, other than bearers thereof; and
 - (e) any other prescribed information.
- (4) A securities register maintained in accordance with this Part is proof of the facts recorded in it, in the absence of evidence to the contrary.
- (5) Unless all the shares of a company rank equally for all purposes, the company's shares, or each class of shares, and any other securities, must be distinguished by an appropriate numbering system.

55. Registration and transfer of certificated securities

- (1) A certificate evidencing a security of a company -
- (a) must state on its face -
 - (i) the name of the issuing company;
 - (ii) the name of the person to whom the security was issued;
 - (iii) the number and class of shares and the designation of the series, if any, evidenced by that certificate; and
 - (iv) any restriction on the transfer of the security evidenced by that certificate; and
 - (b) must be signed by -

- (i) a person authorized by the directors; or
 - (ii) the sole director, if the company has only one director; and
 - (c) is proof that the named security holder owns the security, in the absence of evidence to the contrary.
- (2) A signature contemplated in subsection (1)(b) may be affixed to or placed on the certificate by autographic, mechanical or electronic means.
- (3) A certificate remains valid despite the subsequent departure from office of the person who signed it.
- (4) If, as contemplated in section 54 (5), all of a company's shares rank equally for all purposes, and are therefore not distinguished by a numbering system -
- (a) each certificate issued in respect of those shares must be distinguished by a numbering system; and
 - (b) if the share has been transferred, the certificate must be endorsed with a reference number or similar device that will enable the immediately preceding holder of the share to be identified, subject to section 41 (3).
- (5) Subject to subsection (6), a company must enter in its securities register every transfer of any security that is evidenced by a certificate, including in the entry –
- (a) the name and address of the transferee;
 - (b) the description of the security, or interest transferred;
 - (c) the date of the registration of the transfer; and
 - (d) the amount outstanding on each share or interest, in the case of a transfer of partly paid-up shares or interest in an existing company.
- (6) A company may make an entry contemplated in subsection (5) only if the transfer –
- (a) is evidenced by a proper instrument of transfer that has been delivered to the company; or

(b) was effected by operation of law

irrespective whether the request is made, or instrument is delivered by the transferor, the transferee, or a third party.

56. Registration of uncertificated securities

- (1) At the request of a company, and on payment of the prescribed fee, if any, a participant or central securities depository, as determined in accordance with the rules of the central securities depository, must furnish that company with all details of that company's uncertificated securities reflected in the uncertificated securities register.
- (2) A person who wishes to inspect an uncertificated securities register may do so only -
 - (a) through the relevant company in terms of section 27; and
 - (b) in accordance with the rules of the central securities depository.
- (3) Within five days after the date of a request for inspection, a company must produce a record of the uncertificated securities register, which record must reflect at least the details referred to in section 54 (2)(b) at the close of business on the day on which the request for inspection was made.
- (4) A participant or central securities depository, determined in accordance with the rules of the central securities depository, -
 - (a) must provide a regular statement at prescribed intervals to each person for whom an uncertificated security is held in an uncertificated securities register, setting out the number and identity of the uncertificated securities held on that person's behalf;
 - (b) must not impose a charge for a statement on the person entitled to the statement; and
 - (c) may impose a charge or service fee for such a statement on the relevant company in accordance with the regulations.

- (5) The regulations contemplated in section 53 (6) may provide for a charge or service fee for statements contemplated in subsection (4)(c).

57. Transfer of uncertificated securities

- (1) The transfer of uncertificated securities in an uncertificated securities register may be effected only –
- (a) by a participant or central securities depository; and
 - (b) on receipt of an instruction to transfer sent and properly authenticated in terms of the rules of a central securities depository or by order of court; and
 - (c) in accordance with this section and the rules of the central securities depository.
- (2) Transfer of ownership in an uncertificated security must be effected by -
- (a) debiting the account in the uncertificated securities register from which the transfer is effected; and
 - (b) crediting of the account in the uncertificated securities register to which the transfer is effected,
- in accordance with the rules of a central securities depository.
- (3) A transfer of ownership in accordance with subsections (1) and (2) occurs despite any fraud or illegality that -
- (a) may affect the relevant uncertificated securities; or
 - (b) may have resulted in the transfer being effected
- but a transferee who was a party to or had knowledge of the fraud or illegality may not rely on this subsection.

- (4) A court may not order the name of a transferee contemplated in this section to be removed from a uncertificated securities register unless that person was a party to or had knowledge of a fraud or illegality as contemplated in subsection (3).
- (5) Nothing in this section prejudices any power of a participant or central securities depository, as the case may be, to effect transfer to a person to whom the right to any uncertificated securities of a company has been transmitted by operation of law or agreement.

58. Substitution of certificated for uncertificated securities

- (1) Any person who wishes to withdraw all or part of their uncertificated securities held in an uncertificated securities register and obtain a certificate in respect of those withdrawn securities, may so notify the relevant participant or central securities depository, as determined in accordance with the rules of the central securities depository, which must within five business days -
 - (a) notify the relevant company to provide the requested certificate; and
 - (b) remove the details of the uncertificated securities from the uncertificated securities register.
- (2) After receiving a notice in terms of subsection (1)(a) from a participant or central securities depository, as the case may be, a company must -
 - (a) immediately enter the relevant person's name and details and details of that person's security holding in the company's securities register and indicate on the register that the securities so withdrawn are no longer held in uncertificated form; and
 - (b) within 10 business days -
 - (i) prepare and deliver to the relevant person a certificate in respect of the securities; and

- (ii) notify the central securities depository that the securities are no longer held in uncertificated form.

59. Liability relating to uncertificated securities

- (1) A person who takes any unlawful action in consequence of which any of the following events occur in a securities register or uncertificated securities register, namely-
 - (a) the name of any person remains in, is entered in, or is removed or omitted;
 - (b) the number of uncertificated securities is increased, reduced, or remains unaltered; or
 - (c) the description of any uncertificated security is changed,is liable to any person who has suffered any direct loss or damage arising out of that action.
- (2) A person who gives an instruction to transfer uncertificated securities must -
 - (a) warrant the legality and correctness of that instruction; and
 - (b) indemnify the company and the participant or central securities depository required to effect the transfer in accordance with the rules of the central securities depository, against any claim and against any direct loss or damage suffered by them arising out of such a transfer by virtue of an instruction referred to in paragraph (a).
- (3) A participant or central securities depository who may effect the transfer of uncertificated securities in accordance with the rules of a central securities depository, and who transfers uncertificated securities without instruction, or in accordance with an instruction that was not sent and properly authenticated in terms of the rules of a central securities depository, or in a manner inconsistent with an instruction that was sent and properly authenticated in terms of the rules of a central securities depository, must -

- (a) indemnify the company against any claim made upon it and against any direct loss or damage suffered by it arising out of that transfer; and
- (b) indemnify any other person who suffers any direct loss or damage arising out of that transfer against any such loss or damage.

Part E – Public Security Offerings

60. Application and interpretation of this Part

- (1) In this Part, and in Schedule 3, unless the context otherwise indicates -
- (a) **'company'** includes an external company;
 - (b) **'compliance officer'** means a compliance officer appointed by a company in respect of its employee share scheme;
 - (c) **'expert'** means a geologist, engineer, architect, quantity surveyor, valuer, accountant, auditor, or any person holding himself out to be such and any other person who professes to have extensive knowledge or experience or to exercise special skill which gives or implies authority to a statement made by him;
 - (d) **"initial public offering"** means an offering to the public of any securities of a company, if no securities of that company have previously been the subject of an offer to the public;
 - (e) **'letter of allocation'** means any document conferring a right to purchase shares in terms of a rights offer;
 - (f) **'offer'**, in relation to securities, means an offer made in any way by any person with respect to the acquisition of any securities in a company for consideration;
 - (g) **'offer to the public'** -
 - (i) includes an offer of securities to be issued by a company, its subsidiary or a third company to any section of the public, whether selected -
 - (aa) as security holders of the company concerned;
 - (bb) as clients of the person issuing the prospectus concerned;

-
- (cc) as the holders of any particular class of property; or
 - (dd) in any other manner; but
 - (ii) does not include an offer made in any of the circumstances contemplated in section 61;
 - (h) **“primary offering”** means an offer to the public, made by or on behalf of a company, of securities to be issued by that company or its subsidiary;
 - (i) **'promoter'**, in relation to civil and criminal liability in respect of an untrue statement in a prospectus, means a person who was a party to the preparation of the prospectus or of the portion thereof containing the untrue statement but does not include any person by reason of his acting in a professional capacity for persons engaged in procuring the formation of the company or preparing the said prospectus;
 - (j) **'registered prospectus'** means a prospectus that complies with this Act and -
 - (i) in the case of a listed security, has been approved by the relevant exchange; or
 - (ii) otherwise, has been filed;
 - (k) **'rights offer'** means an offer for subscription, with a right to renounce in favour of other persons, to security holders of a company for any securities of that company or any other company;
 - (l) **“secondary offering”** means an offer to the public of any securities of a company or its subsidiary, made by or on behalf of a person other than that company or its subsidiary;
 - (m) **'specified shares'** means shares, including options on shares, offered to employees of a company in terms of an employee share scheme; and
 - (n) **'unit'** means any right or interest in a security;

- (o) **'untrue statement'** includes a statement that is misleading in the form and context in which it is made.
- (2) For the purposes of this Part and Schedule 3, a person is not to be regarded, by or in respect of a company, as not being a member of the public, solely because that person is a shareholder of the company or a purchaser of goods from the company.
- (3) An untrue statement is deemed to be included in a prospectus or written statement if it is contained in any report or memorandum -
 - (a) that appears on the face of the prospectus or statement; or
 - (b) that is incorporated by reference within, or is attached to or accompanies, the prospectus or statement.
- (4) An omission from a prospectus or written statement of any matter that, in the context is calculated to mislead by omission, constitutes the making of an untrue statement in that prospectus or written statement, irrespective whether this Act required that matter to be included in the prospectus or written statement.
- (5) A provision of an agreement is void to the extent that it -
 - (a) requires an applicant for shares to waive compliance with a requirement of this Part or Schedule 3; or
 - (b) purports to affect the applicant with notice of any contract, document or matter not specifically referred to in a prospectus or written statement.
- (6) Nothing in this Part limits any liability that a person may incur under this Act apart from this Part, or under any other public regulation, or under the common law.

61. Actions that are not an offer to the public

- (1) An offer is not an offer to the public -
 - (a) if the offer is made to no persons other than -

-
- (i) persons whose ordinary business, or part of whose ordinary business, is to deal in shares, whether as principals or agents;
 - (ii) the Public Investments Corporation;
 - (iii) a person or entity regulated by the Reserve Bank of South Africa;
 - (iv) an authorised financial services provider, as defined in the Financial Advisory and Intermediary Services Act, 2002 (Act No. 37 of 2002);
 - (v) a financial institution, as defined in the Financial Services Board Act, 1990 (Act No. 97 of 1990); or
 - (vi) a wholly owned subsidiary of a person contemplated in sub-paragraph (iii), (iv) or (v), acting as agent in the capacity of an authorised portfolio manager for a pension fund registered in terms of the Pension Funds Act, 1956 (Act 24 of 1956), or as manager for a collective investment scheme registered in terms of the Collective Investment Schemes Control Act, 2002 (Act 45 of 2002); or
- (b) if the total contemplated acquisition cost of the securities, for any single addressee acting as principal, is equal to or greater than the prescribed amount;
or
- (c) if it is a non-renounceable offer made only to existing security holders, or persons related to existing security holders, of the company; or
- (d) if it is a rights offer that satisfies the requirements of Item 2 of Schedule 3, and
- - (i) an exchange has granted or has agreed to grant a listing for the securities that are the subject of the offer; and
 - (ii) the rights offers complies with any relevant requirements of that exchange at the time the offer is made; or

- (e) if the offer is made only to a director of the company, or a person related to the director, unless the offer is renounceable in favour of a person who is not a director of the company or a person related to the director; or
 - (f) if it pertains to an employee share scheme that satisfies the requirements of section 62; or
 - (g) if it is an offer, or one of a series of offers, for subscription, made in writing, and
 - (i) no offer in the series is accompanied by or made by means of an advertisement and no selling expenses are incurred in connection with any offer in the series;
 - (ii) the issue of the shares under any one offer in the series is finalised within six months after the date that offer was first made;
 - (iii) the offer, or series of offers in aggregate, is or are accepted by a maximum of fifty persons acting as principals;
 - (iv) the subscription price, including any premium, of the shares issued in respect of the series of offers, does not exceed, in aggregate, the prescribed amount; and
 - (v) no similar offer, or offer in a series of offers, has been made by the company within the prescribed period immediately before the offer, or first of a series of offers, as the case may be.
- (2) The Minister, by notice in the Gazette, may prescribe -
- (a) a maximum value, of not less than R100 000, for the purposes of subsection (1)(b) and (g)(iv); and
 - (b) a minimum period for the purposes of subsection (1)(g)(v), which must not be less than 6 months.

62. Standards for qualifying employee share schemes

- (1) An employee share scheme qualifies for exemptions contemplated in this Act if –
 - (a) the company has -
 - (i) appointed a compliance officer for the scheme to be accountable to the directors of the company;
 - (ii) states in its annual financial statements the number of specified shares that it has allotted during that financial year in terms of its employee share scheme; and
 - (b) the compliance officer has complied with the requirements of subsection (2).
- (2) A compliance officer who is appointed in respect of any employee share scheme -
 - (a) is responsible for the administration of that scheme;
 - (b) must provide a written statement to any employee who receives an offer of specified shares in terms of that employee scheme, setting out -
 - (i) full particulars of the nature of the transaction, including the risks associated with it;
 - (ii) information relating to the company, including its latest annual financial statements, the general nature of its business and its profit history over the last three years; and
 - (iii) full particulars of any material changes that occur in respect of any information provided in terms of subparagraph (i) or (ii);
 - (c) ensure that copies of the documents containing the information referred to in paragraph (b) are filed within 20 business days after the employee share scheme has been established; and

- (d) file a certificate within 40 business days after the end of each financial year, certifying that the compliance officer has complied with the obligations in terms of this section during the past financial year.

63. Advertisements relating to offers

- (1) An offer to the public may –
 - (a) be drawn to the attention of the public by an advertisement that satisfies the requirements of subsection (2); or
 - (b) in addition to any other manner of making such an offer, be made to the public by way of an advertisement that satisfies the requirements of subsection (3).
- (2) An advertisement seeking to draw the attention of the public to an offer, as contemplated in subsection (1)(a) –
 - (a) must include a statement indicating where and how a person may obtain a copy of the relevant prospectus; and
 - (b) must not include any additional information respecting the offer, other than -
 - (i) the number and description of the securities concerned;
 - (ii) the name and date of registration of the company;
 - (iii) the general nature of the main business or proposed main business actually carried on or to be carried on by the company;
 - (iv) the names and addresses of the directors;
 - (v) the places at and times during which copies of the prospectus may be obtained;
 - (vi) if all the securities that are the subject of the offer are intended to be offered only to the shareholders of the company, or its debenture

holders, as the case may be, with or without the right to renounce in favour of other persons -

- (aa) the issue price of the securities;
 - (bb) the ratio in which the securities will be offered to the security holders entitled to accept the offer; and
 - (cc) the last day on which security holders must register as such in order to be entitled to receive the offer; and
- (vii) the last day for purchasing the securities.
- (3) An offer to the public in the form of an advertisement, as contemplated in subsection (1)(b) must satisfy all of the requirements of this Act with respect to a prospectus.
- (4) If an advertisement contemplated in this section provides any information in excess of that contemplated in subsection (2), that advertisement is deemed to have been intended as a prospectus issued by the person responsible for publishing or disseminating the advertisement –
- (a) despite any statement in the advertisement to the effect that the advertisement is not a prospectus; and
 - (b) irrespective of the format in which the advertisement was published or disseminated.

64. General restrictions on offers to the public

- (1) A person must not offer to the public any securities of any person unless that second person -
- (a) is a company or external company within the meaning of this Act or the Close Corporations Act; or
 - (b) has been exempted from the provisions of this subsection by the Commissioner.

- (2) A person must not make an initial public offering unless that offer is accompanied by a prospectus that -
 - (a) satisfies the requirements of this Act; and
 - (b) has been filed.
- (3) Except with respect to securities that are the subject of a company's initial public offering, a person must not make a -
 - (a) primary offer to the public of any -
 - (i) listed securities of a company, otherwise than in accordance with the requirements of the relevant exchange; or
 - (ii) unlisted securities of a company, unless the offer is accompanied by a prospectus that satisfies the requirements of section 65; or
 - (b) secondary offer to the public of any securities of a company, unless the offer satisfies the requirements of section 66.
- (4) A person must not issue a prospectus unless -
 - (a) in the case of listed securities, it has been approved by the relevant exchange; or
 - (b) in the case of unlisted securities, it has been filed.
- (5) A person must not issue, distribute, deliver or cause to be issued, distributed or delivered a letter of allocation unless it is accompanied by any documents that are required, and have been approved, by the relevant exchange.
- (6) Subject to subsection (7), a person must not issue, distribute or deliver or cause to be issued, distributed or delivered, any form of application in respect of securities of a company, unless the form-
 - (a) is attached to -
 - (i) a registered prospectus in the case of a primary offering; or

- (ii) a written statement that satisfies the requirements of section 66, in the case of a secondary offering;
 - (b) bears on the face of it the date the prospectus in respect of those securities was filed.
- (7) Subsection (6) does not apply if the form of application was issued either-
 - (a) in connection with a genuine invitation to enter into an underwriting agreement with respect to the securities; or
 - (b) in relation to securities that were not offered to the public.
- (8) Despite anything contained in a company's Memorandum of Incorporation, the company may exclude any category of security holders of the company not resident within the Republic from any rights offer –
 - (a) if the Commissioner has approved that exclusion in advance, on application by the company in the prescribed manner and form on the grounds that the number of such security holders is insignificant relative to -
 - (i) the number of security holders who are resident within the Republic; and
 - (ii) the administrative cost and inconvenience of extending the rights offer to them; and
 - (b) subject to any conditions attached to that approval.

65. Requirements concerning a prospectus

- (1) This section does not apply in respect of listed securities, except listed securities that are the subject of an initial public offering.
- (2) A prospectus is subject to the provisions of sections 67 to 76, and must -
 - (a) contain all information that an investor may reasonably require to assess –

- (i) a company in which a right or interest is to be acquired, its assets and liabilities, financial position, profits and losses, cash flow and prospects; and
 - (ii) the shares and rights attached to them; and
 - (b) adhere to the specifications of Schedule 3.
- (3) As long as an initial public offering or other primary offer to the public of unlisted securities remains open, any person responsible for information in the prospectus must, when that person becomes aware of it -
 - (a) correct any error;
 - (b) report on any new matter; and
 - (c) report on any change of a matter included in the prospectus;provided these are relevant or material in terms of this Part and Schedule 3.
- (4) A correction or report under subsection (2) must be registered as a supplement to the prospectus, simultaneously published to known recipients of the prospectus and included in future distributions of the prospectus.
- (5) The Commissioner, on application, may allow required information to be omitted from a prospectus, if the Commissioner is satisfied –
 - (a) that publication of the information would be unnecessarily burdensome for the applicant, seriously detrimental to the company whose securities are the subject of the prospectus, or against public interest; and
 - (b) that users will not be unduly prejudiced by the omission.
- (6) An application under subsection (5) must be in writing and accompanied by the prescribed fee.

66. Secondary offers to the public

- (1) Subject only to subsection (2), a person making a secondary offering of the securities of a company must attach to that offer either –
 - (a) the registered prospectus that accompanied the primary offering of those securities, together with any revisions required to address changes in any material matter since the date the prospectus was registered; or
 - (b) a written statement that satisfies the requirements of subsections (3) to (6).
- (2) Subsection (1) does not apply-
 - (a) if the offer is made or the material is published -
 - (i) by a person acting in the capacity of an executor or administrator of a deceased estate or a trustee of an insolvent estate or a liquidator or trustee referred to in the Agricultural Credit Act, 1966 (Act 28 of 1966); or
 - (ii) for the purpose of a sale in execution or by public auction or by public tender.
- (3) If an offer contemplated in this section is in respect of securities of a widely held company, a person publishing or making the offer -
 - (a) must file a copy of the written statement for registration before it is issued, distributed or published; and
 - (b) must not issue, distribute or publish the statement more than three months after the date on which it is registered.
- (4) The written statement must be dated and signed by -
 - (a) the person or persons making the offer or issuing, distributing or publishing the material, and
 - (b) if that person is a company, by every director of the company.

- (5) The written statement must -
- (a) not contain any matter other than the particulars required by this item;
 - (b) not be in characters smaller or less legible than any characters used in –
 - (i) the written offer, if any; or
 - (ii) any documentthat accompanies the statement; and
 - (c) be accompanied by a copy of the last annual financial statements of the company, together with any subsequent interim report or provisional annual financial statements of that company; and
 - (d) must contain particulars with respect to the following matters:
 - (i) Whether the person making the offer is acting as principal or agent and, if as agent -
 - (aa) the name of the principal;
 - (bb) an address in the Republic where that principal can be served with process, and
 - (cc) the nature and extent of the remuneration received or receivable by the agent for his services;
 - (ii) the date on which and the country in which the company was incorporated and the address of its registered office in the Republic or, if there is no such address, the address of its principal office abroad;
 - (iii) the share capital of the company and the number of shares that have been issued, the classes into which the share capital is divided and the rights of each class of shareholders in respect of capital, dividends and voting and the number and amount of shares issued for cash and the number and amount thereof issued for a consideration other than cash,

-
- and the dates on which and the prices at which or the consideration for which those shares were issued;
- (iv) the dividends, if any, paid by the company on each class of shares during each of the five financial years immediately preceding the offer, and if no dividend has been paid in respect of shares of any particular class during any of those years, a statement to that effect;
 - (v) the total amount of any debentures issued by the company and outstanding at the date of the statement, together with the rate of interest payable thereon;
 - (vi) the names and addresses of the directors of the company;
 - (vii) whether or not the shares are listed or permission to deal in those shares has been granted by an exchange, other than that referred to in subsection (1), and, if so, which, and, if not, a statement that they are not so listed or that no such permission has been granted;
 - (viii) if the offer relates to units, particulars of the names and addresses of the persons in whom the shares represented by the units are vested, the date and the parties to any document defining the terms on which those shares are held, and an address in the Republic where that document or a copy thereof can be inspected;
 - (ix) the dates on which and the prices at which the shares offered were originally issued by the company, and were acquired by the person making the offer or by that person's principal, giving the reasons for any difference between those prices and the prices at which the shares are being offered;
 - (x) if the shares were issued as partly paid-up shares under the repealed Act, to what extent they are paid-up; and
 - (xi) the date of registration of the written statement by the Commissioner.

- (6) In subsection (5), the expression 'company' refers to the company that issued the relevant securities.

67. Consent to use of name in prospectus

- (1) A person must not name a second person as a director or proposed director of a company in any prospectus relating to securities of that company unless, before the registration of that prospectus-
- (a) the second person has given written consent, in the prescribed form, to act as a director, and that consent has been deposited with the company; and
 - (b) the prescribed return reflecting the relevant particulars in regard to that second person, has been filed with the Commission.
- (2) A person must not include in a prospectus any statement made by an expert, or reference to any statement purporting to be made by an expert, unless-
- (a) the expert has given written consent to the use of that statement, and has not withdrawn the consent;
 - (b) that consent was deposited with the company before the prospectus was filed;
 - (c) the written consent is endorsed on or attached to the copy of the prospectus filed with the Commission; and
 - (d) the prospectus includes a statement that the expert has consented to the use of the statement, and has not withdrawn that consent.
- (3) A prospectus must not name any person as the auditor, attorney, banker or broker of a company unless it is accompanied by the written consent of the named person, agreeing to –
- (a) be named to act in the stated capacity; and
 - (b) to the use of that person's name in the prospectus.

68. Variation of contract mentioned in prospectus

- (1) Subject to subsection (2), a company must not vary or agree to vary any terms of a contract referred to in a prospectus, within one year after the date of filing that prospectus.
- (2) A variation in contract terms contemplated in subsection (1) may be made or agreed by a company if –
 - (a) the specific terms of the variation are authorized or ratified by a general meeting of members of the company; and
 - (b) notice for the meeting contemplated in paragraph (a) was given on a date not earlier than six months after the date of registration of the prospectus.

69. Liability for untrue statements in prospectus

- (1) If securities are offered to the public for subscription, or sale, pursuant to a prospectus, every -
 - (a) director of the company at the time of the issue of the prospectus;
 - (b) person who becomes a director between the issuing of the prospectus and the holding of the first general meeting of the company at which directors are elected or appointed;
 - (c) person who has consented to be named in the prospectus as a director, or as having agreed to become a director either immediately or after an interval of time;
 - (d) promoter of the company; and
 - (e) person who has authorized the issue of the prospectus

is liable to pay compensation to any person, who has acquired securities on the faith of the prospectus, for any loss or damage they may have sustained as a result of any

untrue statement in the prospectus, any report or memorandum appearing on the face of, issued with, or incorporated by reference in, the prospectus.

- (2) If shares are offered to the public for sale pursuant to a prospectus, the liability contemplated in subsection (1) extends as well to every person-
 - (a) who made that offer; or
 - (b) who, under this Act, is deemed to have authorized the issue of that prospectus.
- (3) Liability contemplated in subsection (1) or (2) does not attach to a person if -
 - (a) with respect to every untrue statement not purporting to be made on the authority of an expert or of a public official document or statement, that person had reasonable ground to believe, and did up to the time of the allotment of the securities or the acceptance of the offer, as the case may be, believe that the statement was true; and
 - (b) with respect to every untrue statement purporting to be a statement by or contained in what purports to be a copy of or extract from the report or valuation of an expert, that it fairly represented the statement or was a correct and fair copy of or extract from the report or valuation and that the person had reasonable ground to believe and did up to the time of the issue of the prospectus believe that the person who made statement was competent to make it, and consented, as required by this Act, to the issue of the prospectus or the making of the offer and had not withdrawn that consent -
 - (i) before the prospectus was filed; or,
 - (ii) to the defendant's knowledge, before any allotment under the prospectus, or before the acceptance of the offer; and
 - (c) with respect to every untrue statement purporting to be a statement made by an official person or contained in what purports to be a copy of or extract from a public official statement, that it was a correct and a fair representation of the statement or copy of or extract from the document; or

-
- (d) that having consented to become a director of the company, the person withdrew that consent before the issue of the prospectus, and that it was issued without consent; or
 - (e) that the prospectus was issued without the knowledge or consent of the person, and that on becoming aware of its issue, that person forthwith gave reasonable public notice that it was issued without their knowledge or consent; or
 - (f) that after the issue of the prospectus and before allotment or acceptance there under, on becoming aware of any untrue statement in it, the person withdrew any consent to the prospectus and gave reasonable public notice of the withdrawal and of the reason for it.
- (4) If a prospectus contains the name of a person as a director of the company, or as having agreed to become a director of that company, and that person has not consented to become a director, or has withdrawn consent before the issue of the prospectus, and has not authorized or consented to the issue of the prospectus –
- (a) the directors of the company, except any without whose knowledge or consent the prospectus was issued, and
 - (b) any other person who issued it or authorized the issue of it
- are liable to indemnify that person against any damage, cost or expense arising as a result of that person having been so named in the prospectus, or incurred in defending against any action or legal proceedings brought in respect of having been so named in the prospectus.
- (5) Subsection (4), read with the changes required by the context, applies equally in respect of any other person whose consent is required in terms of this Act, and who has either –
- (a) not given that consent; or
 - (b) has withdrawn it before the issue of the prospectus.
- (6) A person who, by reason of -

- (a) being a director, or having been named as a director;
- (b) having agreed to become a director;
- (c) having authorized the issue of the prospectus; or
- (d) having become a director between the issue of the prospectus and the holding of the first general meeting of the company at which directors are elected or appointed,

has satisfied any liability under this section by making a payment to another person, may recover a contribution, as in cases of contract, from any other person, who, if sued separately, would have been liable to make the same payment, unless the person who has satisfied such liability was, and that other person was not, guilty of fraudulent misrepresentation.

70. Liability of experts and others

- (1) If a person has consented to the use of their name, or the inclusion of any material in a prospectus, as contemplated in this Part -
 - (a) that consent does not make the person liable as one who has authorized the issue of the prospectus under section 68, either-
 - (i) to compensate persons purchasing on the faith of the prospectus, except in respect of any untrue statement purporting to be made by that person as an expert; or
 - (ii) to indemnify any person against liability under that section.
- (2) Despite subsection (1), a person contemplated in that section is liable under section 68 in respect of any untrue statement purporting to be made that person as an expert unless –
 - (a) the expert person withdrew that consent in writing before the prospectus was filed for registration; or

- (b) between the filing of the prospectus for registration and any allotment in terms of it to a complainant, that expert person became aware of the untrue statement, withdrew the consent in writing and gave reasonable public notice of the withdrawal and of the reason for it; or
- (c) the expert person -
 - (i) was competent to make the statement; and
 - (ii) had reasonable ground to believe and did up to the time of the allotment of the securities or the acceptance of the offer, as the case may be, believe that the statement was true.
- (3) The defences available to a person in this subsection are in lieu of any applicable defence available in terms of section 68 (3).

71. Responsibility for untrue statements in prospectus

- (1) If a prospectus contains a statement that is untrue, every person referred to in section 69 (1) or (2) is equally responsible in terms of the enforcement provisions of this Act, for that untrue statement, subject to the provisions of subsections (3) and (4).
- (2) If -
 - (a) a published prospectus contains or is accompanied by a report of an expert, or an extract from such a report;
 - (b) the report or extract contains a statement that is untrue; and
 - (c) the expert has consented to the inclusion of the statement in the prospectus in the form and context in which it appears

the expert person is solely responsible for the statement, subject to the provisions of subsections (3) and (4).
- (3) A person is not responsible for an untrue statement contemplated in this section if –

- (a) the untrue statement was immaterial;
- (b) with respect to each untrue statement not purporting to be made on the authority of an expert or of a public official document or statement, the person had a reasonable ground to believe and did up to the time of the allotment of the securities or acceptance of the offer, believe that the statement was true, and there was no omission of any material fact necessary to make the statement as set out not misleading;
- (c) with respect to each untrue statement purporting to be a statement by or contained in what purports to be a copy of or extract from a report or valuation of an expert, the person had reasonable grounds to believe and did believe that the person making the report or valuation was competent to make it; or
- (d) with respect to each untrue statement purporting to be a statement made by an official person or contained in what purports to be a copy of or extract from a public official document, that it was a correct and fair representation of the statement or copy of or extract from the document; or
- (e) having consented to become a director of the company, the person subsequently withdrew that consent before the issue of the prospectus, and that it was issued without the person's subsequent authority or consent; or
- (f) the prospectus was issued without the person's knowledge or consent, and that on becoming aware of its issue the person promptly issued a reasonable public notice that it was issued without such knowledge or consent; or
- (g) after the issue of the prospectus and before allotment or acceptance there under, the person, on becoming aware of any untrue statement in it, withdrew any consent to it, and gave reasonable public notice of the withdrawal, and of the reason for it.

72. Time limit as to allotment or acceptance

- (1) A company that has offered securities to the public must not allot any of those securities or accept any offer to purchase any of those securities, more than four months after filing the prospectus for that offer.
- (2) A director of a company that contravenes subsection (1) is equally responsible for that contravention, in terms of the enforcement provisions of this Act, if the director knowingly authorized or permitted the contravention.

73. Restrictions on allotment

- (1) A company that has offered securities to the public must not allot any of those securities unless the amount stated in that prospectus as the minimum amount which in the opinion of the directors of the company concerned must be raised by the issue of share capital in order to provide for the matters specified in Item 30 of Schedule 3 has been subscribed and the amount so stated has been paid to and received by the company.
- (2) For the purposes of subsection (1)-
 - (a) an amount stated in any cheque received by the company must not be deemed to have been paid to it until the amount of the cheque has been unconditionally credited to its account with its bankers; and
 - (b) any amount paid to and received by the company must be reduced by the amount of any money, bill, promissory note or cheque that it has at any time delivered to the payer otherwise than in discharge of a debt bona fide due by the company.
- (3) The amount so stated in the prospectus must be reckoned exclusively of any amount payable otherwise than in cash and is in this Act referred to as 'the minimum subscription'.

- (4) A director of a company that contravenes this section is equally responsible for that contravention, in terms of the enforcement provisions of this Act, if the director knowingly authorized or permitted the contravention.
- (5) A company that has offered securities to the public must not allot any of those securities or accept any offer to purchase any those securities unless -
 - (a) the subscription or offer has been made on an application form which has been attached to or accompanied by a prospectus; or
 - (b) unless it is shown that the applicant, at the time of the application, was in fact in possession of a copy of the prospectus or was aware of its contents.
- (6) A director of a company that contravenes this section is equally responsible for that contravention, in terms of the enforcement provisions of this Act, if the director knowingly authorized or permitted the contravention.

74. Voidable allotment

- (1) If an allotment made by a company to an applicant, or the acceptance of an offer made by an applicant, is in contravention of any provision of section 71, 72 or 73 –
 - (a) that allotment is voidable at the instance of the applicant concerned within 20 business days after the date of allotment or acceptance, irrespective whether the company concerned may be in the course of being wound up; and
 - (b) every director of the company concerned or the offeror, and if the offeror is a company, every director of that company, is liable to compensate the company concerned and the applicant for any loss, damages or costs which the company or the applicant may have sustained or incurred if the allotment or an acceptance is declared void under subsection (1).
- (2) Proceedings to recover any loss, damages or costs contemplated in this section may not be commenced more than three years after the date of the relevant allotment or acceptance.

75. Minimum interval before allotment or acceptance

- (1) No allotment of securities or acceptance of an offer in respect of securities of a company may be made in pursuance of a prospectus, and no proceedings may be taken on applications made in pursuance of a prospectus, until the beginning of the third day after that on which the prospectus is first issued or such later time, if any, specified in the prospectus.
- (2) The reference in subsection (1) to the day on which a prospectus was first issued refers to -
 - (a) the day on which it is first issued as a newspaper advertisement; or
 - (b) if it is not issued as a newspaper advertisement before the third day after that on which it is first issued in any other manner, as a reference to the day on which it is first issued in that other manner.
- (3) A contravention of subsection (1) does not affect the validity of an allotment or acceptance.
- (4) A director of a company that contravenes this section is equally responsible for that contravention, in terms of the enforcement provisions of this Act, if the director knowingly authorized or permitted the contravention.

76. Conditional allotment if prospectus states securities to be listed

- (1) A prospectus containing a statement to the effect that application has been or will be made for permission for the securities offered thereby to be dealt in on an exchange must not be issued unless -
 - (a) an application has in fact been made in accordance with the requirements of the relevant exchange on or before the date of issue of that prospectus; and
 - (b) the prospectus names the particular exchange to which the application has been made.

- (2) Any allotment of securities in pursuance of a prospectus referred to in subsection (1) is subject to the condition that –
 - (a) the application is granted; or
 - (b) an appeal against a refusal of the application is upheld.
- (3) A director of a company that contravenes this section is equally responsible for that contravention, in terms of the enforcement provisions of this Act, if the director knowingly authorized or permitted the contravention.

Chapter 4 - Corporate Governance and Financial Accountability

Part A - Shareholders

77. Shareholder right to be represented by proxy

- (1) A shareholder or an agent of the shareholder may appoint one or more proxies, to participate in, and vote at, a meeting of shareholders, or to act by written consent in lieu of a meeting of shareholders.
- (2) A proxy appointment must be in writing or recorded by electronic communication, and must be signed by the shareholder, and is valid for -
 - (a) one year after the date on which it was signed; or
 - (b) any longer or shorter period expressly set out in the appointment.
- (3) An appointment of proxy may be delivered to the proxy, or to any other person authorised to receive the appointment on behalf of the proxy.
- (4) A company's Memorandum of Incorporation may require an instrument appointing a proxy, or any other document necessary to show the validity of or otherwise relating to the appointment of a proxy, to be delivered to the company or to any other person on behalf of the company, before a meeting at which the appointment may be exercised, but no such requirement may demand delivery more than forty-eight hours before such a meeting.
- (5) If a company issues an invitation to shareholders to appoint one or more persons as a proxy, or supplies a form of instrument for appointing a proxy -
 - (a) the invitation must be sent to every shareholder who is entitled to notice of the meeting at which the proxy is intended to be exercised;
 - (b) the invitation, or form of instrument supplied by the company for the purpose of appointing a proxy, must -

- (i) bear a reasonably prominent summary of the rights established by this section;
 - (ii) contain adequate blank space, immediately preceding the name or names of any person or persons named in it, to enable a shareholder to write in the name and, if so desired, an alternative name of a proxy chosen by the shareholder; and
 - (iii) provide adequate space for the shareholder to indicate whether the appointed proxy is to vote in favour of or against any resolution or resolutions to be put at the meeting, or is to abstain from voting; and
- (c) the company must not require that the proxy appointment be made irrevocable.
- (6) The provisions of subsection (5) (b) do not apply if the company merely supplies a generally available standard form of proxy appointment on request by a shareholder.
- (7) Irrespective of the form of instrument used to appoint a proxy -
 - (a) the appointment is revocable unless the proxy appointment expressly states otherwise; and
 - (b) if the appointment is revocable, a shareholder may revoke the proxy appointment by -
 - (i) cancelling it in writing; or
 - (ii) making a later inconsistent appointment of a proxy.
- (8) If a shareholder does not instruct the appointed proxy to vote in favour of or against any resolution or resolutions, or to abstain from voting, the proxy is entitled to vote independently.

78. Record date for determining shareholder rights

- (1) The board of a company may set a record date for the purpose of determining the shareholders entitled to –

- (a) receive a notice of a meeting of shareholders;
 - (b) participate in and vote at a meeting of shareholders or to assent to any matter by written consent or electronic communication;
 - (c) receive a distribution; or
 - (d) be allotted other rights.
- (2) A record date determined by the board in terms of subsection (1) may not be –
- (a) earlier than the date on which the record date is determined; or
 - (b) more than 90 days before the date on which the action, for which the record date is being set, is scheduled to occur.

79. Shareholder meetings

- (1) A closely held company, or a not for profit company that does not qualify as a public interest company, must hold meetings of shareholders as required by the company's Memorandum of Incorporation.
- (2) A public interest company must hold at least one regularly scheduled meeting of shareholders each year, at a date, time and place determined by the board, but no more than 18 months may elapse between any two such meetings.
- (3) Any failure to hold a meeting as required by subsection (2) does not affect the existence of a company, or the validity of any action by the company.
- (4) A meeting convened in terms of subsection (2) must, at a minimum, transact the following business:
 - (a) Election of directors
 - (b) Approval of financial statements
 - (c) Receipt of remuneration committee report

- (d) Appointment of auditors
- (5) Unless its Memorandum of Incorporation provides otherwise, every meeting of shareholders of -
- (a) a company, other than a public interest company, must be held at a location in the Republic that is reasonably accessible to the shareholders, unless –
 - (i) the Memorandum of Incorporation permits the company to hold a meeting outside the Republic; or
 - (ii) the shareholders unanimously agree to holding a meeting outside the Republic; or
 - (b) a public interest company -
 - (i) may be held at any place determined by the board; and
 - (ii) irrespective whether it is held in the Republic or elsewhere, must be reasonably accessible within the Republic for electronic participation by shareholders in the manner contemplated in section 81 (2).
- (6) The board of a company, or any other person specified in the company's Memorandum of Incorporation or rules, –
- (a) may call a special meeting of shareholders at any time; and
 - (b) subject to subsection (8), must call a special meeting of shareholders if one or more written and signed demands for such a meeting are delivered to the company; and -
 - (i) each such demand describes the specific purpose for which the meeting is proposed; and
 - (ii) in aggregate, demands for substantially the same purpose are made and signed by the holders, as of the same time specified in each of the demands, of at least 25% of the shares entitled to be voted in respect of the matter proposed to be considered at the meeting; and

-
- (iii) a holder may revoke a demand at any time before notice of the special meeting has been sent to the shareholders.
- (7) A company's Memorandum of Incorporation may permit a lower percentage than that set out in subsection (6)(b)(ii).
- (8) A company, or any shareholder of the company, may apply to the court for an order setting aside a demand made in terms of subsection (6)(b) on the grounds that the demand is frivolous, calls for a meeting for no other purpose than to re-consider a matter that has already been decided by the shareholders, or is otherwise vexatious.
- (9) If a company is unable to convene a meeting as required in terms of this section because it has no directors, or because all of its directors are incapacitated -
- (a) any other person authorised by the company's Memorandum of Incorporation may convene the meeting; or
 - (b) if no person has been authorised as contemplated in paragraph (a), the Court, on a request by any shareholder, may order that a shareholders meeting be convened on a date, and subject to any terms, that the Court considers appropriate in the circumstances.
- (10) If a company fails to convene a meeting for any reason other than as contemplated in subsection (9) –
- (a) within the time required by subsection (2);
 - (b) at a time required in accordance with its Memorandum of Incorporation; or
 - (c) when required by shareholders in terms of subsection (6)(b)
- a shareholder of the company may apply to the Court for an order requiring the company to convene a meeting on a date, and subject to any terms, that the Court considers appropriate in the circumstances.

80. Notice of meetings

- (1) Except to the extent provided otherwise by a company's Memorandum of Incorporation, the company must ensure that notice of each meeting of shareholders is delivered to all of the shareholders in the manner and form prescribed by this Act at least -
 - (a) 5 business days before the meeting is to begin, in the case of a closely held company, if all the shares of that company are owned by persons who are related or inter-related;
 - (b) 10 business days before the meeting is to begin in the case of a closely held company not contemplated in paragraph (a); or
 - (c) 15 business days before the meeting is to begin in the case of a widely held company, or a not for profit company that has voting members.
- (2) A notice of a meeting of shareholders -
 - (a) may be in writing or electronic form, unless the company's Memorandum of Incorporation or rules provide otherwise; and
 - (b) must include at least –
 - (i) the date, time and place for the meeting; and
 - (ii) the general purpose of the meeting, and any specific purpose contemplated in section 79 (6)(b), if applicable; and
 - (c) must bear a reasonably prominent statement that -
 - (i) a shareholder entitled to attend and vote at the meeting is entitled to appoint one or more proxies to attend and participate in the meeting in the place of the shareholder;
 - (ii) a proxy need not also be a shareholder of the company; and

(iii) section 81 (1) requires that meeting participants provide satisfactory identification.

(3) If all of the holders of shares entitled to be voted in respect of each item on the agenda of a shareholders meeting -

- (a) acknowledge actual receipt of the notice;
- (b) are present at the meeting; or
- (c) waive notice of the meeting

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.

(4) An immaterial error in the form or manner of giving notice of a meeting does not invalidate any action taken at the meeting.

(5) A shareholder who is present at a meeting is deemed to have -

- (a) acknowledged receipt of notice of the meeting; and
- (b) waived any right based on an actual or alleged defect in the notice of the meeting.

81. Meeting conduct, quorum and adjournment

(1) Before any person may participate in a meeting of shareholders, that person's -

- (a) identity must be verified; and
- (b) right to participate, either as a shareholder, or as a proxy for a shareholder, must be verified

in any manner required by the rules of the company, if any, or to the reasonable satisfaction of the person presiding at the meeting.

- (2) Except to the extent that this Act or a company's Memorandum of Incorporation provides otherwise -
- (a) a meeting of shareholders may be conducted entirely by electronic communication; or
 - (b) if a meeting is being held in person, one or more shareholders, or proxies for shareholders, may participate in that meeting by electronic communication
- so long as the electronic communication employed ordinarily enables all persons participating in that meeting to simultaneously communicate with each other and participate effectively in the meeting.
- (3) Except to the extent that the a company's Memorandum of Incorporation for a smaller or larger number –
- (a) a meeting of shareholders may not begin until holders of at least 25% of the shares entitled to be voted in respect of at least one matter to be decided at the meeting are present at the meeting; and
 - (b) a matter to be decided at the meeting may not begin to be debated unless holders of at least 25% of the shares entitled to be voted on that matter are present at the meeting at the time the matter is called on the agenda.
- (4) After a quorum has been established for a meeting, or for a matter to be considered at a meeting, the meeting may continue, or the matter may be considered, so long as the holder of at least one share entitled to be voted is present at the meeting.
- (5) A meeting of shareholders, or the consideration of any matter being debated at the meeting, may be adjourned from time to time without further notice, subject to subsection (7), on a motion approved by the holders of a majority of the shares –
- (a) entitled to be voted on at least one matter at that meeting, or on the matter under debate, as the case may be; and
 - (b) the holders of which are present at the meeting at the time.

- (6) An adjournment of a meeting, or of consideration of a matter being debated at the meeting -
 - (a) may be either -
 - (i) to a fixed time and place; or
 - (ii) until further noticeas agreed at the meeting; and
 - (b) requires that a further notice be given to shareholders only if the meeting determined that the adjournment was “until further notice”, as contemplated in sub-paragraph (a)(ii).
- (7) A meeting may not be adjourned to a time more than 120 business days, or other period set out in the Memorandum of Incorporation, after the record date determined in accordance with section 78.

82. Shareholder resolutions

- (1) Every resolution adopted at a meeting of shareholders is either a special resolution, or an ordinary resolution.
- (2) A proposed resolution must be -
 - (a) expressed with sufficient clarity and specificity; and
 - (b) accompanied by sufficient information or explanatory materialto enable a reasonably alert shareholder who is entitled to vote on the resolution to determine whether to participate in the meeting and to seek to influence the outcome of the vote on the resolution.
- (3) A shareholder who believes that the requirements of subsection (2) have not been satisfied may apply to the Court, at any time more than 4 business days before the start of the meeting at which the resolution will be considered, for an order requiring

the company, or the sponsor of the proposed resolution, to take appropriate steps to satisfy those requirements.

- (4) Once it has been adopted, a resolution may not be challenged or impugned by any person in any forum on the grounds that subsection (2) was contravened.
- (5) Except to the extent that this Act provides otherwise –
 - (a) for a special resolution to be approved, it must be supported by the holders of at least 75% of the shares voted on the resolution, subject to subsection (6)(a); and
 - (b) for an ordinary resolution to be approved, it must be supported by the holders of at least a majority of the shares voted on the resolution, subject to subsection (6)(b).
- (6) A company's Memorandum of Incorporation may –
 - (a) permit a smaller percentage of shares, subject to a minimum of 65%, to be voted in support of a special resolution, for it to be adopted; or
 - (b) require a larger percentage of shares, subject to a maximum of 60%, to be voted in support of an ordinary resolution, for it to be adopted.
- (7) A special resolution is required to
 - (a) amend the company's Memorandum of Incorporation;
 - (b) approve the voluntary winding up of the company; or
 - (c) approve any other proposal as required by this Act or a company's Memorandum of Incorporation.
- (8) In respect of any vote on a resolution in terms of this Act,–
 - (a) an abstention or other failure by a person present at a meeting to exercise a voting right is deemed to be an affirmative waiver of that voting right at the time; and

- (b) a voting right that is not exercised as contemplated in paragraph (a) must not be counted in determining the number or percentage of shares voted, or entitled to be voted, on the resolution.

83. Shareholders acting other than at a meeting

- (1) A resolution that could be voted on at a meeting of a company's shareholders may instead be adopted by written consent given in person, or by electronic communication, if –
 - (a) the company's Memorandum of Incorporation so permits; and
 - (b) the consent is given by the holders of at least the minimum number of shares that would have been required to adopt that resolution if –
 - (i) it had been voted on at a meeting; and
 - (ii) all of the holders of shares entitled to be voted on the matter had been present at that meeting.
- (2) A resolution adopted in the manner contemplated in this section is of the same effect as if it had been approved by voting at a meeting.
- (3) Within 5 business days after adopting a resolution in terms of this section, the company must deliver a statement describing the resolution to every holder of shares that would have been entitled to be voted on that resolution if it had been voted on at the meeting.

Part B – Board and Directors

84. Board and directors

- (1) Every company must have a board of directors, comprising -
 - (a) in the case of a not for profit company that is not a public interest company, at least three directors;
 - (b) in the case of a closely held company that is not a public interest company, at least one director; or
 - (c) in the case of a public interest company, at least four directors.
- (2) A company's Memorandum of Incorporation may provide for a higher minimum number of directors than required by subsection (1).
- (3) The business and affairs of a company must be managed by or under the direction of its board, which has the authority to exercise all of the powers and perform any of the functions of the company, except to the extent that this Act or the company's Memorandum of Incorporation provides otherwise.

85. Board meetings

- (1) A director authorized by the board of a company -
 - (a) may call a meeting of the board at any time; and –
 - (b) must call such a meeting if at least two of the directors, or 25% of the directors if that is more than 2, require it.
- (2) A company's Memorandum of Incorporation may require a higher, or permit a lower, number or percentage than those set out in subsection (1)(b).
- (3) Except to the extent that this Act or a company's Memorandum of Incorporation provides otherwise –

- (a) a meeting of the board may be conducted by electronic communication; or
- (b) one or more directors may participate in a meeting by electronic communication,

so long as the electronic communication facility employed ordinarily enables all persons participating in that meeting to simultaneously communicate with each other and participate effectively in the meeting.

- (4) The board of a company may determine the form and time for giving notice of its meetings, but –
 - (a) such a determination must comply with any requirements set out in the Memorandum of Incorporation, or rules, of the company; and
 - (b) no meeting of a board may be convened without notice to all of the directors, subject to subsection (5).
- (5) Except to the extent that this Act or the company's Memorandum of Incorporation provides otherwise –
 - (a) if all of the directors of the company -
 - (i) acknowledge actual receipt of the notice;
 - (ii) are present in person or by electronic communication; or
 - (iii) waive notice of the meeting,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;
 - (b) a majority of the directors must be present, in person or by electronic communication, before a vote may be called at a meeting of the directors;
 - (c) each director has one vote on a matter before the board; and
 - (d) a majority of the votes cast on a resolution is sufficient to approve that resolution.

86. Directors acting other than at a meeting

- (1) Unless a company's Memorandum of Incorporation provides otherwise, a decision that could be voted on at a meeting of the board of that company may instead be adopted by unanimous written consent of the directors, given in person, or by electronic communication.
- (2) A decision made in the manner contemplated in this section is of the same effect as if it had been approved by voting at a meeting.

87. Board committees

- (1) The board of a company may -
 - (a) appoint any number of committees of directors; and
 - (b) delegate to any committee any of the authority of the board, subject to any limitation set out in the company's Memorandum of Incorporation.
- (2) Subject to the company's Memorandum of Incorporation and the resolution establishing a committee, the committee has the full authority of the board in respect of a matter referred to it.
- (3) The creation of a committee, delegation of any power to a committee, or action taken by a committee, does not alone satisfy or constitute compliance by a director with the required duty of a director to the company, as set out in section 91.

88. Election and removal of directors

- (1) The directors of a company are elected by the holders of shares entitled to be voted in such an election, subject only to section 90 (3).
- (2) Unless the company's Memorandum of Incorporation provides otherwise, in any election of directors –

-
- (a) the election is to be conducted as a series of votes, each of which is on the candidacy of a single individual to fill a single vacancy, with the series of votes continuing until all vacancies on the board at that time have been filled; and
 - (b) in each vote to fill a vacancy –
 - (i) each share entitled to vote may be cast once; and
 - (ii) the vacancy is filled only if a majority of the votes cast support the candidate.
- (3) The election of a person as director is a nullity if, at the time of the election, that person is disqualified in terms of section 89.
- (4) Unless a company's Memorandum of Incorporation provides otherwise, the terms of directors of a widely held company must be arranged so that, as nearly as possible, the terms of one-third of the directors expire each year.
- (5) Despite anything to the contrary in a company's Memorandum of Incorporation, or any agreement between a company and a director, or between any shareholders and a director, a director may be removed by a special resolution at a meeting of holders of the shares entitled to be voted in an election of directors, if the director –
- (a) has received -
 - (i) notice of the meeting and the resolution, at least equivalent to that which a shareholder is entitled to receive, irrespective whether or not the director is a shareholder of the company; and
 - (ii) a statement setting out reasons for the resolution, with sufficient specificity to reasonably permit the director to prepare and present a response; and
 - (b) has been given a reasonable opportunity to make a presentation to the meeting before the resolution is put to a vote.
- (6) Subsection (5) -

- (a) is in addition to -
 - (i) the right, in terms of section 90 (2), of a company's board to determine whether a director is disqualified, and any right of a director to apply to a court for an order reviewing such a determination; and –
 - (ii) the right, in terms of section 163, to apply to a court for an order declaring a director delinquent, or placing a director on probation; and
- (b) does not deprive a person removed from office as a director in terms of this section of any right that person may have at common law or otherwise to apply to a court for damages or other compensation for –
 - (i) loss of office as a director; or
 - (ii) loss of any other office as a consequence of being removed as a director.

89. Disqualified person may not act as director

- (1) A person who is disqualified, as set out in this section, must not -
 - (a) be appointed or elected as a director of a company, or consent to such an election or appointment;
 - (b) make, or participate in making any decision that affects the whole, or a substantial part, of a company's business;
 - (c) exercise the capacity to affect significantly a company's financial standing;
 - (d) communicate advice, instructions or wishes to the directors of a company, other than in the proper performance of the person's role as a professional advisor to the company in terms of a business relationship with the company, if the person –
 - (i) knows that the directors are accustomed to act in accordance with the person's advice, instructions or wishes; or

-
- (ii) intends that the directors will act in accordance with the person's advice, instructions or wishes; or
 - (e) act in the capacity of a director of a company in any other manner.
 - (2) A company must not knowingly permit a disqualified person to serve as a director.
 - (3) A person who becomes disqualified while serving as a director of a company, ceases to be a director immediately, subject only to section 90 (2).
 - (4) A person who has been placed under probation as a director by a court in terms of section 163 must not serve as a director except to the extent permitted by the order of probation.
 - (5) A person is disqualified as a director of any company if the person –
 - (a) is a juristic person;
 - (b) has not consented to be a director of that company;
 - (c) is an unemancipated minor, or other person under a legal disability;
 - (d) does not reside in the Republic, unless the company has more than one director and at least one of the other directors resides in the Republic, subject to subsection (6);
 - (e) is disqualified by, or does not satisfy any qualification set out in, the company's Memorandum of Incorporation;
 - (f) a court has prohibited that person to be a director, or declared the person to be a delinquent director in terms of section 163;
 - (g) the person is prohibited in terms of any public regulation to be a director of the company; or
 - (h) subject to subsections (8) to (10) –
 - (i) is an unrehabilitated insolvent;

- (ii) has been removed from an office of trust, on the grounds of misconduct;
 - (iii) has been convicted, in the Republic or elsewhere, and imprisoned without the option of a fine, or fined more than the prescribed amount, for theft, fraud, forgery, perjury, or an offence -
 - (aa) involving fraud, misrepresentation or dishonesty;
 - (bb) in connection with the promotion, formation or management of a company, or in connection with any act referred to in subsection (1) (b)(c) or (e); or
 - (cc) under this Act, FICA, Security Services Act, 2004 (Act No. 36 of 2004), Prevention of Corruption Act, 1958 (Act No. 6 of 1958), Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004 (Act No. 12 of 2004).
- (6) A disqualification contemplated in subsection (5)(d) that would arise as a result of the vacating of office of director by a person who is resident in the Republic, takes effect 60 business days after that person vacated the office of director, unless, before that date, the vacancy is filled by another person who is resident in the Republic.
- (7) The Memorandum of Incorporation of a company may impose -
 - (a) additional grounds of disqualification of directors; or
 - (b) minimum qualifications to be met by directors of that company.
- (8) Despite being disqualified in terms of subsection (5)(d) or (h), a person may act as a director of a company if -
 - (a) it is a closely held company; and –
 - (b) all of the shares of that company are held by that disqualified person, or persons related to that disqualified person.
- (9) A disqualification in terms of subsection (5)(h)(iii) ends -

- (a) five years after the completion of the sentence imposed for the relevant offence; or
 - (b) at the end of a single extension of not more than 15 years, as determined by the Court, on application by the Commission before the expiry of the 5 year period contemplated in paragraph (a).
- (10) A court may exempt a person from the application of any provision in subsection (5)(h).

90. Vacancies on the board

- (1) A vacancy arises in the board of a company if, before the expiry of a director's term, the director resigns or dies, or –
- (a) is removed in terms of section 88 (5);
 - (b) is declared delinquent by a court, or placed on probation under conditions that are inconsistent with continuing to be a director of the company, in terms of section 163; or
 - (c) otherwise becomes disqualified in terms of section 89.
- (2) If a dispute arises as to whether a director has become disqualified in terms of section 89 –
- (a) the board, other than the director concerned, may determine the matter by resolution;
 - (b) the director concerned, any other director, or any shareholder may apply to a court to review the determination of the board; and
 - (c) a vacancy does not arise until the later of -
 - (i) the expiry of the time for filing an application for review in terms of paragraph (b); or

- (ii) the granting of an order by the court on such an application.
- (3) If a vacancy arises in the board, the remaining members of the board may appoint a person to fill the vacancy and serve until the time that the vacating director's term would otherwise have ended.
- (4) If, as a result of a vacancy arising in the board, there are no remaining directors of a company, a shareholder may apply to the Court to convene a meeting of shareholders for the purpose of electing directors, on a date, and subject to any terms, that the Court considers appropriate in the circumstances

91. Standards of director's conduct

- (1) Each director of a company, when acting in that capacity, or as a member of a committee of directors, or when gathering information or similarly preparing to act in either of those capacities, is subject to –
 - (a) a duty to exercise the degree of care, skill and diligence that would be exercised by a reasonably diligent individual who had both -
 - (i) the general knowledge, skill and experience that may reasonably be expected of an individual carrying out the same functions as are carried out by that director in relation to the company; and
 - (ii) the general knowledge, skill and experience of that director; and
 - (b) a second, fiduciary, duty to act honestly and in good faith, and in a manner the director reasonably believes to be in the best interests of, and for the benefit of, the company.
- (2) A director's judgement that an action or decision is in the best interest of, or for the benefit of, the company is reasonable if –
 - (a) the director –

-
- (i) has taken reasonably diligent steps to become informed about the subject matter of the judgement, having regard to subsections (4) and (5); and
 - (ii) does not have a personal financial interest in the subject matter of the judgement; and
 - (b) it is a judgement that a reasonable individual in a similar position could hold in comparable circumstances.
 - (3) In addition to the general duty of care, and fiduciary duty, of each director as set out in subsection (1)(a) and (b), respectively, a director must -
 - (a) comply with this Act and the company's Memorandum of Incorporation; and
 - (b) communicate to the board at the earliest practicable opportunity any material information that comes to the director's attention, unless the director –
 - (i) reasonably believes that the information is generally available to the public, or known to the other directors; or
 - (ii) is bound not to disclose that information by a legal or ethical obligation of confidentiality.
 - (4) In discharging any board or committee duty, a director is entitled to rely on –
 - (a) the performance by any of the persons -
 - (i) referred to in subsection (5); or
 - (ii) to whom the board may have delegated, formally or informally by course of conduct, the authority or duty to perform one or more of the board's functions that are delegable under applicable law; and
 - (b) any information, opinions, reports or statements, including financial statements and other financial data, prepared or presented by any of the persons specified in subsection (5).

- (5) To the extent contemplated in subsection (4), a director is entitled to rely on -
- (a) one or more employees of the company whom the director reasonably believes to be reliable and competent in the functions performed or the information, opinions, reports or statements provided;
 - (b) legal counsel, accountants, or other persons retained by the company as to matters involving skills or expertise the director reasonably believes are matters –
 - (i) within the particular person’s professional or expert competence; or
 - (ii) as to which the particular person merits confidence; or
 - (c) a committee of the board of which the director is not a member, unless the director has reason to believe that the actions of the committee do not merit confidence.
- (6) The provisions of this section are in addition to, and not in substitution for, any duties of the director of a company under the common law.

92. Director’s use of information and conflicting interests

- (1) A director must not, directly or indirectly, use that position to -
- (a) make a secret profit or otherwise gain an advantage for the director or someone else; or
 - (b) cause detriment to the company.
- (2) An individual who, as a result of being or having been a director of a company, obtains any information must not use it improperly to –
- (a) gain an advantage for the director or someone else, during or after the time that the individual is a director; or
 - (b) cause detriment to the company.

-
- (3) A director must not improperly use that office to make, participate in the making of, influence or attempt to influence a decision on a matter in respect of which the director has a conflicting personal financial interest.
 - (4) If a director has a conflicting personal financial interest in respect of a matter to be discussed or voted on at a meeting of the board, the director -
 - (a) must declare the conflicting interest and its general nature at the meeting;
 - (b) must immediately leave the meeting or that part of the meeting during which the matter is to be discussed or voted on;
 - (c) must not take part in the discussion or vote on the matter or attempt to influence the discussion or vote on the matter before, during or after the meeting; and
 - (d) must not execute any document in relation to the matter unless specifically directed to do so by the board.
 - (5) In applying subsections (3) and (4) -
 - (a) neither subsection applies to any director, solely on the grounds that the director holds any security of the company;
 - (b) subsection (3) does not apply in respect of a company if -
 - (i) all of the shares of that company are held by one person, or by two or more persons who are all related or inter related;
 - (ii) the company has only one director; and
 - (iii) the director is a shareholder of the company; and
 - (c) subsection (4) does not apply in respect of a company that has only one director.
 - (6) A director who satisfies the requirements of subsection (4) must be regarded as having complied with subsections (1) and (3) with respect to the relevant matter,

irrespective whether the remaining members of the board approve or reject the matter that gave rise to the disclosure.

- (7) A court, on application by any interested person, may declare valid a transaction or agreement that is approved by the board, despite the failure of a director to satisfy the requirements of subsection (4).
- (8) A transaction -
- (a) between the company on the one hand, and a director of the company, on the other; and
 - (b) in which the director has a personal financial interest,

other than a transaction contemplated in section 92A, is not void or voidable solely because of that interest, if the transaction was approved in a decision made in the manner contemplated in subsection (4), or has been ratified by an ordinary resolution of the shareholders.

92A Loans or other financial assistance to directors

- (1) A company must not provide a loan to, secure a debt or obligation of, or otherwise provide direct or indirect financial assistance to, a director of the company, or of a related or inter-related company unless all the following conditions are satisfied -
- (a) the company's Memorandum of Incorporation expressly permits giving such financial assistance, as contemplated in subsection (3)(a); or
 - (b) Irrespective of the status or category of company concerned, the board must be 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 assistance is proposed to be given are fair and reasonable to the company.

-
- (c) Any conditions or restrictions respecting the granting of such assistance set out in the company's Memorandum of Incorporation, as contemplated in subsection (3)(b), must be satisfied.
 - (d) The financial assistance must be -
 - (i) pursuant to an employee share scheme that satisfies the requirements of section 62; or
 - (ii) pursuant to a special resolution of the shareholders, which approved such assistance for the specific recipient, or generally for a category of potential recipients, and the specific recipient falls within that category; or
 - (iii) in the case of a closely held company, pursuant to a specific authorization set out in the company's Memorandum of Incorporation.
 - (2) Subsection (1)(d) does not apply in respect of a company if -
 - (a) all of the shares of that company are held by one person, or by two or more persons who are all related or inter related; and
 - (b) every shareholder of the company is also a director of the company.
 - (3) A company's Memorandum of Incorporation may -
 - (a) specifically authorize any financial assistance contemplated in subsection (1); or
 - (b) impose additional conditions or requirements respecting the granting of any such assistance.
 - (4) A resolution by the board of a company to provide financial assistance contemplated in subsection (1), or an agreement with respect to the provision of any such assistance, is void to the extent that the provision of that assistance would be inconsistent with -
 - (a) this section; or

- (b) a condition or requirement contemplated in subsection (3).
- (5) Any director of a company who voted in favour of a resolution, or approved an agreement, that is void to any extent as contemplated in subsection (4) -
- (a) is liable to compensate the company or any shareholder for any loss, damages or costs that the company or shareholder may have sustained or incurred in relation to the transaction, if proceedings to recover any such loss, damages or costs are commenced within two years after the issuance of the shares, securities or other rights; and
 - (b) may be held as responsible as the company, in terms of this Act, for the contravention.

93. Liability of directors and officers

- (1) Subject to subsections (3) to (5), any provision of an agreement, Memorandum of Incorporation of, or resolution by, a company, whether express or implied, is void to the extent that it directly or indirectly purports to relieve a director of liability in terms of –
- (a) subsection (2); or
 - (b) any law in respect of gross negligence, wilful misconduct or breach of trust.
- (2) A director is liable to the company, and to any other person, for any loss arising as a consequence of that director having -
- (a) signed, or consented to the publication of -
 - (i) a financial statement that was false or misleading in a material respect; or
 - (ii) a prospectus, or a written statement contemplated in section 66, that contained an “untrue statement” as defined and described in section 60

knowing that, or with reckless disregard as to whether, the statement was false, misleading or untrue, as the case may be; or

(b) knowingly been a party to -

(i) the reckless carrying on of the company's business; or

(ii) an act or omission by a company calculated to defraud a creditor, employee or security holder of the company, or with another fraudulent purpose.

(3) A company -

(a) may advance expenses to a director to defend litigation in any proceedings arising out of the director's service to the company;

(b) subject to paragraph (c), may directly or indirectly indemnify a director for -

(i) expenses contemplated in paragraph (a), irrespective whether it has advanced those expenses; or

(ii) any liability arising out of the director's service to the company;

(c) may not indemnify a director, as contemplated in paragraph (b) in respect of any actions for liability in terms of subsection (2), or for gross negligence, wilful misconduct or breach of trust, unless the proceedings exculpate the director or are abandoned before judgment; and

(d) may purchase insurance to protect the company, or the director, against liability, and expenses contemplated in this subsection.

(4) If, in any proceedings against a director, other than for gross negligence, wilful misconduct or breach of trust, it appears to the Court that -

(a) the director is or may be liable, but has acted honestly and reasonably; and

(b) having regard to all the circumstances of the case, including those connected with the appointment of the director, it would be fair to excuse the director,

the Court may relieve the person, either wholly or partly, from the liability on any terms as the Court considers just.

- (5) A director who has reason to apprehend that a claim will be made alleging that the director is liable, other than for gross negligence, wilful misconduct or breach of trust, may apply to the Court for relief, and the Court may grant relief to the director on the same grounds as if the matter had come before the court in terms of subsection (4).
- (6) The provisions of this section are in addition to any rule of the common law that is consistent with this section.

94. Register of directors, auditors and secretaries

- (1) A company must keep a register of its directors, auditors and secretaries, unless the company is -
 - (a) a closely held company that is -
 - (i) not a public interest company; and
 - (ii) the shares of which are all owned by persons who are related or inter-related; or
 - (b) a not for profit company that is not a public interest company, and has no voting members.
- (2) A register of directors, auditors and secretaries must include –
 - (a) in respect of all directors, their respective -
 - (i) full names, including any former names;
 - (ii) identity number or, if a director does not have an identity number, the director's date of birth;
 - (iii) nationality, if the director is not South African;

-
- (iv) occupation,
 - (v) date of their most recent election or appointment as director; and
 - (vi) name and registration number of every other company of which each such director is a director;
- (b) in respect of every secretary that is a body corporate, its name, registration number, the address of its registered office and the date of its appointment;
 - (c) in respect of each auditor –
 - (i) the name and date of appointment of the auditor of the company; and
 - (ii) if a firm is appointed as auditor, the name of the individual specified in terms of section 100 (3);
 - (d) any changes in the particulars referred to in paragraphs (a) and (b), as they occur, with the date and nature of each such change.
- (3) To protect personal privacy, the Minister, by notice in the Gazette, may exempt from the application of subsection (2)(a) categories of names as formerly used by any person before attaining majority, or by persons who have been adopted, married, divorced or widowed.

Part C – Financial Year, Records and Reporting

95. Financial year of company

- (1) A company must have a financial year, ending on a date determined by the company.
- (2) The first financial year of a company -
 - (a) begins on the date that the incorporation of the company is registered, as stated in its Registration Certificate; and
 - (b) ends on the date determined in terms of subsection (1), which may not be less than 3 nor more than 15 months after the date contemplated in paragraph (a).
- (3) The second and each subsequent financial year of a company –
 - (a) begins when the preceding financial year ends; and
 - (b) ends on the date contemplated in subsection (1), unless that date has been changed as contemplated in subsection (4).
- (4) A company may change its financial year end at any time, by filing a notice of that change with the Commission, but -
 - (a) it may not do so more than once during any financial year; and
 - (b) the date as changed may not result in a financial year ending less than 3 months, or more than 18 months, after the end of the preceding financial year.
- (5) Despite subsection (3)(b), the financial year of a company that has changed the date contemplated in subsection (1), ends on the date as changed.
- (6) The financial year of the company is its annual accounting period.

96. Accounting records and statements

- (1) A company must keep accurate accounting records -

-
- (a) in one of the official languages of the Republic;
 - (b) as necessary to present fairly the state of affairs and business of the company, and to explain the transactions and financial position of the business of the company;
 - (c) showing its assets, liabilities and equity, as well as its income and expenses, and any other prescribed information; and
 - (d) satisfying the prescribed standards as to form, content, record keeping procedures, accuracy, and audit and verification requirements.
- (2) A company's accounting records must be kept at, or be accessible from, the registered office of the company.
- (3) Accounting records for a group of related companies may be consolidated, but must comply with the prescribed requirements.
- (4) The accounting records, and any financial statements based on those records, including any annual financial statements of a company required to be prepared in terms of section 97, must not be -
- (a) incomplete in any material particular; or
 - (b) false or misleading in any material respect.
- (5) Every -
- (a) director of a company that has issued a financial statement that does not comply with subsection (4); and
 - (b) any person who was a party to the preparation, approval, publication, issue or supply of a financial statement that does not comply with subsection (4)(b), and who knew or reasonably ought to have suspected, that the statement contained false or misleading material,
- may be held equally responsible with the company, in terms of this Act, for the contravention of subsection (4).

- (6) For the purposes of subsection (5)(b), a person is a party to the preparation of a financial report if -
- (a) the report includes or is otherwise based on a scheme, structure or form of words devised, prepared or recommended by that person; and
 - (b) the scheme, structure or form of words is of such a nature that the person knew or ought reasonably to have suspected that its inclusion or other use in connection with the preparation of the report would cause the report to be false or misleading.
- (7) Subject to subsections (8) and (9), the Minister, after consulting the Financial Reporting Standards Council, may make regulations prescribing -
- (a) financial record and report standards contemplated in this Part, which may establish different standards applicable to public interest, and non public interest, companies respectively; and
 - (b) qualifications, duties and requirements of auditors in terms of this Act.
- (8) Any regulations contemplated in subsection (7)(a) -
- (a) must promote sound and consistent accounting practices;
 - (b) must be consistent with -
 - (i) the International Financial Reporting Standards of the International Accounting Standards Board or its successor body; and
 - (ii) generally accepted accounting practices; and
 - (c) may prescribe different standards applicable to public interest companies, and non public interest companies, respectively, provided that any such different standards satisfy the requirements of paragraph (b).
 - (d) Any regulations contemplated in subsection (7)(b) must be consistent with the Auditing Professions Act, 2005 (Act No. 26 of 2005), and any regulations made in terms of that Act.

97. Annual financial statements

- (1) Each year, within five months after the end of its financial year, a company must prepare annual financial statements in respect of that financial year, unless -
 - (a) all of the shares of the company are held by one person, or by two or more persons who are all related or inter related; and
 - (b) the company is not a holding company, or subsidiary, of a company that is itself required to prepare annual financial statements.
- (2) The annual financial statements of a company must be in an official language, and must -
 - (a) comprise -
 - (i) a balance sheet, together with any relevant notes; and
 - (ii) an income statement or any similar financial statement as appropriate, together with any relevant notes;
 - (b) fairly present the state of affairs of the company as at the end of the financial year, and the results of its operations during that year, in manner that -
 - (i) conforms with financial reporting standards, as applicable to the company and its business; and
 - (ii) satisfies the prescribed standards as to form and content;
 - (c) agree with the company's accounting records, and be summarised in such a manner that a reasonably alert shareholder reading the statements can adequately ascertain the company's financial position; and
 - (d) contain an auditor's report, if -
 - (i) the company is required in terms of section 101(1) to appoint an auditor;
or

- (ii) the company has voluntarily retained an auditor to review and report on the annual financial statements.
- (3) The annual financial statements of a company must -
 - (a) be approved by the board and signed by an authorised director; and
 - (b) presented to the first meeting of -
 - (i) shareholders after the statements have been approved by the board; or
 - (ii) members, in the case of a not for profit company that is required to prepare such statements in terms of this section; and
- (4) Not less than 15 business days before the meeting at which the statements are to be presented in terms of subsection (3), a copy of the statements must be –
 - (a) delivered by mail, or electronic communication if approved by a particular recipient, to every shareholder; and
 - (b) filed with the Commission.
- (5) Prescribed standards contemplated in subsection (2)(b) may be different for public interest and non-public interest companies, respectively.

98. Disclosure of directors' remuneration and benefits

- (1) If a company is required to produce annual financial statements, those statements must contain particulars showing -
 - (a) the remuneration and benefits received by directors, and individuals holding any prescribed office in the company;
 - (b) the amount of the pensions paid to or receivable by current or past directors or individuals who hold or have held any prescribed office in the company;

-
- (c) the amount of any compensation paid in respect of loss of office to current or past directors or individuals who hold or have held any prescribed office in the company; and
 - (d) details of service contracts of current directors and individuals who hold any prescribed office in the company.
- (2) The information to be disclosed under subsection (1) must satisfy the prescribed standards, and must show the amount of any remuneration or benefits paid to or receivable by persons in respect of-
- (a) services rendered as directors or office holders of the company;
 - (b) services rendered while being directors or office holders of the company-
 - (i) as directors or office holders of any of its subsidiaries; and
 - (ii) otherwise in connection with the carrying on of the affairs of the company or any of its subsidiaries.
- (3) Prescribed standards contemplated in this section may be different for public interest and non-public interest companies, respectively.

99. Right to copies of financial statements and reports

- (1) Any shareholder, or holder of debentures, of a company is entitled on demand to receive without charge one copy of the last annual financial statements, or group annual financial statements, provisional annual financial statements or interim report of the company.
- (2) If a judgment creditor of a company has been informed, by a person whose duty it is to execute the judgment, that there appears to be insufficient disposable property to satisfy that judgment, the judgement creditor is entitled within 5 business days after making a demand, to receive without charge one copy of -
 - (a) the last annual financial statement of the company; or

- (b) if the company is not required to produce an annual financial statement, the company's most recent periodic statement, which may not be dated more than 60 business days before the date on which it is provided to the creditor.

Part D – Financial Accountability

100. Audit committees

- (1) In every financial year in which a company is a public interest company, its board must appoint an audit committee for the following financial year, unless
 - (a) the company is a subsidiary of another company, and the audit committee of its holding company will perform the functions required under this section on behalf of that subsidiary company;
 - (b) the company ceases to be a public interest company; or
 - (c) the company falls within a category of companies that has been exempted from the application of this section in terms of subsection (7).
- (2) An audit committee must have at least two members, each of whom must -
 - (a) be a director of the company; and
 - (b) not be -
 - (i) involved in the day to day management of the business;
 - (ii) a full-time salaried employee of the company or its group, or have been such an employee at any time during the previous three financial years; or
 - (iii) related to an individual contemplated in sub-paragraph (i) or (ii); and
 - (c) act independently in the performance of the committee's functions.
- (3) For purposes of subsection (2), a director acts independently if that director –
 - (a) expresses opinions, exercises judgment and make decisions impartially; and
 - (b) is not related to -

- (i) the company or to any shareholder or other director of the company; or
 - (ii) 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 director is compromised by that relationship.
- (4) An audit committee of a public interest company has the following duties with respect to the financial year for which it is appointed –
 - (a) to nominate, for appointment as auditor of the company under section 101, a registered auditor who, in the opinion of the audit committee, is independent of the company;
 - (b) to determine the fees to be paid to the auditor and the auditor's terms of engagement;
 - (c) to ensure that the appointment of the auditor complies with the provisions of this Act and any other legislation relating to the appointment of auditors;
 - (d) to determine, subject to the provisions of this Chapter, the nature and extent of any non-audit services that the auditor may provide to the company;
 - (e) to pre-approve any proposed contract with the auditor for the provision of non-audit services to the company;
 - (f) to insert into the financial statements to be issued in respect of that financial year a report -
 - (i) describing how the audit committee carried out its functions; and
 - (ii) stating whether or not the audit committee is satisfied that the auditor was independent of the company;
 - (g) to receive and deal appropriately with any complaints, whether from within or outside the company, relating either to the accounting practices and internal audit of the company, or to the content or auditing of its financial statements, or to any related matter; and

- (h) to perform other functions determined by the board.
- (5) Neither the appointment, nor the duties, of an audit committee reduce the functions and duties of the board or the directors, except with respect to the appointment, fees and terms of engagement of the auditor.
- (6) A public interest company must pay all expenses reasonably incurred by its audit committee including, if the audit committee considers it appropriate, the fees of any consultant or specialist engaged by the audit committee to assist it in the performance of its duties.
- (7) The Minister, by notice in the Gazette, may specify categories of companies that are exempt from the requirements of this section, only on the grounds that little or no benefit would result from the appointment of an audit committee in those companies.

101. Appointment and rotation of auditor

- (1) Each year at its annual meeting, a public interest company must appoint an auditor.
- (2) A person or firm appointed as auditor must –
 - (a) be a registered auditor;
 - (b) in the case of a public interest company, be acceptable to its audit committee as being independent of the company; and
 - (c) must not be –
 - (i) a director, officer or employee of the company, or a person who was a director or officer of the company at any time during the relevant financial year ;
 - (ii) a director, officer or employee of a person performing secretarial work for the company;

- (iii) a person who, alone or with a partner or employees, habitually or regularly performs the duties of secretary or bookkeeper of the company; or
 - (iv) related to a person contemplated in this paragraph.
- (3) The appointment of a firm as auditor of a public interest company is valid only if -
 - (a) the appointment specifies, in addition to the name of the firm, the name of the individual member of the firm, who will undertake the audit; and
 - (b) that individual meets the requirements of subsection (2).
- (4) If a company that is required to appoint an auditor does not do so when it registers the incorporation of the company, the directors of the company must appoint the first auditor of the company within 15 business days after the date of incorporation of the company.
- (5) If the directors of a company fail to appoint an auditor of the company as provided in subsection (4), the Commissioner may apply to the Court for an order appointing the company's first auditor.
- (6) The auditor of a company appointed under subsection (4) or (5) holds office until the conclusion of the first annual general meeting of the company.
- (7) A retiring auditor may be automatically reappointed at an annual general meeting without any resolution being passed, unless -
 - (a) the retiring auditor is --
 - (i) no longer qualified for appointment; or
 - (ii) no longer willing to accept the appointment, and has so notified the company;
 - (iii) required to cease serving as auditor, in terms of subsection (10); or

-
- (b) an audit committee appointed by the company in terms of this Act objects to the reappointment; or
 - (c) the company has notice of an intended resolution to appoint some other person or persons in place of the retiring auditor.
 - (8) If an annual general meeting of a company does not appoint or re-appoint an auditor -
 - (a) the directors must fill the vacancy in the office within 20 business days after the date of the meeting; and
 - (b) if the directors fail to appoint an auditor in terms of paragraph (a), the Commissioner may apply to the Court for an order appointing an auditor for the company.
 - (9) The company must promptly file a notice of the appointment or reappointment of its auditor.
 - (10) The same individual may not serve as the auditor or designated auditor of a public interest company for more than five consecutive financial years.
 - (11) If an individual has served as the auditor or designated auditor of a public interest company for two or more consecutive financial years and then ceases to be the auditor or designated auditor, the individual may not be appointed again as the auditor or designated auditor of that company until after the expiry of at least two further financial years.
 - (12) If a company has appointed two or more persons as joint auditors, the company must manage the rotation required by this section in such a manner that all of the joint auditors do not relinquish office in the same year.
 - (13) In considering whether, for the purposes of this section, a registered auditor is independent of a company, the audit committee must -

- (a) ascertain that the auditor does not, except as auditor or in rendering services permitted under section 100 (4)(e), receive any direct or indirect remuneration or other benefit;
- (b) consider the extent of any consultancy, advisory or other work undertaken by the auditor;
- (c) consider whether the auditor's independence may have been prejudiced as a result of any previous appointment as auditor; and
- (d) consider compliance with other criteria specified for independence by any professional or industry code

in relation to the company and any subsidiary or holding company or, if the company is a member of a group, any other member of the group.

- (14) Nothing in this section precludes the appointment by a public interest company at its annual general meeting of an auditor other than one nominated by the audit committee, and if such an auditor is to be appointed -
 - (a) section 100 (4)(a) does not apply; and
 - (b) the appointment is not valid unless the audit committee is satisfied that the proposed auditor is independent of the company.

102. Rights, duties and functions of auditors

- (1) The auditor of a company -
 - (a) has the right of access at all times to the accounting records and all books and documents of the company, and is entitled to require from the directors or officers of the company any information and explanations necessary for the performance of the auditor's duties;
 - (b) in the case of the auditor of a holding company, has the right of access to all current and former financial statements of any subsidiary of that holding company and is entitled to require from the directors or officers of the holding

company or subsidiary any information and explanations in connection with any such statements and in connection with the accounting records, books and documents of the subsidiary as necessary for the performance of the auditor's duties; and

- (c) is entitled to –
 - (i) attend any general meeting of the company;
 - (ii) to receive all notices of and other communications relating to any general meeting which any member of the company is entitled to receive; and
 - (iii) to be heard at any general meeting on any part of the business of the meeting which concerns the auditors duties or functions.

- (2) The auditor of a company must carry out the duties set out in this section, and any other prescribed duties and satisfy the prescribed requirements of the office of auditor, and in particular must -
 - (a) be satisfied that –
 - (i) proper accounting records as required by this Act have been kept by the company and that proper returns adequate for audit purposes have been received from branches not visited by the auditor;
 - (ii) the minute books and attendance registers in respect of meetings of the company and of directors and managers have been kept in proper form as required by this Act;
 - (iii) a register of interests required by this Act has been kept and that the entries therein are in accord with the minutes of directors' meetings;
 - (iv) the company's annual financial statements are in agreement with its accounting records and returns;

- (v) that statements made by the directors in their reports do not conflict with a fair interpretation or distort the meaning of the annual financial statements and accompanying notes;
 - (b) examine and be satisfied as to the existence of any securities of the company;
 - (c) examine the annual financial statements and group annual financial statements to be laid before its annual general meeting;
 - (d) examine any of the accounting records of the company, and carry out any tests in respect of those records and any other auditing procedures the auditor considers necessary in order to be satisfied that the annual financial statements or group annual financial statements fairly present the financial position of the company, or of the company and its subsidiaries, and the results of its operations and those of its subsidiaries, in conformity with generally accepted accounting practice applied on a basis consistent with that of the preceding year;
 - (e) obtain all the information and explanations which to the best of the auditor's knowledge and belief are necessary for the purposes of carrying out the auditor's duties;
 - (f) examine group annual financial statements, if applicable, and be satisfied that they comply with the requirements of this Act;
 - (g) report to the Commissioner in the prescribed manner if the auditor has reason to believe that the company is not carrying on business or is not in operation and has no intention of resuming operations in the foreseeable future;
 - (h) to comply with any applicable requirements of the Auditing Professions Act, 2005 (Act No. 26 of 2005).
- (3) After conducting an audit, the auditor must report to the shareholders of the company, stating –
- (a) that the auditor has examined the annual financial statements and group annual financial statements; and

-
- (b) whether those statements fairly present the financial position of the company and its subsidiaries and the results of its operations and that of its subsidiaries in the manner required by this Act.
 - (4) If an auditor is unable to report without qualification that the financial statements meet the test referred to in subsection (3)(b), the auditor's report must include a statement to that effect, and set out the relevant facts or circumstances.
 - (5) The auditor's report under subsection (3) must be read out at the annual general meeting, unless all the members present agree to the contrary.
 - (6) An auditor appointed to a public interest company may not perform for that company any -
 - (a) book-keeping or accounting (as distinct from auditing) services, and to the extent that these would be subject to its own auditing, internal audit or tax advisory services; or
 - (b) any other services, as may be determined by the company's audit committee.
 - (7) Subsection (6) does not affect the power of an audit committee to limit further the services that an auditor of that company may perform.
 - (8) Not more than one month before a meeting at which the board of directors of a public interest company will vote to approve the financial statements of the company for any financial year, the designated auditor must attend a meeting of the board to consider matters that appear to the auditor or the audit committee to be of importance and relevant to the proposed financial statements and to the affairs of the company generally.
 - (9) At every annual general meeting of a public interest company at which the financial statements of the company for a financial year are to be considered, the auditor must attend and respond to the best of the auditor's ability to any question that is relevant to the audit of those financial statements.
 - (10) Subsection (9) applies equally in the case of a company that is not a public interest company, if the company has notice of a resolution requiring the presence of the

auditor at an annual general meeting of the company at which financial statements of the company for any financial year are to be considered.

- (11) If the auditor is unable to attend a meeting as required by subsection (9) or subsection (10), the auditor must ensure that -
- (a) another auditor with knowledge of the audit attends and carries out the duties of the designated auditor at the meeting; and
 - (b) if the designated auditor is a member of a firm, the individual attending the meeting in place of the designated auditor is a member of that firm.

103. Resignation of auditors and filling of casual vacancies

- (1) An auditor may resign at any time by delivering a written notice in the prescribed form to the company and to the Commission, stating that the auditor has no reason to believe that, in the conduct of the affairs of the company, a reportable irregularity within the meaning of section 22 of the Auditing Professions Act, 2005 (Act No. 26 of 2005) has taken place or is taking place that has caused or is likely to cause financial loss to the company or to any of its shareholders or creditors, other than an irregularity, if any, that has been reported to the Commission.
- (2) An auditor is not required to carry out a special audit before giving notice in terms of subsection (1).
- (3) The resignation of an auditor is effective when the notice is filed.
- (4) Subject to subsection (5), if a casual vacancy arises in the office of auditor of a company -
- (a) during the tenure of its audit committee, the directors must propose to the audit committee a registered auditor to be appointed as the new auditor, within 15 business days after the vacancy occurs; and
 - (b) otherwise, the directors -

-
- (i) must appoint a new auditor within 20 business days, if there is only one incumbent auditor of the company; and
 - (ii) may appoint a new auditor at any time, if there is more than one incumbent, but while any such vacancy continues, the surviving or continuing auditor may act as auditor of the company.
 - (5) Section 101(8)(b) applies to a failure by the directors to fill a vacancy contemplated in subsection (4)(b)(i).
 - (6) If, within 10 business days after making of a proposal to an audit committee under subsection (4), the audit committee does not give notice in writing to the directors rejecting the proposed auditor, the directors must either -
 - (a) appoint the auditor; or
 - (b) propose a different person to the committee.
 - (7) If a company appoints a firm as its auditor, any change in the composition of the members of that firm does not by itself create a casual vacancy in the office of auditor for that year, subject to subsection (8).
 - (8) If, by comparison with the membership of that firm at the time of its latest appointment, less than one half of the members remain after a change contemplated in subsection (7), that change constitutes the resignation of the firm as auditor of the company, giving rise to a casual vacancy.

Part E – Secretary for Widely Held Companies

104. Mandatory appointment of secretary

- (1) A widely held company must appoint a person who is permanently resident in the Republic and who, in the opinion of the directors, has the requisite knowledge and experience, to be the company secretary.
- (2) The provisions of section 89, other than section 89(5)(a), each read with the changes required by the context, apply to the appointment of a secretary.
- (3) The first secretary of a widely held company may be appointed either by –
 - (a) an ordinary resolution of the shareholders; or
 - (b) the directors of the company.
- (4) A casual vacancy in the office of secretary may be filled by the directors of the company within 90 days after vacancy arises.
- (5) If the directors of a widely held company fail to appoint a secretary as required by this section, the Commissioner may apply to the Court for an order appointing a secretary for the company.

105. Body corporate or partnership may be appointed secretary

- (1) A juristic person or partnership may be appointed to hold the office of secretary of a widely held company provided that at least one person in the employment of that juristic person or partnership complies with the requirements referred to in section 104.
- (2) A change in the membership of a juristic person that holds office as secretary does not constitute a casual vacancy in the office of secretary, if the juristic continues to have at least one person in its employment who complies with the requirements referred to in section 104.

-
- (3) A change in the composition of a partnership that holds office as secretary does not constitute a casual vacancy in the office of secretary if the new partnership continues to have as a partner or employee at least one person who complies with the requirements referred to in section 104.
 - (4) If at any time a juristic person or partnership that holds office as secretary no longer has a member, partner or employee who complies with the requirements referred to in section 104 –
 - (a) the juristic person or partnership must immediately so notify the directors of the company; and
 - (b) is deemed to have resigned as secretary.

106. Duties of secretary

- (1) A secretary's duties include, but are not restricted to-
 - (a) providing the directors of the company collectively and individually with guidance as to their duties, responsibilities and powers;
 - (b) making the directors aware of all law and legislation relevant to or affecting the company and reporting at any meetings of the shareholders of the company or of the company's directors, any failure to comply with such law or legislation;
 - (c) ensuring that minutes of all shareholders' meetings, directors' meetings and the meetings of any committees of the directors are properly recorded in accordance with this Act;
 - (d) certifying in the annual financial statements of the company that the company has filed required returns in terms of this Act, and that all such returns are true, correct and up to date;
 - (e) ensuring that a copy of the company's annual financial statements is sent, in accordance with this act, to every person who is entitled to it.

107. Name of secretary to be publicized

The first names or the initials, and the surname of the secretary of a widely held company must be stated on every trade catalogue, trade circular and business letter bearing the company's name.

108. Notice to be given of resignation or removal of secretary

- (1) The company must notify the Commission within 21 days after a vacancy arises in the office of secretary.
- (2) If the secretary is removed from office, the secretary may require the company to include a statement in its annual financial statements relating to that financial year, not exceeding a reasonable length, setting out the secretary's contention as to the circumstances that resulted in the removal.
- (3) If the secretary wishes to exercise the power referred to in subsection (2), the secretary must give written notice to that effect to the company by not later than the end of the financial year in which the removal took place and that notice must include the statement referred to in subsection (2).
- (4) The statement of the secretary referred to in subsection (2) must be included in the directors' report in the company's annual financial statements and if no directors' report is required in respect of the company's annual financial statements, it must be included under a separate heading in the company's annual financial statements.

Chapter 5 –Takeovers, Offers and Fundamental Transactions

Part A – Authority of the Takeovers Regulation Panel and Takeovers Regulations

109. Application and definitions

- (1) This chapter does not apply to -
 - (a) an affected transaction, or an agreement of any kind, irrespective whether that agreement contemplates or could result in an affected transaction, if the affected transaction or agreement is contemplated within, or is incidental to the implementation of, a business rescue plan approved in terms of Chapter 6; or
 - (b) an offer contemplated in section 156 (1)(b)(ii), or in a business rescue plan approved in terms of Chapter 6, or made incidental to the implementation of such a business rescue plan.
- (2) In this Chapter and in the Takeover Regulations –
 - (a) **“affected transaction”** means –
 - (i) the acquisition of a beneficial interest in any shares of a widely held company if the acquisition would result in a person alone, or together with other related or inter-related persons or with persons acting in concert with the first person, being able to exercise 35% or more of the voting rights of that widely held company;
 - (ii) a mandatory offer contemplated in section 114, or a compulsory acquisition contemplated in section 115;
 - (iii) a transaction or series of transactions amounting to the disposal of substantially all of the assets or undertaking of a widely held company, as contemplated in section 116;
 - (iv) a merger or amalgamation involving at least one widely held company, as contemplated in section 117; or

- (v) a scheme of arrangement between a widely held company and its shareholders, as contemplated in section 118;
- (b) **“holder”** means a person who holds the beneficial interest in a security of a widely held company;
- (c) **“offer”**, when used as a noun, means a proposal of any sort which, if accepted, would result in an affected transaction, but does not include such a proposal if it is exclusively between or among two or more persons who are related or inter-related; and
- (d) **“offer period”** means the period from the time when an announcement is made of a proposed or possible offer until the first closing date or, if later, the date when the offer becomes or is declared unconditional as to acceptances or lapses.

110. Panel regulation of affected transactions

- (1) The Takeover Regulation Panel may -
 - (a) regulate and approve any affected transaction or offer, in accordance with this Chapter and the Takeover Regulations;
 - (b) require the filing, for approval or otherwise, of any document with respect to an affected transaction or offer, if the document is required to be prepared in terms of this Chapter; and
 - (c) initiate or receive complaints, conduct investigations, and issue compliance notices, with respect to any affected transaction or offer, in accordance with Chapter 7, and the Takeover Regulations.
- (2) A person -
 - (a) making an offer must comply with any reporting or approval requirements set out in this Chapter or the Takeover Regulations, except to the extent that the Panel has granted the person an exemption from any such requirement; and

-
- (b) must not give effect to an affected transaction unless the Takeovers Regulation Panel has -
 - (i) approved the transaction; or
 - (ii) granted an exemption from approval of that transaction.
 - (3) The Takeover Regulation Panel may exempt a person from the application of any provision of -
 - (a) this Chapter, to the extent such an exemption is specifically provided for in the relevant provision; or
 - (b) the Takeover Regulations if -
 - (i) there is no reasonable potential for the affected transaction to prejudice the interests of any existing shareholder;
 - (ii) the cost of compliance is disproportionate relative to the value of the affected transaction; or
 - (iii) doing so is otherwise reasonable and justifiable in the circumstances having regard to the principles and purposes of this Part and the Takeover Regulations.

111. Takeover Regulations

The Minister, in consultation with the Takeover Regulation Panel, may prescribe regulations, to be known as the Takeover Regulations, which may provide for -

- (a) compliance with and enforcement of –
 - (i) the provisions of this Chapter respecting affected transactions and offers; and
 - (ii) the Takeover Regulations;

- (b) the administration, operation and procedures of the Takeover Regulation Panel;
- (c) any other matters relating to the powers and functions of the Takeover Regulation Panel.

Part B – Regulation and Implementation of Certain Transactions

112. Restricted application of this Part

- (1) Provisions of this Part not specifically mentioned in subsection (2) to (4) apply to all companies.
- (2) Sections 113 to 115 apply only with respect to the shares of widely held companies.
- (3) Sections 116, 117 (2) to (5), 118 (2) and (3) and 119 –
 - (a) apply with respect to all widely held companies;
 - (b) do not apply with respect to a closely held company if all of its shares are held by persons who are related or inter-related; and
 - (c) apply with respect to a closely held company not contemplated in paragraph (b) only if the Memorandum of Incorporation of the company expressly provides that this Part will apply to the company.
- (4) Sections 116, 117 (2) to (5), and 119 apply with respect to a not for profit company if it is a public interest company.

113. Required disclosure concerning certain share transactions

- (1) A person, two or more related or inter-related persons, or a combination of persons acting in concert, must notify a widely held company, in the prescribed manner, within three business days after -
 - (a) they directly or indirectly, individually or collectively, acquire a beneficial interest in sufficient shares of a class of shares issued by that company such that, as a result of the acquisition, they individually or collectively hold a beneficial interest in any particular multiple of 5% of the issued shares of that class; or

- (b) they directly or indirectly, individually or collectively, dispose of a beneficial interest in sufficient shares of a class of shares issued by a widely held company such that, as a result of the disposition, they no longer individually or collectively hold a beneficial interest in a particular multiple of 5% of the issued shares of that class, as previously notified.
- (2) A person who has made a statement to a company in terms of subsection (1) must issue an amended statement to the company within three business days of any material change affecting the original statement.
- (3) A widely held company that has received a notice or statement in terms of this section must –
 - (a) file a copy with the Takeover Regulation Panel; and
 - (b) report the information to the holders of the relevant class of shares if the board considers the purchase or disposition to be material.
- (4) For the purposes of this section –
 - (a) when determining the number of issued shares of a class, a person is entitled to rely on the mostly recently published statement by the company, unless that person knows or has reason to believe that the statement is inaccurate; and
 - (b) when determining the number of shares held by -
 - (i) a person or persons contemplated in subsection (1) -
 - (aa) all of the shares of which a person has a beneficial interest must be aggregated, irrespective of the nature of the person's beneficial interest of any of those shares; and
 - (bb) any shares that may be issued to the person if they exercised any options, conversion privileges or similar rights, are to be included; and

- (ii) any other person, any shares that may be issued to that other person if they exercised any options, conversion privileges or similar rights, are to be excluded.

114. Mandatory offers

- (1) This section applies if -
 - (a) a person acting alone has, or two or more related or inter-related persons, or two or more persons acting in concert, have, acquired or agreed to acquire a beneficial interest in shares of a widely held company; and
 - (b) as a result of that actual or agreed acquisition, together with any other shares of the company already held by that person, or those persons, they will be able to exercise 35% or more of the voting rights of that widely held company.
- (2) Within one month after the date of an acquisition or agreement contemplated in subsection (1), the person or persons who acquired or agreed to acquire the beneficial interest in shares must give notice in the prescribed manner to the holders of the remaining shares of the widely held company, including in that notice –
 - (a) a statement that they are, or, as a result of the acquisition, will be, in a position to exercise 35% or more of the voting rights of that widely held company; and
 - (b) offering to acquire any remaining shares of the widely held company on the same terms that applied to the agreement or acquisition contemplated in subsection (1).
- (3) Within three months after receiving a notice in terms of subsection (2), any holder of shares in the widely held company may require the person or person who gave the notice to acquire those shares on -
 - (a) the terms referred to in subsection (2)(b); or
 - (b) other terms as -
 - (i) agreed between the offeror and the share holder; or

- (ii) ordered by a court on the application of either the offeror or the share holder.

115. Compulsory acquisitions and squeeze out

- (1) If within four months after the date of an offer for the acquisition of any class of shares of a widely held company that offer has been accepted by the holders of at least 90% of that class of shares, other than any such shares held before the offer by the offeror, a related or inter-related person, or a nominee or subsidiary of the offeror or related or inter-related person, the offeror must, within one month, notify the holders of the remaining shares of the class that the offer has been accepted to that extent.
- (2) Within three months after receiving a notice in terms of subsection (1), a person may demand that the offeror acquire all of the person's shares of the class concerned.
- (3) At the time of giving notice in terms of subsection (1), or within a month after giving that notice, the offeror may notify the holders of the remaining shares of the class that the offeror desires to acquire all remaining shares of that class.
- (4) Within six weeks after receiving a notice in terms of subsection (3), a person may apply to the court for an order -
 - (a) that the offeror is not entitled to acquire the applicant's shares of that class; or
 - (b) imposing conditions of acquisition different from those of the original offer.
- (5) After receiving a demand in terms of subsection (2), or giving notice in terms of subsection (3), the offeror is entitled, and required, to acquire the shares concerned on the same terms that applied to shares whose holders accepted the original offer, subject only to an order of the court in terms of subsection (4).
- (6) If an offer to acquire the shares of particular class has not been accepted to the extent contemplated in subsection (1), the offeror may apply to the Court for an order authorizing the offeror to give a notice contemplated in subsection (3).

-
- (7) On an application in terms of subsection (6), the Court may make the order applied for, if –
- (a) after making reasonable enquiries, the offeror has been unable to trace one or more of the persons holding shares to which the offer relates;
 - (b) by virtue of acceptances of the original offer, the shares that are the subject of the application, together with the shares held by the person or persons referred to in paragraph (a), amount to not less than the minimum specified in subsection (1);
 - (c) the consideration offered is fair and reasonable; and
 - (d) the Court is satisfied that it is just and equitable to make the order, having regard, in particular, to the number of holders of shares who have been traced but who have not accepted the offer.
- (8) If an offeror has given notice in terms of subsection (2), and no order has been made in terms of subsection (4) -
- (a) six weeks after the date on which the notice was given, or, if an application to the Court is then pending, after the application has been disposed of, the offeror must -
 - (i) transmit a copy of the notice to the company whose shares are the subject of the offer, together with an executed instrument of transfer, and
 - (ii) pay or transfer to that company the consideration representing the price payable by the offeror for the shares concerned, and,
 - (b) subject to the payment of prescribed fees or duties, the company must thereupon register the offeror as the holder of those shares.
- (9) An instrument of transfer contemplated in subsection (7) is not required for any share for which a share warrant is for the time being outstanding.

- (10) A company must deposit any consideration received under this section into a separate bank account with a banking institution registered under the Banks Act, 1990 (Act 94 of 1990) and those deposits must be held in trust by the company for the person entitled to the shares in respect of which the consideration was received.
- (11) In this section any reference to a “holder of shares who has not accepted the offer” includes any holder who has failed or refused to transfer their shares to the offeror in accordance with the offer.

116. Proposals to dispose of substantially all assets or undertaking

- (1) If a company anticipates entering into an agreement or series of agreements to dispose of substantially all of the assets or undertaking of that company, but has not done so, the board may submit a proposed resolution to be considered at a meeting of the shareholders in accordance with section 119, to authorize the making of such an agreement or series the agreements in advance.
- (2) If a company has entered into an agreement or series of agreements to dispose of substantially all of the assets or undertaking of that company, without prior shareholder approval as contemplated in subsection (1), the board must submit a proposed resolution to authorize the agreement or series of agreements to be considered at a meeting of the shareholders in accordance with section 119.
- (3) A notice of a meeting of shareholders contemplated in subsection (1) or (2) must -
- (a) be delivered within the prescribed time, and in the prescribed manner and form to each shareholder of the company; and
 - (b) include or be accompanied by -
 - (i) a written summary, that satisfies the prescribed standards, of the transaction or series of transactions; and
 - (ii) the provisions of sections 119 and 165.

- (4) A proposed resolution to authorize a contemplated agreement or series of agreements in advance, as contemplated in subsection (1) may provide that -
 - (a) the resolution is enabling but not binding upon the board; and
 - (b) at any time before entering into such an authorized agreement, the board may void the resolution, notwithstanding its approval by the shareholders.
- (5) Any part of the undertaking or assets of a company to be disposed of in terms of a proposed transaction must be assigned its fair market value as at the date of the proposal.

117. Proposals for merger or amalgamation

- (1) Subject to section 11 (4), two or more companies, including holding and subsidiary companies, may amalgamate or merge if, upon implementation of the amalgamation or merger, each amalgamated or merged company will satisfy the solvency and liquidity test.
- (2) Two or more companies proposing to amalgamate or merge must enter into an agreement setting out the terms and means of effecting the amalgamation or merger and, in particular, setting out –
 - (a) in the case of an amalgamation, the proposed Memorandum of Incorporation of any new company to be formed by the amalgamation;
 - (b) the name and identity number of each proposed director of any proposed amalgamated or merged company;
 - (c) the manner in which the shares of each amalgamating or merging company are to be converted into shares or other securities of any proposed amalgamated or merged company, or exchanged for other property;
 - (d) if any shares of are not to be converted into securities of any proposed amalgamated or merged company, the consideration that the holders of those

- shares are to receive in addition to or instead of securities of any proposed amalgamated or merged company;
- (e) the manner of payment of any consideration instead of the issue of fractional shares of an amalgamated or merged company or of any other body corporate the securities of which are to be received in the amalgamation or merger;
 - (f) whether any rules made by any of the amalgamating or merging companies are to apply to any proposed amalgamated or merged company, and if so, which ones; and
 - (g) details of any arrangements necessary to complete the amalgamation or merger, and to provide for the subsequent management and operation of the proposed amalgamated or merged company.
- (3) If shares of one of the amalgamating or merging companies are held by or on behalf of another of the amalgamating or merging companies, an agreement required by subsection (2) must provide for the cancellation of those shares when the amalgamation or merger becomes effective, without any repayment of capital in respect thereof, and no provision may be made in the agreement for the conversion of those shares into shares of an amalgamated or merged company.
- (4) The board of each amalgamating or merging company -
- (a) must consider whether, upon implementation of the agreement, each proposed amalgamated or merged company will satisfy the solvency and liquidity test; and
 - (b) if the board reasonably believes that each proposed amalgamated or merged company will satisfy the solvency and liquidity test, it may submit the agreement for consideration at a meeting of the shareholders of that company, in accordance with section 119.
- (5) A notice of a meeting of shareholders contemplated in subsection (4)(b) must be sent to each shareholder of each amalgamating or merging company, and must include or be accompanied by a copy or summary of –

- (a) the amalgamation or merger agreement; and
- (b) the provisions of sections 119 and 165.

118. Proposals for scheme of arrangement

- (1) Unless it is in liquidation or in the course of business rescue proceedings, a company may propose and, subject to approval in terms of this Chapter, implement any arrangement between the company and its shareholders, or any class of them, including but not limited to, a reorganization of the share capital of the company by way of, among other things -
 - (a) a consolidation of shares of different classes;
 - (b) a division of shares into different classes;
 - (c) an expropriation of shares from shareholders;
 - (d) a share exchange;
 - (e) a share re-purchase; or
 - (f) a combination of the methods contemplated in this subsection.
- (2) The proponent of an arrangement contemplated in subsection (1) must retain an independent expert, who meets the following requirements, to compile a report as required by subsection (3):
 - (a) The person to be retained must be -
 - (i) qualified, and have the experience necessary, to understand the type of arrangement proposed, evaluate its consequences, and assess the impact of the arrangement on the value of shares and its effect on the rights and interests of a shareholder or creditor of the company; and
 - (ii) able to express opinions, exercise judgment and make decisions impartially.

- (b) The person to be retained must not –
 - (i) have any other relationship with the company or with a proponent of the arrangement, 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;
 - (ii) be a full-time employee or a former full-time employee of the company within the past two years;
 - (iii) be the company's current auditor;
 - (iv) currently be, or have been within the past year, a legal, professional or other advisor of the company; or
 - (v) be related to a person contemplated in this paragraph.

- (3) The person retained in terms of subsection (2) must prepare, and distribute to all shareholders of the company, a report concerning the proposed arrangement, which must –
 - (a) state all information relevant to the value of the shares affected by the proposed arrangement;
 - (b) identify every type and class of shareholder affected by the proposed arrangement;
 - (c) describe the effects that the proposed arrangement will have on the rights and interests of the persons mentioned in paragraph (b), and evaluate any adverse effects against –
 - (i) the compensation that any of those persons will receive in terms of the arrangement; and
 - (ii) the likely effect of the arrangement on the business and prospects of the company;

- (d) state any material interest of any director of the company, or trustee for debenture holders, whether as shareholder or in any other capacity, and state the effect of the arrangement on those interests and persons; and
- (e) include a copy of sections 119 and 165.

119. Required approval for transactions contemplated in this Part

- (1) Despite section 82, and any provision of a company's Memorandum of Incorporation, or any resolution adopted by its board or shareholders, to the contrary, a company may not take any steps—
 - (a) to give effect to an agreement or series of agreements to dispose of substantially all of the assets or undertaking of the company;
 - (b) to implement a merger or an amalgamation; or
 - (c) to implement a scheme of arrangementunless it has been approved in terms of this section.
- (2) A proposed transaction contemplated in subsection (1) must be approved -
 - (a) by the shareholders of the company, only by a resolution –
 - (i) adopted at a meeting called for that purpose, at which the holders of at least 25% of the shares entitled to be voted were present; and
 - (ii) supported by the holders of at least a majority of the shares voted, as determined in accordance with subsection (4); and
 - (b) by the shareholders of the company's holding company, if any, if the transaction by the first company substantially constitutes a parallel transaction by the holding company;
 - (c) by the court, in the circumstances and manner contemplated in subsections (3) to (6); and

- (d) by the Takeover Regulation Panel, if it is an affected transaction.
- (3) Despite a resolution having been adopted as contemplated in subsections (2) (a) or (b), a company may not proceed to implement that resolution without the approval of a court if –
- (a) the holders of at least 15% of the shares that were voted on that resolution -
 - (i) voted against its adoption; and
 - (ii) unanimously require the company to seek court approval; or
 - (b) the court, on an application by any shareholder who voted against adoption of the resolution, grants that shareholder leave to apply to the court for a review of the transaction.
- (4) If a resolution requires approval by a court as contemplated in terms of subsection (3)(a), the company must either -
- (a) apply to the court for approval, and bear the costs of that application; or
 - (b) treat the resolution as a nullity.
- (5) On an application contemplated in subsection (3)(b), the court may grant leave only if it is satisfied that the applicant -
- (a) is acting in good faith;
 - (b) appears prepared to sustain the proceedings; and
 - (c) has alleged facts which, if true, would support an order in terms of subsection (6).
- (6) On reviewing a resolution in terms of subsection (4) or after granting leave in terms of subsection (5), the court may set aside the resolution only if -
- (a) the resolution is manifestly unfair to any class of shareholders; or

-
- (b) the vote was tainted by conflict of interest, inadequate disclosure, failure to comply with the Act, the Memorandum of Incorporation or any applicable rules of the company, or other significant and material procedural irregularity.
- (7) If a resolution adopted in terms of subsection (2) (a) or (b), as the case may be, was supported by the holders of -
- (a) less than 75% of the shares entitled to be voted, as determined in accordance with subsection (8), a shareholder who, having given the company notice of dissent, voted against the resolution is entitled to seek relief in terms of section 165; or
 - (b) at least 75% of the shares entitled to be voted, as determined in accordance with subsection (8), no shareholder is entitled to seek relief in terms of section 165, irrespective whether they gave the company notice of dissent or voted against the resolution.
- (8) For the purposes of calculating the percentage of shares voted in support of a resolution, any voting shares controlled by an acquiring party, or a person acting in concert with an acquiring party, must not be included in determining either -
- (a) the number of shares entitled to be voted; or
 - (b) the number of shares voted in support of the resolution.

120. Implementation of amalgamation or merger

- (1) After a resolution approving an amalgamation or merger has been adopted by each company that is party to the agreement, a Notice of Amalgamation or Merger may be filed with the Commissioner, together with -
- (a) in the case of an amalgamation, the Memorandum of Incorporation of any newly amalgamated company, if that company would be required to file its Memorandum of Incorporation in terms of section 15; and
 - (b) a statement that -

- (i) there are reasonable grounds for believing that no creditor of any of the amalgamating or merging companies will be prejudiced by the amalgamation or merger; and
 - (ii) adequate notice has been given to all known creditors of each amalgamating or merging company, and no creditor has objected to the amalgamation or merger otherwise than on grounds that are frivolous or vexatious; and
- (c) confirmation that the merger or amalgamation has been approved–
 - (i) by the Court or the Takeover Regulation Panel, or both, to the extent required in terms of this Chapter; and
 - (ii) in terms of the Competition Act, 1998 (Act No. 89 of 1998), if so required by that Act.
- (2) For the purposes of subsection (1), adequate notice to creditors will have been given if a notice in writing has been sent to each known creditor stating that the company intends to amalgamate or merge with one or more specified companies in accordance with this Act and that a creditor of the company may object to the amalgamation or merger within thirty days from the date of the notice.
- (3) After receiving a Notice of Amalgamation or Merger, the Commissioner must -
 - (a) in the case of an amalgamation, issue a certificate of incorporation for the newly amalgamated company; and
 - (b) de-register each of the amalgamating or merging companies, other than any surviving company, in the case of a merger.
- (4) A merger or amalgamation –
 - (a) takes effect in accordance with, and subject to any conditions set out in the merger or amalgamation agreement;
 - (b) does not affect any -

-
- (i) existing liability of a party to the agreement to prosecution;
 - (ii) civil, criminal or administrative action or proceeding pending by or against an amalgamating or merging company, and any such proceeding may be continued to be prosecuted by or against the newly amalgamated, or surviving merged, company; or
 - (iii) a conviction against, or ruling, order or judgment in favour of or against, an amalgamating or merged company, and any such ruling, order or judgement may be enforced by or against the newly amalgamated, or surviving merged, company.
- (5) When a merger or amalgamation agreement takes effect –
- (a) the property of each amalgamating or merging company becomes property of the newly amalgamated, or surviving merged, company; and
 - (b) each newly amalgamated, or surviving merged, company is liable for all of the obligations of every amalgamating or merged company
- subject to any provision of the agreement to the contrary.
- (6) If a transaction contemplated in this Part has been approved, any person to whom assets are, or an undertaking is, to be transferred, may apply to the Court for an order to effect -
- (a) the transfer of the whole or any part of the undertaking, assets and liabilities of a company contemplated in that transaction;
 - (b) the allotment and appropriation of any shares or similar interests to be allotted or appropriated as a consequence of the transaction;
 - (c) the transfer of shares from one person to another;
 - (d) the continuation by or against a company of any legal proceedings pending by or against another company;

- (e) incidental, consequential and supplemental matters that are necessary for the effectiveness and completion of the transaction; or
- (f) the dissolution, without winding up, of a company, as contemplated in the transaction.

Part C – Conduct of Bids and Offers

121. Application and Interpretation of this Part

- (1) This Part applies only in respect of a widely held company.
- (2) A person granted an option to acquire shares with a voting right in a widely held company is presumed to be acting in concert with the grantor of the option, unless the voting rights are in the grantor.
- (3) A presumption under subsection (2) may be rebutted by evidence to the contrary.

122. Secrecy of offers and announcements

- (1) A person contemplating making an offer must take all reasonable steps to ensure that secrecy is observed until a firm intention to make the offer has been announced.
- (2) All persons privy to confidential information, price-sensitive or otherwise, concerning an offer or contemplated offer must treat that information as secret.
- (3) No one may issue a news release relating to an announcement or offer, under embargo until a future time, unless the Panel has approved the release in advance.

123. Announcement and making of offer

- (1) A cautionary announcement that satisfies the prescribed requirements must be made if, while an offer is under discussion, —
 - (a) the offeree company becomes the subject of rumour and speculation; or
 - (b) there is an abnormal movement in the price of the offeree company's securities or in the volume of its shares traded on a stock exchange; or

- (c) negotiations or discussions are about to be extended to include more than a very restricted number of persons, apart from those in the companies concerned who need to know and their immediate advisers.
- (2) An offeror must not take any action that, in terms of subsection (3), would require making an announcement of a firm intention to make an offer unless the offeror and its financial adviser have proper grounds for believing that the offeror is and will continue to be able to implement the offer.
- (3) An offeror must announce a firm intention to make an offer -
 - (a) when the board of the offeree company has been notified in writing by a serious source of that firm intention, irrespective of the attitude of the offeree board to the offer; or
 - (b) upon an acquisition of shares that gives rise to an obligation to make an offer under section 114.
- (4) An announcement of a firm intention to make an offer –
 - (a) must not be delayed while full information is being obtained; and
 - (b) must satisfy the prescribed requirements for such an announcement.
- (5) If, after making an announcement of a firm intention to make an offer, additional relevant information becomes available, that information can be the subject of a supplementary announcement.
- (6) If an announcement has been made of a firm intention to make an offer, the offeror must proceed with the offer unless -
 - (a) the posting of the offer is subject to the prior fulfilment of a previously disclosed specific condition and that condition has not been fulfilled; or
 - (b) the Panel grants the offeror an exemption to this subsection.
- (7) When an offer is to be made, it must be put forward to the board of the offeree company, or to its authorised advisers.

-
- (8) If the offer, or an approach with a view to an offer being made, is made by a person other than the ultimate offeror or potential offeror, the identity of the ultimate offeror or potential offeror must be disclosed when the offer is put forward.
 - (9) If a company has more than one class of shares as its capital -
 - (a) separate offers must be made for each class for which an offer is to be made; and
 - (b) a comparable offer must be made for each class, irrespective whether it carries voting rights.
 - (10) Classes of non-equity securities need not be the subject of an offer, except in the circumstances referred to in section 114 (1).

124. Conditional offers

- (1) An offer must not be subject to conditions that depend solely on any subjective judgment by the directors of the offeror, or the fulfilment of which is in their hands, unless the Panel grants the offeror an exemption from this subsection.
- (2) An offer for non-voting shares must not be made conditional on any particular level of acceptances in respect of that class unless the offer for the voting shares is also conditional on the success of the offer for the non-voting shares.

125. Public disclosure of dealings during an offer period

- (1) An offeror or offeree company, or any concert party, that deals for on its own account or on account of a client, in relevant shares of the offeror or offeree company during an offer period must promptly disclose those dealings -
 - (a) in a press release;
 - (b) to the Panel, which may publicise the disclosure in whatever manner it considers appropriate; and

- (c) in the case of a listed company, to the relevant exchange in the manner required by that exchange for immediate public release.
- (2) If a person contemplated in subsection (1) deals in relevant shares for the account of clients, the names of those clients are not required be disclosed.

126. Prohibited dealings before and during an offer

- (1) During an offer, or when one is reasonably in contemplation, an offeror or a person acting in concert with that offeror, must not -
 - (a) make any arrangements with holders of the relevant shares;
 - (b) deal in, or enter into arrangements to deal in, shares of the offeree company; or
 - (c) enter into arrangements which involve acceptance of an offerif there are favourable conditions attached that are not being extended to all holders of the relevant shares, unless the Panel grants that person an exemption from this subsection.
- (2) During an offer, an offeror or a person acting in concert with that offeror must not –
 - (a) sell any shares in the offeree company, unless –
 - (i) the Panel has consented in advance to that sale; and
 - (ii) the person selling those shares has given at least 24 hours public notice that sales of that type might be made, in the manner and form required by section 125 (1), read with the changes required by the context; or
 - (b) purchase any shares after making an announcement contemplated in paragraph (a)(ii).
- (3) The Panel must not give its consent in terms of subsection (2)(a)(i) for a sale arising from a mandatory offer under Section 114.
- (4) Sales below the value of the offer will not be permitted.

127. Fair dealing in acquisitions

- (1) Subject to subsection (2), if an offeror or any person acting in concert with it has acquired relevant shares in the offeree company during the three month period immediately before the start of the offer period, the offer to the holders of relevant shares of the same class must be on terms similar to the most favourable of those acquisitions.
- (2) The Panel may –
 - (a) exempt a person from the application of subsection (1); or
 - (b) extend the period of three months contemplated in subsection (1).
- (3) If, after the commencement of the offer period and before the offer closes for acceptance, an offeror or any person acting in concert with it purchases relevant shares in the offeree company at above the then current offer price, that person must –
 - (a) increase its offer for the relevant shares to not less than the highest price paid for any such newly acquired shares; and
 - (b) promptly make an announcement, stating –
 - (i) the number of newly acquired shares, and the price paid for them; and
 - (ii) that a revised offer will be made in accordance with this subsection.

128. Restrictions on frustrating action

- (1) If the board of a company believes that a bona fide offer might be imminent, or has received such an offer, the board may not –
 - (a) take any action in relation to the affairs of the company that could effectively result in –
 - (i) a bona fide offer being frustrated; or

- (ii) the holders of relevant shares being denied an opportunity to decide on its merits;
- (b) issue any authorised but unissued shares;
- (c) issue or grant options in respect of any unissued shares;
- (d) create or issue, or permit the creation or issue of, any shares carrying rights of conversion into or subscription for other shares;
- (e) sell, dispose of or acquire, or agree to sell, dispose of or acquire, assets of a material amount;
- (f) enter into contracts otherwise than in the ordinary course of business; or
- (g) pay any dividend that is abnormal as to timing and amount;

without the approval of the holders of relevant shares, or in terms of a pre-existing obligation or contract entered into before the time contemplated in this subsection.

- (2) If a company believes that it is subject to a pre-existing obligation contemplated in subsection (1), it may apply to the Court for consent to proceed without shareholder approval.

129. Restrictions following offers

- (1) If an offer has been announced or posted, but has not become or been declared unconditional, and has subsequently been withdrawn or lapsed, for a period of 12 months after the date on which the offer was withdrawn or lapsed, the offeror, any person who acted in concert with the offeror in the course of the original offer, or any person who is subsequently acting in concert with any of them, must not -
 - (a) make an offer for the relevant shares of the offeree company; or
 - (b) acquire any shares of the offeree company, if as a result of that acquisition, either the offeror or that person would be required to make a mandatory offer in terms of section 114.

- (2) Subsection (1) applies equally to a partial offer that could result in a holding of not less than the specified percentage and not more than 50% of the voting rights of the offeree company whether or not the offer has become or been declared unconditional, but the period of 12 months runs from that date on which that offer became or was declared to be unconditional.

Chapter 6 - Business Rescue

Part A – Business Rescue Proceedings

130. Definitions applicable only to this Chapter

- (1) In this Chapter –
- (a) “**affected person**”, in relation to a company, means -
 - (i) a shareholder or creditor of the company;
 - (ii) any registered trade union representing employees of the company; and
 - (iii) if any of the employees of the company are not represented by a registered trade union, each of those employees or their respective representatives;
 - (b) “**business rescue**” means proceedings to facilitate the rehabilitation by its management of a company that is insolvent, or may imminently become insolvent, by providing for –
 - (i) the temporary supervision of the management of the affairs, business and property of the company;
 - (ii) a temporary moratorium on the rights of claimants against the company or in respect of property in its possession; and
 - (iii) the development and implementation, if approved, of a plan to rescue the company by re-structuring 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 it is not possible for the company to so continue in existence, results in a better return for the company’s creditors or

shareholders than would result from the immediate liquidation of the company;

- (c) “**creditor**” means a person to whom a company owes money under any arrangement immediately before the beginning of the company’s business rescue proceedings, and for greater certainty, does not include a person who provides post-commencement finance to the company, as contemplated in section 138, except to the extent that such a person was a creditor of the company before providing that post-commencement finance;
- (d) “**independent creditor**” means a creditor of the company, including an employee of the company who is a creditor in terms of section 147 (1), who is not related to the company, a director, or the supervisor;
- (e) “**rescuing the company**” means achieving the goals set out in the definition of ‘business rescue’ in paragraph (b);
- (f) “**supervision**” means the oversight imposed on the management of a company during its business rescue proceedings; and
- (g) “**voting interest**” means an interest as recognised, appraised and valued in terms of section 148 (4) to (7).

- (2) For the purpose of paragraph (d), an employee of a company is not related to that company solely as a result of being a member of a trade union that holds shares of the company.

131. Insolvency of a company

- (1) For the purposes of this Act, an insolvency event occurs with respect to a company if
 -
 - (a) an amount exceeding the minimum value prescribed in terms of subsection (3) is due and payable by the company to a creditor, by cession or otherwise, and that creditor –

- (i) has served on the company a demand requiring the company to pay the amount that is due and payable; and
 - (ii) the company has not paid the amount demanded, or otherwise satisfied the creditor, within 15 business days after the demand was served;
 - (b) any process issued on a judgment, decree or order of a court in favour of a creditor of the company has been returned by the sheriff or the messenger with an endorsement that there appears to be insufficient disposable property to satisfy the judgment, decree or order or that any disposable property found did not upon sale satisfy the judgment, decree or order; or
 - (c) a Court is satisfied that the company is unable to pay its debts.
- (2) In determining for the purpose of subsection (1)(c) whether a company is unable to pay its debts, the Court must take into account all current, contingent and prospective liabilities of the company.
- (3) From time to time, the Minister must prescribe a minimum value for the purpose of subsection (1)(a).

132. Company resolution to begin business rescue

- (1) Subject to subsection (2)(a), either the shareholders of a company by ordinary resolution, or the board of the company, may resolve that the company voluntarily begin business rescue proceedings and place the company under supervision, if, in either case, -
- (a) an insolvency event has occurred, or the shareholders or directors, as the case may be, believe that the company is insolvent, or may imminently become insolvent; and
 - (b) there appears to be a reasonable prospect of rescuing the company.
- (2) A resolution contemplated in subsection (1) -

-
- (a) may not be adopted if liquidation proceedings have been initiated by or against the company; and
 - (b) has no force or effect until it has been filed with the Commission.
- (3) A company that has adopted a resolution contemplated in subsection (1) must –
- (a) publish a notice of the resolution, and its effective date, in the prescribed manner to every affected person within 5 business days after the resolution has been filed with the Commission;
 - (b) appoint a supervisor who satisfies the requirements of section 141, and has consented in writing to accept the appointment, within 5 business days after the resolution has been filed with the Commission, or such longer time as the Commissioner, on application by the company, may allow;
 - (c) file a notice of the appointment of a supervisor with the Commission within 2 business days after making the appointment; and
 - (d) publish a copy of the notice of appointment to each affected person within 5 business days after the notice was filed with the Commission.
- (4) If a company fails to comply with subsection (3)(b) or (c) –
- (a) its resolution to begin business rescue proceedings and place the company under supervision lapses and is a nullity; and
 - (b) the company may not adopt a further such resolution for a period of three months after the date on which the lapsed resolution was adopted, unless the Court, on good cause shown, gives prior consent for such a further resolution.
- (5) A company that has adopted a resolution contemplated in this section may not adopt a resolution to begin liquidation proceedings, until the business rescue proceedings have ended as determined in accordance with section 135(2).

133. Objections to company resolution

- (1) Subject to subsection (2), at any time after the adoption of a resolution in terms of section 132, until the adoption of a business rescue plan in terms of section 155, an affected person may apply to a court for an order setting aside -
 - (a) the resolution, on the grounds that there is no reasonable prospect for rescuing the company; or
 - (b) the appointment of the supervisor, on the grounds that the supervisor –
 - (i) does not satisfy the requirements of section 141;
 - (ii) is not independent of the company or its management; or
 - (iii) lacks the necessary skills, having regard to the company's circumstances.
- (2) An affected person who, as a shareholder or director of a company, voted in favour of a resolution contemplated in section 132 may not apply to the court in terms of subsection (1)(a) to set aside that resolution.
- (3) An applicant in terms of subsection (1) must –
 - (a) serve a copy of the application on the company and the Commission; and
 - (b) notify each affected person of the application in the prescribed manner.
- (4) Each affected person has a right to participate in the hearing of an application in terms of this section.
- (5) When considering an application in terms of subsection (1)(a) to set aside the company's resolution, –
 - (a) if there is overwhelming evidence supporting the applicant's position that there is no reasonable prospect of rescuing the company, the court must set aside the resolution; or
 - (b) in any other case, the court -

- (i) must afford the supervisor sufficient time to form an opinion whether or not there is a reasonable prospect of rescuing the company; and
- (ii) after receiving a report from the supervisor, may set aside the company's resolution only if there is overwhelming evidence that there is no reasonable prospect of rescuing the company,

and if it makes an order setting aside the resolution, may make any further necessary and appropriate order, including an order placing the company under liquidation.

- (6) If, after considering an application in terms of subsection (1)(b), the court makes an order setting aside the appointment of a supervisor -
 - (a) the court must appoint an alternate supervisor who satisfies the requirements of section 141, recommended by, or acceptable to, the holders of a majority of the independent creditors' voting interests; and
 - (b) the provisions of subsection (5)(b)(i), if relevant, apply to the supervisor appointed in terms of paragraph (a).

134. Court order to begin business rescue proceedings

- (1) If an insolvency event has occurred with respect to a company, but the company has not adopted a resolution contemplated in section 132, an affected person may apply to the court for an order placing the company under supervision.
- (2) If liquidation proceedings have already been commenced by or against the company at the time an application is made in terms of subsection (1), the application will suspend those liquidation proceedings until –
 - (a) the court has adjudicated upon the application; or
 - (b) the business rescue proceedings end, if the court makes the order applied for.
- (3) An applicant in terms of subsection (1) must –
 - (a) serve a copy of the application on the company and the Commission; and

- (b) notify each affected person of the application in the prescribed manner.
- (4) Each affected person has a right to participate in the hearing of an application in terms of this section.
- (5) After considering an application in terms of subsection (1) –
 - (a) if there is overwhelming evidence that there is no reasonable prospect of rescuing the company, the court must dismiss the application, and may make any further necessary and appropriate order, including an order placing the company under liquidation; or
 - (b) in any other case, a court may make an order –
 - (i) placing the company under supervision; and
 - (ii) requiring the company to appoint a supervisor, ~~if~~ unless the company ~~has~~ does not have effective management.
- (6) If, at the time the court makes an order in terms of subsection (5)(b), the company does not have effective management, the court may make a further order appointing a supervisor who satisfies the requirements of section 141, recommended by, or acceptable to, the holders of a majority of the independent creditors' voting interests.
- (7) In addition to the powers of a court on an application contemplated in this section, a court may make an order contemplated in subsection (5), or (6) if applicable, at any time during the course of any liquidation proceedings or proceedings to enforce security against the company.
- (8) A company that has been placed under supervision in terms of this section -
 - (a) may not adopt a resolution placing itself in liquidation until the business rescue proceedings have ended;
 - (b) must notify each affected person of the order within 5 business days after the date of the order;

- (c) if required by the court order to appoint a supervisor, must appoint a person who satisfies the requirements of section 141 and has consented in writing to accept the appointment, within 5 business days, or such longer time as the court may allow, after the date of the order;
 - (d) must file with the Commission a notice of the appointment of a supervisor, whether by the company or by the court, within two business days after the appointment has been made; and
 - (e) must publish a copy of the notice of appointment to each affected person, within 5 business days after the notice was filed with the Commission.
- (9) If a company -
- (a) complies with subsection (8)(c), the provisions of section 133 (1)(b) apply with respect to that appointment; or
 - (b) fails to comply with subsection (8)(c), the court must appoint a supervisor recommended by, or acceptable to, the holders of a majority of the independent creditors' voting interests.

135. Duration of business rescue proceedings

- (1) Business rescue proceedings begin when -
- (a) the company files with the Commission a resolution to place itself under supervision in terms of section 132;
 - (b) a person applies to the court for an order placing the company under supervision in terms of section 134 (1); or
 - (c) during the course of liquidation proceedings, or proceedings to enforce a security interest, as contemplated in section 134 (6), a court makes an order placing the company under supervision.
- (2) Business rescue proceedings end when -

- (a) the court sets aside the resolution or order that began those proceedings;
 - (b) a business rescue plan has been proposed and rejected in terms of Part D, and no affected person has acted to extend the proceedings in any manner contemplated in section 156;
 - (c) a business rescue plan has been adopted in terms of Part D, and the supervisor has subsequently filed with the Commission a Notice of Substantial Implementation of that plan;
 - (d) the supervisor has filed with the Commission a Notice of the Termination of Business Rescue Proceedings; or
 - (e) the proceedings have been converted by court order to liquidation proceedings.
- (3) If a company's business rescue proceedings have not ended within three months after the start of those proceedings, the supervisor must –
- (a) prepare a report on the progress of the business rescue proceedings, and update it at the end of each subsequent month until the end of those proceedings; and
 - (b) deliver the report and each update in the prescribed manner to –
 - (i) each affected person; and
 - (ii) the court, if the proceedings arose as a result of a court order.

136. General moratorium on legal proceedings against company

- (1) During business rescue proceedings, no legal proceeding, including enforcement action, against the company, or in relation to any property belonging to the company, or lawfully in its possession, may be commenced or proceeded with in any forum, except –
- (a) with the written consent of the supervisor;

- (b) with the leave of the court and in accordance with any terms the court considers suitable;
 - (c) as a set-off against any claim made by the company in any legal proceedings, irrespective whether those proceedings commenced before or after the business rescue proceedings began;
 - (d) criminal proceedings against the company or any of its directors or officers; or
 - (e) proceedings concerning any property or right over which the company exercises the powers of a trustee.
- (2) During business rescue proceedings, a guarantee or surety of a company may not be enforced against any person, except with leave of the court and in accordance with any terms the court considers suitable.
- (3) If any right to commence proceedings or otherwise assert a claim against a company, or against a person contemplated in subsection (2), is subject to a time limit, the measurement of that time must be suspended during the company's business rescue proceedings.

137. Protection of property interests

- (1) During business rescue proceedings -
- (a) the company may dispose, or agree to dispose, of property only -
 - (i) in the ordinary course of its business;
 - (ii) in a bona fide transaction at arm's length for fair value approved in advance and in writing by the supervisor; or
 - (iii) in a transaction contemplated within, and undertaken as part of the implementation of, a business rescue plan that has been approved in terms of section 155; and

- (b) despite any provision of an agreement to the contrary, no person may exercise any right in respect of any property owned by, or in the lawful possession of, the company, except to the extent that -
 - (i) the supervisor approves in writing; or
 - (ii) the exercise of those rights is in accordance with -
 - (aa) an agreement made in the ordinary course of the company's business;
 - (bb) the implementation of the business rescue plan; or
 - (cc) an order of a court.
- (2) Subsection (1) does not extend to any property or right over which the company exercises the powers of a trustee.
- (3) If, during a company's business rescue proceedings, the company disposes of any property over which another person has any security or title interest, the company must promptly -
 - (a) pay to that person the sale proceeds attributable to that property; or
 - (b) provide security for the amount of those proceeds, reasonably satisfactory to that person.

138. Post-commencement finance

- (1) To the extent that any money becomes due and payable by a company to an employee during the company's business rescue proceedings, but is not paid to the employee –
 - (a) the money is deemed to be post-commencement financing, irrespective whether it has been approved by other creditors; and
 - (b) will be paid in the order of preference set out in subsection (3)(a).

-
- (2) Any amount of financing obtained by the company during its business rescue proceedings, other than as contemplated in subsection (1), will be paid in the order of preference set out in subsection (3)(b).
 - (3) After payment of the supervisor's remuneration and costs referred to in section 146, and other claims arising out of the costs of the business rescue proceedings, all claims contemplated -
 - (a) in subsection (1) will have preference in the order in which they were incurred over -
 - (i) all claims contemplated in subsection (2); and
 - (ii) all secured and unsecured claims against the company; or
 - (b) in subsection (2) will have preference in the order in which they were incurred over all unsecured claims against the company.
 - (4) If business rescue proceedings are superseded by a liquidation order, the preference conferred in terms of this section will remain in force except to the extent of any claims arising out of the costs of liquidation.

139. Effect of business rescue on suppliers and employees

- (1) Despite any provision of an agreement to the contrary, during a company's business rescue proceedings –
 - (a) any person who, immediately before the beginning of those proceedings, was supplying or had contracted to supply to the company any goods, services or inputs that the management of the company regards as essential to the conduct of its business -
 - (i) must continue that supply to the company on the same terms and conditions, except to the extent that -
 - (aa) the supplier and the company agree terms and conditions that are more advantageous to the company;

- (bb) a court orders otherwise; or
 - (cc) an approved business rescue plan provides otherwise; and
 - (ii) must be paid by the company on a current basis for any such supply made after the business rescue proceedings began; and
- (b) 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;
 - (ii) the employees and the company agree terms and conditions that are more advantageous to the company; or
 - (iii) an approved business rescue plan provides otherwise.
- (2) Despite any provision of an agreement to the contrary, during business rescue proceedings, the company may unilaterally abrogate or suspend entirely, partially or conditionally any provision of a contract to which it is a party, other than a contract of employment, and if it does so, any other party to that contract may assert a claim against the company only for damages.
- (3) If liquidation proceedings have been converted into business rescue proceedings, the liquidator is a creditor of the company to the extent of any outstanding claim by the liquidator for any remuneration due for work performed, or compensation for expenses incurred, before the business rescue proceedings began.

140. Effect on shareholders and directors

- (1) During business rescue proceedings -
 - (a) an alteration in the status of a shareholder or shareholders of a company, other than by way of a transfer of shares in the ordinary course of business, is invalid except to the extent –

- (i) the court otherwise directs; or
 - (ii) contemplated in an approved business rescue plan; and
 - (b) the board and directors of a company must continue to perform and exercise their functions and powers, subject to the authority of the supervisor.
- (2) If, during a company's business rescue proceedings, the board, or one or more directors of the company, purports to take any action on behalf of the company that requires the approval of the supervisor, that action is void unless approved by the supervisor.

Part B – Supervisor's functions and Terms of Appointment

141. Qualifications of supervisors

A person may be appointed as the supervisor of a company only if the person -

- (a) has the prescribed qualifications;
- (b) is not subject to an order of probation in terms of section 163; and
- (c) would not be disqualified from acting as a director of the company in terms of section 89 (5).

142. Removal and replacement of supervisor

- (1) If the appointment of the supervisor by the company has not been set aside in terms of section 133, the supervisor may be removed only as provided for in this section.
- (2) Upon request of an affected person, or on its own motion, the court may remove a supervisor from office on any of the following grounds:
 - (a) incompetence or failure to perform duties;
 - (b) failure to exercise the proper degree of care in the performance of their duties;
 - (c) engaging in illegal acts or conduct;
 - (d) the supervisor having become disqualified to serve in that capacity; or
 - (e) conflict of interest or lack of independence.
- (3) The company must appoint a new supervisor if -
 - (a) a supervisor dies, resigns or is removed from office; or
 - (b) serious illness or any other event causes the supervisor to be unable to perform the functions of that office,

subject to the right of an affected person to bring a fresh application to set aside that application in terms of section 133 (1)(b).

143. Powers and duties of supervisors

- (1) During a company’s business rescue proceedings, the supervisor -
 - (a) is responsible to supervise and advise the management of the company;
 - (b) may approve or veto any significant management decision taken by the board or the management of the company;
 - (c) may authorise the company to borrow in priority of existing obligations in order to fund ongoing business activities, subject to section 138;
 - (d) may -
 - (i) remove from office any person who forms part of the management of the company; or
 - (ii) appoint a person as part of the management of a company, whether to fill a vacancy or not, subject to subsection (2); and
 - (e) is responsible to supervise and assist the management of the company in developing a business rescue plan to be considered by affected persons, in accordance with Part D.
- (2) A supervisor may not appoint a person as part of the management of the company, or an advisor to the company or to the supervisor, unless, immediately before the appointment, that person is independent of the company and the supervisor.
- (3) During a company’s business rescue proceedings, the supervisor is an officer of the court for the purposes of this Chapter.

144. Investigation of the affairs of the company

- (1) As soon as practicable after being appointed, the supervisor must investigate the company’s affairs, business, property, and financial situation; and after having done so, consider whether there is any reasonable prospect of the company being rescued.
- (2) If, at any time during business rescue proceedings, the supervisor concludes that -
 - (a) there is no reasonable prospect for the company to be rescued, the supervisor must –
 - (i) so inform the court, the company, and all affected persons in the prescribed manner; and
 - (ii) apply to the court for an order discontinuing the business rescue proceedings and placing the company into liquidation;
 - (b) the company is not, or is no longer, insolvent, and there is no longer a reasonable probability of it imminently becoming insolvent, the supervisor must –
 - (i) so inform the court, the company, and all affected persons in the prescribed manner; and
 - (ii) file a notice of termination of the business rescue proceedings with the Commission; or
 - (c) there is evidence, in the dealings of the company before the business rescue proceedings began, of –
 - (i) reckless trading, voidable transactions, or breach of duty by the board, the supervisor must direct the management to take any necessary steps to rectify the matter;
 - (ii) fraud or other contravention of any law, the supervisor must -
 - (aa) forward the evidence to the appropriate authority for further investigation and possible prosecution; and

- (bb) direct the management to take any necessary steps to recover any misappropriated assets of the company.
- (3) A court to which an application has been made in terms of subsection (2)(a)(ii) may make the order applied for, or any other order that the court considers appropriate in the circumstances.

145. Directors of company to co-operate with and assist supervisor

- (1) As soon as practicable after business rescue proceedings begin, each director of a company must deliver to the supervisor all books and records that relate to the affairs of the company and are in the director's possession.
- (2) Any director of a company who knows where other books and records relating to the company are being kept, must inform the supervisor as to the whereabouts of those books and records.
- (3) Within 5 business days after business rescue proceedings begin, or such longer period as the supervisor allows, the directors of a company must provide the supervisor with a statement of affairs containing, at a minimum, the following information:
 - (a) transactions occurring before the business rescue proceedings began that involved the company or the assets of the company;
 - (b) any court, arbitration or administrative proceedings, including enforcement proceedings, involving the company;
 - (c) assets, liabilities, income and disbursements of the company;
 - (d) employees, and any collective agreements or other employment contracts; or
 - (e) debtors and their obligations; and
 - (f) creditors and their claims.

- (4) A director of a company must attend to the requests of the supervisor at all times, and provide the supervisor with any information about the company's affairs as may reasonably be required.
- (5) No person is entitled, as against the supervisor of a company, to retain possession of any books or records of the company, or to claim or enforce a lien over any such books or records.

146. Remuneration of supervisor

- (1) As soon as practicable after the appointment of a supervisor, the company and the supervisor must conclude a written agreement setting out the supervisor's remuneration for services, and for expenses incurred in the business rescue proceedings.
- (2) The remuneration and expenses contemplated in subsection (1) –
 - (a) must not include any provision for compensation or benefits calculated on the basis of a contingency related to –
 - (i) the adoption of a business rescue plan at all, or within a particular time, or the inclusion of any particular matter within such a plan; or
 - (ii) the attainment of any particular result or combination of results relating to the business rescue proceedings; and
 - (b) may be paid by the company as part of its operating costs; and
 - (c) to the extent that they are not fully paid, will rank in priority before the claims of all other secured and unsecured creditors.

Part C – Rights of Affected Persons During Business Rescue

147. Rights of employees

- (1) To the extent that any money became due and payable by a company to an employee at any time before the beginning of the company's business rescue proceedings, and had not been paid to that employee immediately before the beginning of those proceedings, the employee is a senior unsecured creditor of the company for the purposes of this Chapter.
- (2) During a company's business rescue proceedings -
 - (a) each employee of the company may elect to exercise any rights as a creditor either directly, or by proxy through their registered trade union or, if the employee is not represented by a registered trade union, another employee organisation or representative;
 - (b) the employees of the company, acting collectively through their registered trade union or, to the extent that there are employees who are not represented by a registered trade union, another employee organisation or representative, are entitled to -
 - (i) notice of each significant court proceeding, decision, meeting or other relevant event concerning the business rescue proceedings;
 - (ii) participate in any court proceedings arising during the business rescue proceedings;
 - (iii) form a committee of employees' representatives;
 - (iv) be consulted by the supervisor during the development of the business rescue plan, and to have an opportunity to review and consider any such plan before it is submitted to a meeting of creditors;

- (v) to be present and to make a submission to the meeting of the holders of voting interests before a vote is taken on any proposed business rescue plan;
 - (vi) to vote with creditors on a motion to approve a proposed business plan, to the extent -
 - (aa) that the employee is a creditor, as contemplated in subsection (1); and
 - (bb) of any further voting interest contemplated in section 148 (5)(b); and
 - (vii) if the proposed business rescue plan is not adopted, to –
 - (aa) propose the development of an alternative plan, in the manner contemplated in section 156; or
 - (bb) present an offer to purchase the interests of any or all creditors.
- (3) A health and welfare scheme, or a pension scheme, for the benefit of the past or present employees of a company is an unsecured creditor of the company for the purposes of this Chapter to the extent of -
- (a) any amount that was due and payable by the company to the trustees of the scheme at any time before the beginning of the company's business rescue proceedings, and that had not been paid immediately before the beginning of those proceedings; and
 - (b) in the case of a defined benefit pension scheme, any unfunded liability under that scheme.
- (4) The rights set out in this section are in addition to any other rights arising or accruing in terms of any law, contract, collective agreement, shareholding, security or court order.

148. Participation by creditors

- (1) Each creditor is entitled to –
 - (a) notice of each significant court proceeding, decision, meeting or other relevant event concerning the business rescue proceedings;
 - (b) participate in any court proceedings arising during the business rescue proceedings;
 - (c) formally participate in a company's business rescue proceedings to the extent provided for in this chapter; and
 - (d) informally participate in those proceedings by making proposals for a business rescue plan to the supervisor.
- (2) In addition to the rights set out in subsection (1), each creditor has -
 - (a) the right to vote to amend, approve or reject a proposed business rescue plan; and
 - (b) if the proposed business rescue plan is not adopted, a further right to -
 - (i) propose the development of an alternative plan, in the manner contemplated in section 156; or
 - (ii) present an offer to purchase the interests of any or all of the other creditors.
- (3) The creditors of a company are entitled to form a creditors' committee, and through that committee are entitled to be consulted by the supervisor during the development of the business rescue plan.
- (4) In respect of any decision contemplated in this Chapter that requires the support of the holders of creditors' voting interests –
 - (a) a senior unsecured creditor has a voting interest equal to the value of the amount owed to that creditor by the company;

- (b) a secured creditor has a voting interest equal to the amount owed to that creditor by the company, minus the amount covered by their security, as appraised and valued by the supervisor; and
 - (c) a subordinated creditor, who would be subordinated in a liquidation, has a voting interest, as appraised and valued by the supervisor, equal to the amount, if any, that the subordinated creditor could reasonably expect to receive in such a liquidation of the company.
- (5) In any vote concerning a business rescue plan, in addition to the voting interests referred to in subsection (4) -
 - (a) a contingent or prospective creditor affected by the proposed plan has a voting interest as appraised and valued by the supervisor; and
 - (b) in addition to any voting interest an employee may have as a creditor in terms of section 147, an employee of the company -
 - (i) who may be retrenched under the proposed plan has a voting interest equal to the value of the employee's remuneration and benefits for the greater of –
 - (aa) three months; or
 - (bb) any notice or retrenchment period determined in accordance with any collective agreement or other time-limited contract that was in force immediately before the business rescue proceedings began, to the extent the employee is subject to such an agreement or contract;
 - (ii) whose terms and conditions of employment may be adversely affected by the proposed plan has a voting interest as appraised and valued by the supervisor in consultation with the employee's representative, equal to the difference in value of the employee's terms and conditions of employment over the period -

-
- (aa) to the end of any collective agreement or other time-limited contract that was in force immediately before the business rescue proceedings began, to the extent the employee is subject to such an agreement or contract; or
 - (bb) of one year, in any other case.
 - (6) The supervisor of a company may -
 - (a) determine whether a creditor is independent for the purposes of this Chapter; and
 - (b) appraise and value an interest contemplated in subsection (4) (b) or (c), (5)(a), or (5)(b)(ii).
 - (7) A person may apply to the court to –
 - (a) review the supervisor’s determination that the person is, or is not, an independent creditor in terms of subsection (6)(a); or
 - (b) review, re-appraise and re-value that person’s voting interest, as determined by the supervisor in terms of subsection (6)(b).

149. Participation by shareholders

- (1) During a company’s business rescue proceedings, each shareholder of the company is entitled to –
 - (a) notice of each significant court proceeding, decision, meeting or other relevant event concerning the business rescue proceedings;
 - (b) participate in any court proceedings arising during the business rescue proceedings, subject to section 133 (2);
 - (c) formally participate in a company’s business rescue proceedings to the extent provided for in this Chapter;

- (d) vote to approve or reject a proposed business rescue plan, if the plan affects the class of shares held by that shareholder; and
- (e) if the holders of voting interests, or shareholders, fail to approve a proposed business rescue plan, to –
 - (i) propose the development of an alternative plan, in the manner contemplated in section 156; or
 - (ii) present an offer to purchase the interests of any or all of the creditors or other shareholders.

150. First meeting of creditors

- (1) Within 10 business days after being appointed, the supervisor must convene, and preside over, a first meeting of creditors, at which –
 - (a) the supervisor -
 - (i) must inform the creditors whether the supervisor believes that there is a reasonable prospect of rescuing the company; and
 - (ii) may receive proof of claims by creditors; and
 - (b) the creditors may determine whether or not a committee of creditors should be appointed and, if so, may appoint the members of the committee.
- (2) The supervisor must give notice of the meeting to every creditor of the company whose name and address is known to, or can reasonably be obtained by, the supervisor, setting out -
 - (a) the date, time and place of the meeting; and
 - (b) the agenda for the meeting.

- (3) At the meeting of creditors, a decision supported by the holders of a simple majority of the independent creditors voting interests voted on a matter, is the decision of the meeting on that matter.

151. First meeting of employees representatives

- (1) Within 10 business days after being appointed, the supervisor must convene, and preside over, a first meeting of employees' representatives, at which –
 - (a) the supervisor must inform the employees' representatives whether the supervisor believes that there is a reasonable prospect of rescuing the company; and
 - (b) the employees' representatives may determine whether or not an employees' committee should be appointed and, if so, may appoint the members of the committee.
- (2) The supervisor must give notice of the meeting to every registered trade union representing employees of the company, and if there are any employees who are not represented by such a registered trade union, to those employees, or their representatives, setting out -
 - (a) the date, time and place of the meeting; and
 - (b) the agenda for the meeting.

152. Functions, duties and membership of committees of affected persons

- (1) A committee of employees, or of creditors, appointed in terms of section 150 or 151, respectively -
 - (a) may consult with the supervisor about any matter relating to the business rescue proceedings, but may not direct or instruct the supervisor;
 - (b) may, on behalf of the general body of creditors or employees, receive and consider reports relating to the business rescue proceedings; and

- (c) must act independently of the supervisor to ensure fair and unbiased representation of creditors' or employees' interests.
- (2) A person may be a member of a committee of creditors or employees, respectively, only if the person is -
 - (a) an independent creditor, or an employee, of the company;
 - (b) an agent, proxy or attorney of an independent creditor or employee, or other person acting under a general power of attorney; or
 - (c) authorised in writing by an independent creditor or employee to be a member.

Part D – Development and Approval of Business Rescue Plan

153. Proposal of a business rescue plan

- (1) Under the supervision and with the advice of the supervisor, the management of the company must prepare a business rescue plan for consideration and possible adoption at a meeting held in terms of section 154.
- (2) The business rescue plan must specify at least the following information, but may contain any additional information that will assist affected persons in deciding whether or not to accept or reject the plan:
 - (a) the property of the company that is to be available to pay creditors' claims in terms of the business rescue plan;
 - (b) the nature and duration of any moratorium for which the business rescue plan makes provision;
 - (c) the extent to which the company is to be released from the payment of its debts, and the extent to which any debt is proposed to be converted to equity in the company, or another company;
 - (d) the treatment of contracts and ongoing role of the company;
 - (e) the conditions, if any, for the business rescue plan to come into operation;
 - (f) the conditions, if any, for the business rescue plan to continue in operation;
 - (g) the circumstances in which the business rescue plan will end;
 - (h) the order of preference in which the proceeds of property will be applied to pay creditors if the business rescue plan is adopted; and
 - (i) the effect of the plan, if any on the number of employees, and their terms and conditions of employment.

- (3) A business rescue plan must be accompanied by a statement containing at least the following information:
- (a) a complete list of all the assets of the company, as well as an indication as to which assets were held as security by creditors when the business rescue proceedings began;
 - (b) a complete list of the creditors of the company when the business rescue proceedings began, as well as an indication as to which creditors would qualify as secured, statutory preferent and concurrent in terms of the laws of insolvency, and an indication of which of the creditors have proved their claims;
 - (c) a complete list of the equity holders of the company, and the effect that the business rescue plan will have on them;
 - (d) the probable dividend that would be received by creditors, in their specific classes, if the company were to be placed in liquidation;
 - (e) the benefits of adopting the business rescue plan as opposed to the benefits that would be received by creditors if the company were to be placed in liquidation;
 - (f) whether the business rescue plan includes a proposal made informally by a creditor of the company;
 - (g) a copy of the written agreement concerning the supervisor's remuneration; and
 - (h) a projected -
 - (i) balance sheet for the company; and
 - (ii) statement of income and expenses for the ensuing three years, prepared on the assumption that the proposed business plan is adopted.
- (4) The projected balance sheet and statement required by subsection (3)(h) –

-
- (a) must include a notice of any significant assumptions on which the projections are based; and
 - (b) may include alternative projections based on varying assumptions and contingencies.
- (5) The statement required by subsection (3) must conclude with a certificate by the company stating that -
- (a) any factual information provided is accurate, complete, and up to the date; and
 - (b) any projections provided are estimates made in good faith on the basis of factual information and assumptions as set out in the statement.
- (6) The business rescue plan must be published by the company within 25 business days after the date on which the supervisor was appointed, or such longer time as may be allowed by –
- (a) the court, on application by the company; or
 - (b) the holders of a majority of the voting interests.

154. Meeting to determine future of company

- (1) The supervisor must convene and preside over a meeting of creditors and any other holders of a voting interest, called for the purpose of considering the proposed rescue plan within -
 - (a) 10 business day after the publication of that plan in terms of section 153; or
 - (b) a shorter period as approved by –
 - (i) the court, on application by the supervisor; or
 - (ii) unanimous consent of -
 - (aa) the holders of a voting interest; and

- (bb) shareholders entitled to vote in term of section 155 (3)(b).
- (2) At least 5 business days before the meeting contemplated in subsection (1), the supervisor must deliver a notice of the meeting to all affected persons, setting out -
- (a) the date, time and place of the meeting;
 - (b) the agenda of the meeting; and
 - (c) a summary of the rights of affected persons to participate in and vote at the meeting.
- (3) The meeting contemplated in this section may be adjourned from time to time, but may not be adjourned to a day that is more than 60 business days after the day on which the supervisor was appointed, even if no decision regarding the company's future has been taken at the meeting.

155. Consideration of the business rescue plan

- (1) At the meeting convened in terms of section 154, the supervisor must –
- (a) introduce the proposed business plan for consideration by the creditors and any other holders of a voting interest;
 - (b) inform the meeting whether the supervisor continues to believe that there is a reasonable prospect of the company being rescued;
 - (c) provide an opportunity for the employees' representatives to address the meeting;
 - (d) invite discussion, and entertain and conduct a vote, on any motions to -
 - (i) amend the proposed plan, in any manner moved and seconded by holders of voting interests, and satisfactory to the supervisor; or
 - (ii) direct the supervisor to adjourn the meeting in order to revise the plan for further consideration, subject to section 154 (3); and

-
- (e) call for a vote for adoption of the proposed plan, as amended if applicable, unless the meeting has first been adjourned in accordance with paragraph (d)(ii).
- (2) If adoption of the proposed business plan was opposed -
- (a) by the holders of more than 50% of the voting interests that were voted in terms of subsection (1) (e), or
 - (b) by more than 25 % of the independent creditors' voting interests, if any, that were voted in terms of subsection (1) (e)
- the plan has failed to be adopted.
- (3) If the proposed business plan did not fail to be adopted, as contemplated in subsection (2), and
- (a) the plan does not affect the interests of any class of shareholders, the business rescue plan will have been adopted, subject to any conditions on which the plan is contingent; or
 - (b) the plan does affect the interests of any class of shareholders, the supervisor must immediately hold a meeting of the class, or classes of shareholders affected by the plan, and call for a vote by those shareholders to approve the adoption of the proposed business rescue plan.
- (4) If the holders of at least a majority of the shares that were voted in terms of subsection (3) (b) support approval of the proposed business plan, the plan will have been adopted, subject to any conditions on which the plan is contingent.
- (5) A business rescue plan that has been adopted is binding on the company, and on each of the creditors and shareholders of the company, whether or not -
- (a) they were present at the meeting;
 - (b) they voted in favour of adoption of the plan; or
 - (c) in the case of creditors, they proved their claims against the company.

- (6) The company, under the direction of the supervisor, must take all necessary steps to -
- (a) attempt to satisfy any conditions on which the business rescue plan is contingent; and
 - (b) implement the plan.
- (7) When the business rescue plan has been implemented, the supervisor must file with the Commission a Notice of the Substantial Implementation of the business rescue plan.

156. Failure to adopt business rescue plan

- (1) If a business rescue plan is not adopted as contemplated in section 155 -
- (a) the supervisor may -
 - (i) seek a vote of approval from the holders of voting interests to prepare and publish a revised plan; or
 - (ii) advise the meeting that the company will apply to the court to set aside the result of the vote by the holders of voting interests or shareholders, as the case may be, on the grounds that it was inappropriate or egregiously irrational; and
 - (b) if the supervisor does not take any action contemplated in paragraph (a) –
 - (i) any affected person present at the meeting may -
 - (aa) call for a vote of approval from the holders of voting interests requiring the supervisor to prepare and publish a revised plan; or
 - (bb) apply to the court to set aside the result of the vote by the holders of voting interests or shareholders, as the case may be, on the grounds that it was inappropriate or egregiously irrational; or

-
- (ii) any affected person, or combination of affected persons, may make a binding offer to purchase the voting interests of any person who opposed adoption of the business rescue plan, at a value that the supervisor determines to be the probable return to that person if the company were to be liquidated.
 - (2) If a person makes an offer contemplated in subsection (1)(b)(ii), the supervisor must
 -
 - (a) adjourn the meeting until the transaction has been completed;
 - (b) make any necessary revisions to the business rescue plan to appropriately reflect the results of the transaction; and
 - (c) set a date for resumption of the meeting, at which the provisions of section 155 will apply afresh.
 - (3) If no person takes any action contemplated in subsection (1) or (2), the supervisor must promptly file with the Commission a Notice of the Termination of Business Rescue Proceedings.
 - (4) A holder of a voting interest, or a person offering to acquire that interest, may apply to the court to review, re-appraise and re-value a determination by the supervisor in terms of subsection (1)(b)(ii).

157. Discharge of debts and claims

- (1) A business rescue plan may 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.
- (2) Creditors and other holders of voting interests who have not participated in the business rescue proceedings are not entitled to enforce any debt that arose before those proceedings began, unless the business rescue plan is not approved, or not implemented.

Chapter 7 - Remedies and Enforcement

Part A – General Principles

158. Alternative procedures for addressing complaints or securing rights

A person referred to in section 159 (1) may seek to address an alleged contravention of this Act, or to enforce any provision of, or right in terms of this Act, a company's Memorandum of Incorporation or rules, or a transaction or agreement, by –

- (a) attempting to resolve any dispute with a company through alternative dispute resolution in accordance with Part C of this Chapter;
- (b) applying to the Companies Ombud for arbitration in terms of section 167 (3), if it has such authority over the matter in terms of this Act;
- (c) applying for appropriate relief to the division of the High Court that has jurisdiction over the matter; or
- (d) filing a complaint in accordance with Part D of this Chapter within the time permitted by section 220 with -
 - (i) the Takeover Regulation Panel, if the complaint concerns a matter within its jurisdiction; or
 - (ii) with the Commission in respect of any matter arising in terms of this Act, other than a matter contemplated in subparagraph (i).

159. Extended standing to apply for remedies

- (1) When, in terms of this Act, a person has a right to approach a court, the Companies Ombud, the Takeover Regulation Panel or the Commission, that right may be exercised by –
 - (a) the person directly;

-
- (b) a person acting on behalf of another person who cannot act in their own name;
 - (c) a person acting as a member of, or in the interest of, a group or class of persons;
 - (d) a person acting in the public interest; or
 - (e) an association acting in the interest of its members.
- (2) The Commission or the Takeover Regulation Panel, acting on its own motion and in its absolute discretion, may –
- (a) commence any proceedings in a court in the name of a person who, when filing a complaint with the Commission or Panel, as the case may be, 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.
- (3) For greater certainty, nothing in this section creates a right of any person to commence any legal proceedings contemplated in section 165 (1), other than –
- (a) on behalf of a person entitled to make a demand in terms of section 165 (2); and
 - (b) in the manner set out in section 165.

160. Remedies to promote the purpose of the Act

- (1) When determining a matter brought before it in terms of this Act, or making an order contemplated in this Act, a court –
- (a) must promote the spirit, purpose and objects of this Act;

- (b) must develop the common law as necessary to improve the realization and enjoyment of rights established by this Act;
 - (c) must strictly interpret any document prepared or published by or on behalf of any person –
 - (i) so that any ambiguity that allows for more than one reasonable interpretation of any part of such a document is resolved to the benefit of any other person who did not prepare or publish it;
 - (ii) so that any restriction, limitation, exclusion or deprivation of a person's legal rights set out in such a document or notice is limited to the extent that a reasonable person would ordinarily contemplate or expect, having regard to the content of the document, the manner and form in which it was prepared and presented, and the circumstances of the transaction or agreement; and
 - (d) if any provision of this Act, read in its context, can be reasonably construed to have more than one meaning, must prefer the meaning that best promotes the spirit and purpose of this Act, and will best improve the realization and enjoyment of rights.
- (2) In any proceedings in terms of this Act to remedy any conduct prejudicial to the shareholders of a company a court may not impose a requirement that the applicant deposit security for costs in the proceedings.

161. Protection for whistle-blowers

- (1) Despite any provision of any other law, a company's Memorandum of Incorporation, or an agreement, a director, secretary or other officer, or employee of a company, a registered trade union or other representative of the employees of that company, a supplier or goods or services to a company, or an employee of such a supplier, who -
- (a) has reasonable grounds to suspect that the company or any of its directors or employees has, or may have, contravened -

-
- (i) this Act; or
 - (ii) any other legislation in a manner that could expose the company to an actual or contingent risk of liability, or is inherently prejudicial to the interests of the company; and
- (b) in good faith discloses information concerning that suspicion to -
- (i) the Commission;
 - (ii) a director, committee of the board, auditor of the company or audit committee; or
 - (iii) company secretary or other person authorised by the company to receive such information

is immune from any civil or criminal liability for that disclosure, unless the disclosure was made anonymously.

- (2) If a person has made a disclosure contemplated in subsection (1), the person has qualified privilege in respect of the disclosure.
- (3) A person is entitled to compensation from another person for any damages suffered if the first person is entitled to make, or has made, a disclosure contemplated in subsection (1) and, because of that possible or actual disclosure, the second person -
- (a) engages in conduct with the intent to cause detriment to the first person, and the conduct causes such detriment; or
 - (b) directly or indirectly makes an express or implied threat, whether conditional or unconditional, to cause any detriment to the first person or to another person; and
 - (i) intends the first person to fear that the threat will be carried out; or
 - (ii) is reckless as to causing the first person to fear that the threat will be carried out

irrespective whether the first person actually feared that the threat would be carried out.

- (4) Without limiting subsection (3), a court may order the reinstatement of an employee of a company, with compensation for lost remuneration, if -
 - (a) the employee has made a disclosure contemplated in subsection (1); and
 - (b) the company purports to terminate the contract of employment because the employee made that disclosure.
- (5) Any provision of a company's Memorandum of Incorporation, or an agreement, is void to the extent that it purports to limit, set aside or negate the effect of this section.
- (6) A public interest company must directly or indirectly -
 - (a) establish and maintain a system to receive disclosures contemplated in this section confidentially, and act on them; and
 - (b) routinely publicise the availability of that system to the categories of persons contemplated in subsection (1).

Part B – Rights to seek specific remedies

162. Application to declare or protect shareholders' rights

- (1) A shareholder of a company may apply to a court for -
 - (a) a declaratory order determining any rights of the shareholder in terms of this Act, the company's Memorandum of Incorporation, or any rules of the company; or
 - (b) any appropriate order necessary to –
 - (i) protect any right contemplated in paragraph (a); or
 - (ii) rectify any harm done to the shareholder by the company or any of its directors as a consequence of an act or omission that contravened this Act or the company's Memorandum of Incorporation or rules, or violated any right contemplated in paragraph (a).
- (2) The right to apply to a court in terms of this section is in addition to any other remedy available to a shareholder -
 - (a) in terms of this Act; or
 - (b) in terms of the common law, subject to this Act.

163. Application to declare director delinquent or under probation

- (1) A company, a shareholder, director, company secretary or other officer of a company, a registered trade union or other representative of the employees of a company, or the Commission or the Takeover Regulation Panel, may apply to a court for a order declaring a person delinquent or under probation if -
 - (a) the person is or, within the 24 months immediately preceding the application, was a director of that company; and

- (b) any of the circumstances contemplated in subsection (2), or subsections (4) and (5), apply.
- (2) The Court may make an order declaring a person to be a delinquent director if the person -
- (a) consented to serve as a director, or acted in any manner contemplated in section 89 (1), while disqualified in terms of section 89, unless the person was acting –
 - (i) as a director as contemplated in section 89 (8); or
 - (ii) under the protection of a court order contemplated in section 89 (10);
 - (b) while under a court order of probation in terms of this section, acted as a director in a manner that contravened that order;
 - (c) while a director, -
 - (i) grossly abused the position of director;
 - (ii) took personal advantage of information or an opportunity, contrary to section 92;
 - (iii) intentionally, or by gross negligence, inflicted harm upon the company;
 - (iv) acted in a manner -
 - (aa) that amounted to gross negligence, wilful misconduct or breach of trust; or
 - (bb) contemplated in section 93 (2);
 - (d) has repeatedly been personally subject to a compliance notice for substantially similar contraventions of this Act;
 - (e) has at least twice been personally subject to an administrative fine for failure to carry out the requirements of a compliance notice in terms of this Act; or

-
- (f) within a period of 5 years, irrespective whether concurrently, sequentially or at unrelated times, was a director of one or more companies that were subject to an administrative fine in terms of this Act, and -
 - (i) the person was a director of each such company at the time of the contravention that resulted in the administrative fine; and
 - (ii) the Court is satisfied that the declaration of delinquency is justified, have regard to the nature of the company's contraventions, and the person's conduct in relation to the management, business or property of any company at the time.
 - (3) A declaration of delinquency in terms of -
 - (a) subsection (2)(a) or (b) is unconditional, and subsists for the lifetime of the person declared delinquent; or
 - (b) subsection (2)(c) to (f) –
 - (i) may be made subject to any conditions the court considers appropriate, including conditions limiting the application of the declaration to one or more particular category of companies; and
 - (ii) subsists for 7 years from the date of the order, or such longer period as determined by the court at the time of making the declaration.
 - (4) The Court may make an order placing a person under probation, if -
 - (a) while serving as a director, the person -
 - (i) improperly supported a resolution despite the inability of the company to satisfy the solvency and liquidity test, contrary to this Act;
 - (ii) otherwise acted in a manner inconsistent with the duties of a director; or
 - (iii) acted in, or supported a decision of the company to act in, a manner contemplated in section 164 (1); or

- (b) within any period of 10 years after the effective date –
 - (i) the person has been a director of more than one company, irrespective whether concurrently, sequentially or at unrelated times; and
 - (ii) two or more such companies have each failed to fully pay all of its creditors or meet all of its obligations, except under a business rescue plan resulting from a resolution of the board in terms of section 132, during the time that the person was a director of that company.
- (5) The court may declare a person under probation in the circumstances contemplated in -
 - (a) subsection (4)(a)(iii), only if the court is satisfied that the declaration is justified having regard to the circumstances of the company's conduct, if applicable, and the person's conduct in relation to the management, business or property of any company at the time; or
 - (b) subsection (4)(b), only if the court is satisfied that -
 - (i) the manner in which the company was managed was wholly or partly responsible for the company failing to meet its obligations; and
 - (ii) the declaration is justified, having regard to the circumstances of the company's failure, and the person's conduct in relation to the management, business or property of any company at the time.
- (6) A declaration placing a person under probation –
 - (a) may be made subject to any conditions the court considers appropriate, including conditions limiting the application of the declaration to one or more particular categories of companies; and
 - (b) subsists for a period not exceeding 5 years, as determined by the court at the time it makes the declaration.
- (7) A person who has been declared delinquent, other than as contemplated in subsection (3)(a), may apply to the Court -

-
- (a) to suspend the order of delinquency, and substitute an order of probation, with or without conditions, at any time more than 3 years after the order of delinquency was made; or
 - (b) to set aside the order of delinquency at any time more than 2 years after it was suspended as contemplated in paragraph (a).
- (8) On considering an application contemplated in subsection (7), the court -
- (a) may not grant the order applied for unless the applicant has satisfied any conditions that were attached to the original order, or imposed in terms of subsection (7)(a); and
 - (b) may grant an order if, having regard to the circumstances leading to the original order, and the conduct of the applicant in the ensuing period, the court is satisfied that -
 - (i) the applicant has demonstrated progress towards rehabilitation, and
 - (ii) there is a reasonable prospect that the applicant would be able to successfully serve as a director of a company in the future.
- (9) Without limiting the powers of the court, a court may order, as conditions applicable or ancillary to a declaration of probation or delinquency, that the person concerned –
- (a) undertake a designated program of remedial education relevant to the nature of the person’s conduct as director;
 - (b) carry out a designated program of community service;
 - (c) pay compensation to any person adversely affected by the person’s conduct as a director, to the extent that such a victim does not otherwise have a legal basis to claim compensation; or
 - (d) in the case of an order of probation –
 - (i) be supervised by a mentor in any future participation as a director while the order remains in force; or

- (ii) be limited to serving as a director of a closely held company.
- (10) The Commission must establish and maintain in the prescribed manner a public registry of persons who are subject to an order of a court in terms of this section.

164. Relief from oppressive or prejudicial conduct

- (1) A shareholder, creditor or director of a company may apply to a court for relief if -
- (a) any act or omission of the company, or a related person, has had a result that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant;
 - (b) the business of the company, or a related person, is being or has been carried on 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 the directors of the company, or a related person, are being or have been exercised in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant.
- (2) Upon considering an application in terms of subsection (1), the court may make any interim or final order it thinks fit including, without limiting the generality of the foregoing -
- (a) an order restraining the conduct complained of;
 - (b) an order appointing a liquidator, if the company appears to be insolvent;
 - (c) an order to regulate the company's affairs by amending its Memorandum of Incorporation or creating or amending a unanimous shareholder agreement;
 - (d) an order directing an issue or exchange of shares;
 - (e) an order -

-
- (i) appointing directors in place of or in addition to all or any of the directors then in office; or
 - (ii) declaring any person delinquent or under probation, as contemplated in section 163;
- (f) an order directing the company or any other person to restore to a shareholder any part of the consideration that the shareholder paid for shares, or pay the equivalent value, with or without conditions;
- (g) an order varying or setting aside a transaction or contract to which the company is a party and compensating the company or any other party to the transaction or contract;
- (h) an order requiring the company, within a time specified by the court, to produce to the court or an interested person financial statements in a form required by this Act, or an accounting in any other form the court may determine;
- (i) an order to pay compensation to an aggrieved person, to the extent that such a victim does not otherwise have a legal basis to claim compensation;
- (j) an order directing rectification of the registers or other records of a company;
or
- (k) an order for the trial of any issue that may arise in terms of this Act, as determined by the court.
- (3) If an order made under this section directs the amendment of the company's Memorandum of Incorporation -
- (a) the directors must promptly file with the Commission a Notice of Amendment to give effect to that order; and
 - (b) no further amendment altering, limiting or negating the effect of the court order may be made to the Memorandum of Incorporation, until a court orders otherwise.

165. Dissenting shareholders' appraisal rights

- (1) If a company has given notice to shareholders of a meeting to consider adopting a resolution to -
 - (a) amend its Memorandum of Incorporation in any manner adverse to the rights or interests of holders of any class of shares; or
 - (b) enter into a transaction contemplated in section 115, 116 or 117;that notice must include a statement informing shareholders of their rights under this section.
- (2) At or before the meeting of shareholders at which a resolution referred to in subsection (1) is to be voted on, a dissenting shareholder may send to the company a written objection to the resolution.
- (3) Within ten business days after a company has adopted a resolution contemplated in this section, the company must send a notice that the resolution has been adopted to each shareholder who -
 - (a) filed an objection in terms of subsection (2); and
 - (b) has not either withdrawn that objection, or voted in support of the resolution.
- (4) A holder of shares of any class of a company may demand that the company pay the shareholder the fair value for those shares if -
 - (a) the shareholder -
 - (i) sent the company a notice of objection, subject to subsection (5); and
 - (ii) in the case of an amendment to the company's Memorandum of Incorporation, holds shares of a class that is adversely affected by the amendment;
 - (b) the company has adopted the resolution contemplated in subsection (1);

-
- (c) the resolution was supported by less than 75% of the shares entitled to be voted, as determined in accordance with section 118 (8); and
 - (d) the shareholder -
 - (i) voted those shares in opposition to that resolution; and
 - (ii) has complied with the procedural requirements of this section.
 - (5) The requirement of subsection (4)(a)(i) does not apply if the company failed to give notice of the meeting, or failed to include in that notice a statement of the shareholders' rights under this section.
 - (6) A shareholder who satisfies the requirements of subsection (4) may deliver a demand contemplated in that subsection by sending a written notice to the company within -
 - (a) 20 business days after receiving a notice under subsection (3) or,
 - (b) if the shareholder does not receive a notice under subsection (3), within 20 business days after learning that the resolution has been adopted.
 - (7) A demand delivered in terms of subsections (4) to (6) must state -
 - (a) the shareholder's name and address;
 - (b) the number and class of shares in respect of which the shareholder dissents; and
 - (c) a demand for payment of the fair value of those shares.
 - (8) A shareholder who has sent a demand in terms of subsections (4) to (7) has no further rights in respect of those shares, other than to be paid their fair value, unless -
 - (a) the shareholder withdraws that demand before the company makes an offer under subsection (10), or allows an offer made by the company to lapse, as contemplated in subsection (11)(b);
 - (b) the company fails to make an offer in accordance with subsection (10) and the shareholder withdraws the demand; or

- (c) the company revokes the adopted resolution that gave rise to the shareholder's rights under this section.
- (9) If any of the events contemplated in subsection (8)(a) to (c) occur, all of the shareholder's rights in respect of the shares are re-instated without interruption.
- (10) Within 5 business days after the later of -
- (a) the day on which the action approved by the resolution is effective;
 - (b) the last day for the receipt of demands in terms of subsection (6)(a); or
 - (c) the day the company received a demand as contemplated in subsection (6)(b), if applicable

the company must send to each shareholder who has sent such a demand a written offer to pay an amount considered by the company's directors to be the fair value of the relevant shares, accompanied by a statement showing how that value was determined.

- (11) Every offer made under subsection (10) -
- (a) in respect of shares of the same class or series must be on the same terms; and
 - (b) lapses if it has not been accepted within 30 business days after it was made.
- (12) If a shareholder accepts an offer made under subsection (11) –
- (a) the shareholder must either –
 - (i) in the case of shares evidenced by certificates, tender the relevant share certificates to the company or the company's transfer agent; or
 - (ii) in the case of uncertificated shares, take the steps required in terms of section 57 to transfer those shares to the company or the company's transfer agent; and
 - (b) the company -

-
- (i) must pay that shareholder the agreed amount within ten business days after the shareholder accepted the offer and tendered the share certificates, subject to subparagraph (ii); or
 - (ii) may apply to the Court for an order deferring the obligation to pay to the shareholder the amount contemplated in subparagraph (i), solely on the grounds that if all such amounts were to be paid as required, the company would not satisfy the solvency and liquidity test.
 - (13) A shareholder who has made a demand in terms of subsections (4) to (7) may apply to the Court to determine a fair value in respect of the shares that were the subject of that demand, and an order requiring the company to pay the shareholder the fair value so determined, if the company –
 - (a) has failed to make an offer under subsection (10); or
 - (b) has made an offer that the shareholder considers to be inadequate, and that offer has not lapsed.
 - (14) On an application to the court under subsection (12)(b)(ii), or (13) -
 - (a) all dissenting shareholders who have not accepted an offer from the company as at the date of the application, must be joined as parties and are bound by the decision of the court;
 - (b) the company must notify each affected dissenting shareholder of the date, place and consequences of the application and of their right to participate in the court proceedings; and
 - (c) the court -
 - (i) may determine whether any other person is a dissenting shareholder who should be joined as a party;
 - (ii) must determine a fair value in respect of the shares of all dissenting shareholders;
 - (iii) in its discretion may -

- (aa) appoint one or more appraisers to assist it in determining the fair value in respect of the shares; or
 - (bb) allow a reasonable rate of interest on the amount payable to each dissenting shareholder from the date the action approved by the resolution is effective, until the date of payment;
 - (iv) may make an appropriate order of costs, having regard to any offer made by the company, and the final determination of the fair value by the court; and
 - (v) must make an order requiring the -
 - (aa) dissenting shareholders to either withdraw their demand, in which case the shareholder is reinstated to their full rights as a shareholder, or comply with subsection 12 (a); and
 - (bb) company to pay the fair value in respect of their shares to each dissenting shareholder who tenders share certificates, subject to any conditions the court considers necessary to ensure that the company satisfies the solvency and liquidity test, on the one hand, and fulfils its obligations under this section, on the other.
- (15) The fair value in respect of any shares must be determined as at the date on which, and time immediately before, the company adopted the resolution that gave rise to a shareholder's rights under this section.
- (16) If the resolution that gave rise to a shareholder's rights under this section authorized the company to merge or amalgamate with one or more other companies, such that the company whose shares are the subject of a demand in terms of this section has ceased to exist, the obligations of that company under this section are obligations of the successor to that company resulting from the merger or amalgamation.

166. Derivative actions

- (1) Any right at common law of a person other than a company to bring or prosecute any legal proceedings on behalf of that company is abolished, and the rights in this section are in substitution for any such abolished right.
- (2) A person may serve a demand upon a company to commence or continue legal proceedings, or take related steps, to protect the interests of the company if the person is -
 - (a) a shareholder, former shareholder, or person entitled to be registered as a shareholder, of the company or of a related company; or
 - (b) a director or former director of the company or of a related company; or
 - (c) a registered trade union, or other representative of employees of the company.
- (3) A company that has been served with a demand in terms of subsection (2) –
 - (a) may apply to the Court to set aside the demand only on the grounds that it is frivolous, vexatious or wholly without merit; or
 - (b) unless the Court makes an order contemplated in paragraph (a), must –
 - (i) appoint an independent and impartial person or committee to investigate the demand, and report to the board on -
 - (aa) any facts or circumstances that may give rise to a cause of action, or concerning proceedings, contemplated in the demand;
 - (bb) the probable costs that would be incurred if the company pursued any such cause of action or continued any proceedings; and
 - (cc) whether it appears to be in the best interests of the company to pursue any such cause of action or continue any proceedings; and

- (ii) within 60 business days after being served with the demand, or within a longer time as the Court, on application by the company, may allow, either –
 - (aa) initiate or continue legal proceedings, or take related legal steps to protect the interests of the company, as contemplated in the demand; or
 - (bb) serve a notice on the person who made the demand, refusing to comply with it.
- (4) A person who has made a demand in terms of subsection (2) may apply to the Court for leave to bring or continue proceedings in the name and on behalf of the company, and the court may grant leave only if -
 - (a) the company –
 - (i) has failed to take any particular step required by subsection (3);
 - (ii) appointed an investigator or committee who was not independent and impartial;
 - (iii) accepted a report that was clearly inadequate in its preparation, or was irrational or unreasonable in its conclusions or recommendations;
 - (iv) acted in a manner that was wholly inconsistent with the reasonable report of an independent, impartial investigator or committee; or
 - (v) has served a notice refusing to comply with the demand, as contemplated in subsection (3)(b)(ii)(bb); and
 - (b) the court is satisfied that –
 - (i) the applicant for leave is acting in good faith;
 - (ii) the proposed or continuing proceedings involve the trial of a serious question of material consequence to the company; and

-
- (iii) it is in the best interests of the company that the applicant be granted leave to commence the proposed proceedings.
- (5) In exceptional circumstances, a person contemplated in subsection (2) may apply to the Court for leave to bring proceedings in the name and on behalf of the company without making a demand as contemplated in that subsection, or without affording the company time to respond to the demand in accordance with subsection (3), and the court may grant leave only if the court is satisfied that -
- (a) the delay required for the procedures set out in subsection (3) to be completed may result in -
 - (i) irreparable harm to the company, or
 - (ii) substantial prejudice to the interests of the applicant or another person;
 - (b) there is a reasonable probability that the company may not act to prevent that harm or prejudice, or act to protect the companies interests that the applicant seeks to protect; and
 - (c) that the requirements of subsection (4)(b) are satisfied.
- (6) A rebuttable presumption that granting leave is not in the best interests of the company arises if it is established that -
- (a) the proposed or continuing proceedings are:
 - (i) by the company against a third party; or
 - (ii) by a third party against the company; and
 - (b) the company has decided:
 - (i) not to bring the proceedings; or
 - (ii) not to defend the proceedings; or
 - (iii) to discontinue, settle or compromise the proceedings; and

- (c) all of the directors who participated in that decision:
 - (i) acted in good faith for a proper purpose; and
 - (ii) did not have a personal financial interest in the decision; and
 - (iii) informed themselves about the subject matter of the decision to the extent they reasonably believed to be appropriate; and
 - (iv) reasonably believed that the decision was in the best interests of the company, as determined in accordance with section 91(2).

- (7) For the purposes of subsection (6) -
 - (a) a person is a third party if the company and that person are not related or inter-related; and
 - (b) proceedings by or against the company include any appeal from a decision made in proceedings by or against the company.

- (8) If the Court grants leave to a person under this section -
 - (a) the Court must also make an order stating who is liable for the remuneration and expenses of the person appointed; and
 - (b) the Court may vary the order at any time; and
 - (c) the persons who may be made liable under the order, or the order as varied, are -
 - (i) all or any of the parties to the proceedings or application; and
 - (ii) the company; and
 - (d) if the order, or the order as varied, makes 2 or more persons liable, the order may also determine the nature and extent of the liability of each of those persons; and

-
- (e) the person to whom leave has been granted is entitled, on giving reasonable notice to the company, to inspect any books of the company for any purpose connected with the legal proceedings.
- (9) The Court may at any time make any orders it considers appropriate about the costs of the following persons in relation to proceedings brought or intervened in with leave under this section, or in respect of an application for leave under this section -
- (a) the person who applied for or was granted leave;
 - (b) the company;
 - (c) any other party to the proceedings or application.
- (10) An order under this section may require security for costs, subject to section 160 (2).
- (11) At any time after the court has granted leave in terms of this section, a person contemplated in subsection (2) may apply to the Court for an order that they be substituted for the person to whom leave was originally granted, and the court may make the order applied for if it is satisfied that -
- (a) the applicant is acting in good faith; and
 - (b) it is appropriate to make the order in all the circumstances.
- (12) An order substituting one person for another has the effect that:
- (a) the grant of leave is taken to have been made in favour of the substituted person; and
 - (b) if the person originally granted leave has already brought the proceedings, the substituted person is taken to have brought those proceedings or to have made that intervention.
- (13) If the members of a company have ratified or approved any particular conduct of the company, -
- (a) the ratification or approval -

- (i) does not prevent a person from making a demand, applying for leave, or bringing or intervening in proceedings with leave under this section; and
 - (ii) does not prejudice the outcome of any application for leave, or proceedings brought or intervened in with leave under this section; but
 - (b) the court may take that ratification or approval into account in making any judgement or order.
- (14) Proceedings brought or intervened in with leave under this section must not be discontinued, compromised or settled without the leave of the Court.
- (15) For greater certainty, the right of a person in terms of this section to serve a demand on a company, or apply to a court for leave, may be exercised by that person directly, or by the Commission or Takeover Regulation Panel, or another person on behalf of that first person, in the manner permitted by section 159.

Part C – Voluntary resolution of disputes

167. Alternative dispute resolution

- (1) As an alternative to applying for relief to a court, or filing a complaint with the Commission or the Takeover Regulation Panel, in terms of Part D, a person who 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 to -
 - (a) The Companies Ombud, or
 - (b) an accredited entityfor resolution by mediation, conciliation or arbitration.
- (2) If an entity to whom a matter is referred for alternative dispute resolution concludes that either party to the conciliation, mediation or arbitration is not participating in that process in good faith, or that there is no reasonable probability of the parties resolving their dispute through that process, the entity must issue a certificate in the prescribed form stating that the process has failed.
- (3) An arbitration decision by the Companies Ombud with respect to a decision, notice or order by the Commission or the Takeover Regulation Panel, is binding on the Commission or Panel, as the case may be.

168. Dispute resolution may result in consent order

- (1) An entity that has resolved, or assisted parties in resolving, a dispute in terms of this Part may -
 - (a) record the resolution of that dispute in the form of an order, and
 - (b) if the parties to the dispute consent to that order, submit it to a court to be confirmed as a consent order, in terms of its Rules.
- (2) After hearing an application for a consent order, the court must –

- (a) make the order as agreed and proposed in the application;
 - (b) indicate any changes that must be made to the draft order before it will be made an order of the court; or
 - (c) refuse to make the order.
- (3) A consent order confirmed in terms of subsection (1) -
- (a) may include an award of damages; and
 - (b) does not preclude a person applying for an award of civil damages, unless the consent order includes an award of damages to that person.
- (4) A court hearing any proceedings concerning a dispute arising out of a consent order may order the proceedings closed to the public if it is the interest of the confidentiality of the parties to the consent order to do so.

Part D – Complaints to the Commission or the Takeover Regulation Panel

169. Initiating a complaint to Commission

- (1) Any person may file a complaint -
 - (a) with the Takeover Regulation Panel in respect of a matter with its jurisdiction;
or
 - (b) with the Commission in respect of any other provision of this Act

in the prescribed manner and form, alleging that a person has acted in a manner inconsistent with this Act, or that the complainant's rights under this Act, or under a company's Memorandum of Incorporation or rules, have been infringed.
- (2) A complaint may be initiated directly by the Commission, or the Takeover Regulation Panel, as the case may be, on its own motion or on the request of another regulatory authority.
- (3) The Minister may direct the Commission or the Takeover Regulation Panel, to investigate -
 - (a) an alleged contravention of this Act; or
 - (b) other specified circumstances,

as contemplated in section 191 (b).

170. Investigation by Commission or Takeover Regulation Panel

- (1) Upon initiating or receiving a complaint, or receiving a direction from the Minister, in terms of this Act, the Commission or Takeover Regulation Panel, as the case may be, may –
 - (a) except in the case of a direction from the Minister, issue a notice to the complainant in the prescribed form indicating that it will not investigate the

complaint, if the complaint appears to be frivolous or vexatious, or does not allege any facts that, if true, would constitute grounds for a remedy under this Act;

- (b) refer the complainant to the Companies Ombud, or another alternative dispute resolution agent, with a recommendation that the complainant seek to resolve the matter with the assistance of that agency; or
 - (c) direct an inspector or investigator to investigate the complaint as quickly as practicable, in any other case.
- (2) At any time during an investigation, the Commission or Takeover Regulation Panel, as the case may be, may -
- (a) designate one or more persons to assist the inspector conducting the investigation;
 - (b) submit a proposal to any company whose conduct is the subject of the investigation to jointly appoint an independent investigator -
 - (i) at the expense of the company; and
 - (ii) to report to both the Commission or Takeover Regulation Panel, as the case may be, and the company;
 - (c) apply to the Court for an order appointing an independent investigator –
 - (i) at the expense of the company; and
 - (ii) to report to both the Commission or Takeover Regulation Panel, as the case may be, and the company.
- (3) In conducting an investigation contemplated in this section an inspector or investigator may investigate any person -
- (a) named in the complaint, or related to a person named in the complaint; or

- (b) whom the inspector reasonably considers may have information relevant to the investigation of the complaint.

171. Outcome of investigation

- (1) After receiving the report of an inspector or independent investigator, the Commission or Takeover Regulation Panel, as the case may be, may -
 - (a) issue a notice of non-referral to the complainant in the prescribed form, with a statement advising the complainant of any rights they may have under this Act to seek a remedy in court;
 - (b) propose that the complainant and any affected person meet with the Commission or Takeover Regulation Panel, as the case may be, or with the Companies Ombud, with a view to resolving the matter by consent order;
 - (c) commence proceedings in a court in the name of the complainant, if the complainant -
 - (i) has a right in terms of this Act to apply to the court in respect of that matter; and
 - (ii) has consented to the Commission or Takeover Regulation Panel, as the case may be, doing so;
 - (d) refer the matter to the National Prosecuting Authority, or other regulatory authority concerned, if the Commission or Takeover Regulation Panel, as the case may be, alleges that a person has committed an offence in terms of this Act or any other legislation; or
 - (e) in the case of -
 - (i) the Commission, issue a compliance notice in terms of section 172; or
 - (ii) the Takeover Regulation Panel, refer the matter to the Takeover Special Committee, with a recommendation that it issue a compliance notice in terms of section 172.

- (2) The Commission or Takeover Regulation Panel, as the case may be –
- (a) in its sole discretion, may publish a report contemplated in subsection (1); and
 - (b) irrespective whether it publishes such a report, must deliver a copy of the report to –
 - (i) the complainant, or a regulatory authority that requested the initiation of the complaint;
 - (ii) any person who was a subject of the investigation;
 - (iii) any court, if requested or ordered to do so by the court; and
 - (iv) any holder of securities, or creditor, of a company that was the subject of the report, or any other person implicated in the report, upon payment of the prescribed fee.

172. Issuance of compliance notices

- (1) Subject to subsection (3), the Commission, or Takeover Special Committee, as the case may be, may issue a compliance notice in the prescribed form to any person whom the Commission or Committee, as the case may be, on reasonable grounds believes -
- (a) has contravened this Act; or
 - (b) assented to, was implicated in, or directly or indirectly benefited from, a contravention of this Act,
- unless the alleged contravention could otherwise be addressed in terms of this Act by an application to a court.
- (2) A compliance notice may require the person to whom it is addressed to –
- (a) cease, correct or reverse any action in contravention of this Act;
 - (b) take any action required by this Act;

-
- (c) restore assets or their value to a company or any other person;
 - (d) provide a community service; or
 - (e) take any other steps reasonably related to the contravention and designed to rectify its effect.
- (3) When issuing a notice in terms of subsection (1) to a regulated entity, the Commission or Takeover Special Committee, as the case may be, must send a copy of the notice to the regulatory authority that issued a licence to that regulated entity.
- (4) A compliance notice contemplated in subsection (1) -
- (a) must set out—
 - (i) the person or association to whom the notice applies;
 - (ii) the provision of this Act that has been contravened;
 - (iii) details of the nature and extent of the non-compliance;
 - (iv) any steps that are required to be taken and the period within which those steps must be taken; and
 - (v) any penalty that may be imposed in terms of this Act if those steps are not taken.
- (5) A compliance notice issued in terms of this section, or any part of it, remains in force until—
- (a) it is set aside by the Companies Ombud, or a court upon an appeal or review of the notice; or
 - (b) the Commission or Takeover Regulation Panel, as the case may be, issues a compliance certificate contemplated in subsection (5).
- (6) If the requirements of a compliance notice issued in terms of subsection (1) have been satisfied, the Commission or Takeover Regulation Panel, as the case may be, must issue a compliance certificate.

- (7) If a person to whom a compliance notice has been issued fails to comply with the notice, the Commission or Takeover Regulation Panel, as the case may be, may either –
- (a) apply to the Court for the imposition of an administrative fine; or
 - (b) refer the matter to the National Prosecuting Authority for prosecution as an offence in terms of section 215 (2)
- but may not do both in respect of any compliance notice.

173. Objection to notices

- (1) Any person issued with a compliance notice in terms of section 172 may apply to the Companies Ombud, in the prescribed manner and form, or the Court to review the notice within—
- (a) 15 business days after receiving that notice; or
 - (b) such longer period as may be allowed on good cause shown.
- (2) After considering any representations by the applicant and any other relevant information, the Companies Ombud, or the Court may confirm, modify or cancel all or part of a compliance notice.
- (3) If the Companies Ombud, or a court confirms or modifies all or part of a notice, the applicant must comply with that notice as confirmed or modified, within the time period specified in it, subject to subsection (4).
- (4) A decision by the Companies Ombud in terms of this section –
- (a) is binding on the Commission or the Panel, as the case may be; and
 - (b) may be referred to the court by the person named in the compliance notice, with an application to review or appeal the decision.

174. Consent orders

If a matter has been investigated in terms of this Part, and the Commission or Takeover Regulation Panel, as the case may be, and the respondent agree to the proposed terms of an appropriate order, the Commission or Takeover Regulation Panel, as the case may be, may refer the matter to a court to be confirmed as a consent order, in terms of its Rules, and section 168, read with the changes required by the context, applies to any such application.

175. Referral of complaints to court

- (1) If the Commission or Takeover Regulation Panel, as the case may be, issues a notice of non-referral in response to a complaint, the complainant concerned may apply to the Court for leave to refer the matter directly to the Court.
- (2) The Court -
 - (a) may grant leave contemplated in subsection (1) only if it appears that the applicant has no other remedy available in terms of this Act; and
 - (b) if it grants leave, and after conducting a hearing, determines that the respondent has contravened the Act, may -
 - (i) require the Commission or Takeover Special Committee, as the case may be, to issue a compliance notice sufficient to address that contravention; or
 - (ii) make any other order contemplated in this Act that is just and reasonable in the circumstances.

176. Administrative fines

- (1) A court, on application by the Commission or Takeovers Regulation Panel, may impose an administrative fine -
 - (a) only for failure to comply with a compliance notice, as contemplated in section 172 (7); and

- (b) not exceeding the greater of -
 - (i) 10% of the respondent's annual turnover during the preceding financial year; and
 - (ii) R 1 000 000.
- (2) When determining an appropriate fine, the Court must consider the following factors:
 - (a) the nature, duration, gravity and extent of the contravention;
 - (b) any loss or damage suffered as a result of the contravention;
 - (c) the behaviour of the respondent;
 - (d) the market circumstances in which the contravention took place;
 - (e) the level of profit derived from the contravention;
 - (f) the degree to which the respondent has co-operated with the Commission or Takeover Regulation Panel, as the case may be, and the Court; and
 - (g) whether the respondent has previously been found in contravention of this Act.
- (3) For the purpose of this section, the annual turnover of any person, is the amount determined in the prescribed manner.
- (4) A fine payable in terms of this section must be paid into the National Revenue Fund referred to in section 213 of the Constitution.

Part E – Powers to support investigations and inspections**177. Summons**

- (1) At any time during an investigation being conducted by it, the Commission, or the Takeover Regulation Panel, as the case may be, may -
 - (a) issue a summons to any person who is believed to be able to furnish any information on the subject of the investigation, or to have possession or control of any book, document or other object that has a bearing on that subject –
 - (i) to appear before the Commission or Panel, or before an inspector or independent investigator, to be questioned at a time and place specified in the summons; or
 - (ii) to deliver or produce to the Commission or Panel, or to an inspector or independent investigator, any book, document or other object referred to in paragraph (a) at a time and place specified in the summons.
- (2) A summons contemplated in subsection (1) –
 - (a) must be signed by the Commissioner or the Executive Director, as the case may be, or by an employee of the Commission or Panel designated by the Commissioner or the Executive Director, as the case may be; and
 - (b) may be served in the same manner as a subpoena in a criminal case issued by the magistrate's court.
- (3) An inspector or investigator before whom a person is summoned to appear, or to whom a person is required to deliver any book, document or other object, may –
 - (a) interrogate and administer an oath to, or accept an affirmation from, the person named in the summons; and
 - (b) retain any such book, document or other object for examination, for a period not exceeding two months, or such longer period as the court, on good cause shown, may allow.

- (4) A person questioned by the Commission, the Takeover Regulation Panel, or an inspector or independent investigator conducting an investigation must answer each question truthfully and to the best of that person's ability, but -
- (a) a person is not obliged to answer any question if the answer is self-incriminating; and
 - (b) the person asking the questions must inform that person of the right set out in paragraph (a).
- (5) No self-incriminating answer given or statement made by any person to the Commission, Takeover Regulation Panel, or an inspector or independent investigator exercising powers in terms of this Act will be admissible as evidence against that person in criminal proceedings against that person instituted in any court, except in criminal proceedings for perjury or in which that person is tried for an offence contemplated in section 216 (2)(e), and then only to the extent that the answer or statement is relevant to prove the offence charged.

178. Authority to enter and search under warrant

- (1) A judge of the High Court, a regional magistrate, or a magistrate may issue a warrant to enter and search any premises that are within the jurisdiction of that judge or magistrate, if, from information on oath or affirmation, there are reasonable grounds to believe that –
- (a) a contravention of this Act has taken place, is taking place, or is likely to take place on or in those premises; or
 - (b) that anything connected with an investigation in terms of this Act is in the possession of, or under the control of, a person who is on or in those premises.
- (2) A warrant to enter and search may be issued at any time and must specifically –
- (a) identify the premises that may be entered and searched; and

-
- (b) authorise an inspector or a police officer to enter and search the premises and to do anything listed in section 179.
- (3) A warrant to enter and search is valid until one of the following events occurs:
- (a) the warrant is executed;
 - (b) the warrant is cancelled by the person who issued it or, in that person's absence, by a person with similar authority;
 - (c) the purpose for issuing it has lapsed; or
 - (d) the expiry of one month after the date it was issued.
- (4) A warrant to enter and search may be executed only during the day, unless the judge, regional magistrate, or magistrate who issued it authorises that it may be executed at night at a time that is reasonable in the circumstances.
- (5) A person authorised by warrant issued in terms of subsection (2) may enter and search premises named in that warrant.
- (6) Immediately before commencing with the execution of a warrant, a person executing that warrant must either-
- (a) if the owner, or person in control, of the premises to be searched is present-
 - (i) provide identification to that person and explain to that person the authority by which the warrant is being executed; and
 - (ii) hand a copy of the warrant to that person or to the person named in it; or
 - (b) if none of those persons is present, affix a copy of the warrant to the premises in a prominent and visible place.

179. Powers to enter and search

- (1) A person who is authorised under section 178 to enter and search premises may –

- (a) enter upon or into those premises;
 - (b) search those premises;
 - (c) search any person on those premises if there are reasonable grounds for believing that the person has personal possession of an article or document that has a bearing on the investigation;
 - (d) examine any article or document that is on or in those premises that has a bearing on the investigation;
 - (e) request information about any article or document from the owner of, or person in control of, the premises or from any person who has control of the article or document, or from any other person who may have the information;
 - (f) take extracts from, or make copies of, any book or document that is on or in the premises that has a bearing on the investigation;
 - (g) use any computer system on the premises, or require assistance of any person on the premises to use that computer system, to –
 - (i) search any data contained in or available to that computer system;
 - (ii) reproduce any record from that data; and
 - (h) seize any output from that computer for examination and copying; and
 - (i) attach, and, if necessary, remove from the premises for examination and safekeeping, anything that has a bearing on the investigation.
- (2) Section 177 (5) applies equally to an answer given or statement made to an inspector or police officer in terms of this section.
- (3) An inspector authorised to conduct an entry and search in terms of section 178 may be accompanied and assisted by a police officer.

180. Conduct of entry and search

- (1) A person who enters and searches any premises under section 179 must conduct the entry and search with strict regard for decency and order, and with regard for each person's right to dignity, freedom, security and privacy.
- (2) During any search under section 179 (1)(c), only a female inspector or police officer may search a female person, and only a male inspector or police officer may search a male person.
- (3) A person who enters and searches premises under section 179, before questioning anyone -
 - (a) must advise that person of the right to be assisted at the time by an advocate or attorney; and
 - (b) allow that person to exercise that right.
- (4) A person who removes anything from premises being searched must-
 - (a) issue a receipt for it to the owner of, or person in control of, the premises; and
 - (b) return it as soon as practicable after achieving the purpose for which it was removed.
- (5) During a search, a person may refuse to permit the inspection or removal of an article or document on the grounds that it contains privileged information.
- (6) If the owner or person in control of an article or document refuses in terms of subsection (5) to give that article or document to the person conducting the search, the person conducting the search may request the registrar or sheriff of the High Court that has jurisdiction to attach and remove the article or document for safe custody until that court determines whether or not the information is privileged.
- (7) A police officer who is authorised to enter and search premises under section 178, or who is assisting an inspector who is authorised to enter and search premises under section 179 may overcome resistance to the entry and search by using as much force as is reasonably required, including breaking a door or window of the premises.

- (8) Before using force in terms of subsection (7), a police officer must audibly demand admission and must announce the purpose of the entry, unless it is reasonable to believe that doing so may induce someone to destroy or dispose of an article or document that is the object of the search.
- (9) The Commission may compensate anyone who suffers damage because of a forced entry during a search when no one responsible for the premises was present.

Part F – Companies Ombud Arbitration Procedures

181. Arbitration hearings before Ombud

- (1) The Companies Ombud –
 - (a) may conduct its arbitration proceedings contemplated in section 196 (b) expeditiously and informally; and
 - (b) must conduct those proceedings in accordance with the principles of natural justice.
- (2) If arbitration proceedings before the Ombud are open to the public, the presiding Ombud may exclude members of the public, or specific persons or categories of persons, from attending the proceedings-
 - (a) if evidence to be presented is confidential information, but only to the extent that the information cannot otherwise be protected;
 - (b) if the proper conduct of the hearing requires it; or
 - (c) for any other reason that would be justifiable in civil proceedings in a High Court.
- (3) At the conclusion of arbitration proceedings, the Ombud must issue a decision together with written reasons for its decision.

182. Right to participate in hearing

The following persons may participate in an arbitration hearing contemplated in this Part, in person or through a representative, and may put questions to witnesses and inspect any books, documents or items presented at the hearing:

- (a) the Commission or Takeover Regulation Panel;
- (b) the applicant or complainant; and

- (c) any other person who has a material interest in the hearing, unless that interest is adequately represented by another participant.

183. Powers of Ombud arbitration hearing

The Ombud may-

- (a) direct or summon any person to appear at any specified time and place;
- (b) question any person under oath or affirmation;
- (c) summon or order any person-
 - (i) to produce any book, document or item necessary for the purposes of the hearing; or
 - (ii) to perform any other act in relation to this Act; and
- (d) give directions prohibiting or restricting the publication of any evidence given to the Ombud.

184. Rules of procedure

Subject to the requirements of the applicable sections of this Act, the Companies Ombud may determine any matter of procedure for an arbitration hearing, with due regard to the circumstances of the case.

185. Witnesses

- (1) Every person giving evidence before the Companies Ombud at an arbitration hearing must answer any relevant question.
- (2) The law regarding a witness's privilege in a criminal case in a court of law applies equally to a person who provides information during an arbitration hearing.

- (3) The Ombud may order a person to answer any question, or to produce any article or document, even if it is self-incriminating to do so.
- (4) Section 177 (5) applies equally to evidence given by a witness in terms of this section.

Chapter 8 - Regulatory Agencies and Administration of the Act

Part A - Companies and Intellectual Property Commission

186. Establishment of Companies and Intellectual Property Commission

- (1) The Companies and Intellectual Property Commission is hereby established as an organ of state within the public administration, but as an institution outside the public service.
- (2) The Companies and Intellectual Property Commission —
 - (a) has jurisdiction throughout the Republic;
 - (b) must exercise the functions assigned to it in terms of this Act or any other law, or by the Minister, in –
 - (i) the most cost-efficient and effective manner; and
 - (ii) in accordance with the values and principles mentioned in section 195 of the Constitution.

187. Commission objectives

- (1) The objectives of the Companies and Intellectual Property Commission are -
 - (a) the efficient and effective registration of-
 - (i) corporate entities, in terms of this Act or any other relevant legislation; and
 - (ii) intellectual property rights, in terms of any relevant legislation;
 - (b) the maintenance of accurate, up-to-date and relevant information concerning companies, corporate entities and intellectual property rights, and the provision of that information to the public and to other organs of state;

-
- (c) the promotion of education and awareness of company and intellectual property laws, and related matters;
 - (d) the promotion of compliance with this Act, and any other applicable legislation; and
 - (e) the efficient, effective and widest possible enforcement of this Act, and any other legislation listed in Schedule 5.
- (2) To achieve its objectives, the Companies and Intellectual Property Commission may
- - (a) have regard to international developments in the field of company and intellectual property law; or
 - (b) consult any person, organisation or institution with regard to any matter.

188. Functions of Companies and Intellectual Property Commission

- (1) In this section, “this Act” includes any legislation listed in Schedule 5.
- (2) The Companies and Intellectual Property Commission must enforce this Act, other than with respect to matters within the jurisdiction of the Takeover Regulation Panel by, among other things, —
 - (a) promoting informal resolution of disputes arising in terms of this Act between companies on the one hand and a shareholder or director on the other, as contemplated in Part C of Chapter 7, without intervening in, or adjudicating any such dispute;
 - (b) monitoring proper compliance with this Act by companies and directors;
 - (c) receiving or initiating complaints concerning alleged contraventions of this Act, and investigating and evaluating those complaints;

- (d) receiving directions from the Minister in terms of section 191 (b), concerning investigations to be conducted into alleged contraventions of this Act, or other circumstances, and conducting any such investigation;
 - (e) ensuring that contraventions of this Act are promptly and properly resolved;
 - (f) negotiating and concluding undertakings and consent orders contemplated in section 174;
 - (g) issuing and enforcing compliance notices;
 - (h) referring alleged offences in terms of this Act to the National Prosecuting Authority; and
 - (i) referring matters to a court, and appearing before the court, as permitted or required by this Act.
- (3) The Commission must promote the reliability of financial reports by, among other things, -
- (a) investigating alleged non-compliance with financial reporting standards and recommending appropriate measures for rectification or restitution;
 - (b) appointing suitably qualified persons to -
 - (i) monitor the financial reports and accounting practices of public interest companies specified under paragraph (a) in order to detect any non-compliance with financial reporting standards that may prejudice users; and
 - (ii) where reasonable grounds exist for suspecting such non-compliance, refer the matter to the Commissioner as a complaint.
- (4) The Companies and Intellectual Property Commission is responsible to -
- (a) establish and maintain in the prescribed manner and form a Companies Register, and any other register contemplated in this Act, or in any other legislation that assigns a registry function to the Commission, and make the

-
- information in those registers efficiently and effectively available to the public, and to other organs of state;
- (b) register and de-register companies, directors, business names and intellectual property rights, in accordance with relevant legislation; and
 - (c) perform any related functions assigned to it by legislation, or reasonably necessary to carry out its assigned registry functions.
- (5) Subject to the provisions of subsection (6), any person, on payment of the prescribed fee, may-
- (a) inspect a document filed under this Act; or
 - (b) obtain a certificate from the Commissioner as to the contents or part of the contents of any document that -
 - (i) has been filed under this Act in respect of any company; and
 - (ii) is open to inspection; or
 - (c) obtain a copy of or extract from any document contemplated in paragraph (b);
 - (d) through any electronic medium approved by the Commission -
 - (i) inspect, or obtain a copy of or extract from, any document contemplated in paragraph (b) that has been converted into electronic format, or
 - (ii) obtain a certificate from the Commissioner as to the contents or part of the contents of any document in the registry in respect of a company.
- (6) The Commissioner -
- (a) must waive any prescribed registry fee contemplated in subsection (5) if the Commissioner is satisfied -
 - (i) that an inspection, certificate, copy or extract is required on behalf of a foreign government accredited to the Republic; and

- (ii) that no fees are payable in the foreign country concerned in respect of such inspection, certificate, copy or extract required on behalf of the Republic; and
 - (b) may waive any such fee if satisfied that any inspection, certificate, copy or extract is required for the purposes of research by or under the control of an institution for higher education.
- (7) Subsection (5) does not apply to any part of a filed document if that part has been determined to be confidential information in accordance with section 213.

189. Reporting, research, public information and relations with other regulators

- (1) In addition to any other advice or reporting requirements set out in this Part, the Companies and Intellectual Property Commission is responsible to—
 - (a) recommend to the Minister changes to bring the law and developments up to date and in line with international best practice and;
 - (b) report to the Minister annually on the volume and nature of registration and enforcement mechanisms in terms of this Act;
 - (c) enquire into and report to the Minister on any matter concerning the purposes of this Act, and advise the Minister in respect of any matter referred to it by the Minister.
- (2) The Companies and Intellectual Property Commission is responsible to increase knowledge of the nature and dynamics of companies and intellectual property law, and to promote public awareness of company and intellectual property law matters, by—
 - (a) implementing education and information measures to develop public awareness of the provisions of this Act, and in particular to advance the purposes of this Act;
 - (b) providing guidance to the public by—

-
- (i) issuing explanatory notices outlining its procedures, or its non-binding opinion on the interpretation of any provision of this Act; or
 - (ii) applying to a court for a declaratory order on the interpretation or application of any provision of this Act;
 - (c) conducting research relating to its mandate and activities and, from time to time, publishing the results of that research; and
 - (d) over time, reviewing legislation and public regulations, and reporting to the Minister concerning matters relating to companies and intellectual property law.
- (3) The Companies and Intellectual Property Commission may—
- (a) liaise with any regulatory authority on matters of common interest, and without limiting the generality of this paragraph, may exchange information with, and receive information from, any such authority pertaining to -
 - (i) matters of common interest; or
 - (ii) a specific complaint or investigation
 - (b) negotiate agreements with any regulatory authority, and exercise its authority through any such agreement, to—
 - (i) co-ordinate and harmonise the exercise of jurisdiction over company and intellectual property law matters within the relevant industry or sector; and
 - (ii) ensure the consistent application of the principles of this Act;
 - (c) participate in the proceedings of any regulatory authority; and
 - (d) advise, or receive advice from, any regulatory authority.

- (4) The Companies and Intellectual Property Commission may liaise with any foreign or international authorities having any objects similar to the functions and powers of the Companies and Intellectual Property Commission.
- (5) The Companies and Intellectual Property Commission may refer to –
 - (a) the Competition Commission any concerns regarding market share, or anti-competitive behaviour or conduct that may be prohibited in terms of the Competition Act, 1998 (Act No. 89 of 1998);
 - (b) the South Africa Revenue Service any concerns regarding behaviour or conduct that may be prohibited in terms of legislation within its jurisdiction;
 - (c) the Independent Regulatory Board for Auditors any concerns regarding behaviour or conduct that may be prohibited in terms of the Auditing Profession Act, 2005 (Act No. 26 of 2005) ; or
 - (d) any other regulatory authority any concerns regarding behaviour or conduct that may be prohibited in terms of legislation within the jurisdiction of that regulatory authority.

190. Appointment of the Commissioner

- (1) The Minister must appoint a suitably qualified and experienced person as Commissioner of the Companies and Intellectual Property Commission, who—
 - (a) is responsible for all matters pertaining to the functions of the Companies and Intellectual Property Commission; and
 - (b) holds office for an agreed term not exceeding five years.
- (2) A person may be re-appointed as Commissioner on the expiry of an agreed term of office.
- (3) The Commissioner is the accounting authority of the Commission, and as such, is responsible for -

-
- (a) All income and expenditure of the Commission;
 - (b) All revenue collected by the Commission;
 - (c) All assets, and the discharge of all liabilities, of the Commission; and
 - (d) The proper and diligent implementation of the Public Finance Management Act, 1999 (Act No. 1 of 1999), with respect to the Commission.
- (4) The Commissioner may -
- (a) assign management or other duties to employees of the Commission, who have appropriate skills to assist in the management, or control over any function of the Commission; and
 - (b) delegate, with or without conditions, any of the powers or functions of the Commissioner to any suitably qualified employee of the Commission, but any such delegation does not divest the Commissioner of responsibility for the exercise or any power or performance of any duty.

191. Minister may direct policy and require investigation

The Minister -

- (a) by notice in the Gazette, may issue policy directives to the Commission with respect to the application, administration and enforcement of this Act, but any such directive must be consistent with this Act; and
- (b) may at any time direct the Commission to investigate -
 - (i) an alleged contravention of this Act; or
 - (ii) any matter or circumstances with respect to the administration of one or more companies in terms of this Act, whether or not those circumstances appear at the time of the direction to amount to a possible contravention of this Act.

192. Establishment of Advisory Committees

- (1) The Minister may appoint one or more specialist committees to advise the Commissioner and the Minister on any matter relating to company law or policy and the management of the Commission's resources, including asset management, human resources and information technology, subject to subsection (2).
- (2) The specialist committee responsible for human resources must advise -
 - (a) the Minister on matters concerning the terms and conditions of employment of any class of employees in the management structure of the Commission, as agreed between the Minister and the Commissioner; and
 - (b) the Commissioner on matters concerning the terms and conditions of employment of all employees of the Commission, other than employees contemplated in paragraph (a).
- (3) The Minister may assign specific powers to the members of a specialist committee for the purposes of performing any function contemplated in subsection (1) or (2).
- (4) A specialist committee may determine its own procedures.

193. Constitution of Committees

- (1) A specialist committee established under section 192 must perform its functions impartially and without fear, favour or prejudice.
- (2) A specialist committee contemplated in section 192 must consist of -
 - (a) not more than eight persons who are independent from the Commission and are appointed by the Minister; and
 - (b) not more than two senior employees of the Commission designated by the Commissioner.
- (3) A person appointed as a member of a committee must -

- (a) be a fit and proper person;
 - (b) have appropriate expertise or experience; and
 - (c) have the ability to perform effectively as a member of that committee.
- (4) The members of a committee must not -
- (a) act in any way that is inconsistent with subsection (3) or expose themselves to any situation in which the risk of a conflict between their responsibilities and private interests may arise; or
 - (b) use their position or any information entrusted to them to enrich themselves or improperly benefit any other person.
- (5) A member ceases to be a member of a committee if
- (a) The person resigns from the committee;
 - (b) the Minister terminates the person's membership because the member no longer complies with subsection (3) or has contravened subsection (4); or
 - (c) the member's term has expired.
- (6) A member of a specialist committee who has a personal or financial interest in any matter on which such committee gives advice must disclose that interest and withdraw from the proceedings of the specialist committee when that matter is discussed.
- (7) The Commission must remunerate a member mentioned in section 193 (3) and compensate the member for expenses, as determined by the Minister.

Part B - The Companies Ombud

194. Establishment of Companies Ombud

- (1) There is hereby established a juristic person to be known as The Companies Ombud, which

- (a) has jurisdiction throughout the Republic;
 - (b) is independent, and subject only to the Constitution and the law;
 - (c) must exercise its functions in accordance with this Act; and
 - (d) must perform its functions impartially and without fear, favour, or prejudice, and in as transparent a manner as is appropriate having regard to the nature of the specific function.
- (2) Each organ of state must assist the Companies Ombud to maintain its independence and impartiality, and to perform its functions effectively.
- (3) In carrying out its functions, the Companies Ombud may—
- (a) have regard to international developments in the field of company law; or
 - (b) consult any person, organisation or institution with regard to any matter.

195. Appointment of the Companies Ombud

- (1) The Minister must appoint a person with suitable knowledge of company law matters to serve as the Companies Ombud for a term of 7 years.
- (2) A person may not be -
- (a) appointed as Companies Ombud unless the person satisfies the requirements of section 206; or
 - (b) re-appointed to a second terms as Companies Ombud.
- (3) Section 207 to 209 apply to the Companies Ombud.

196. Functions of the Companies Ombud

The Companies Ombud is responsible -

- (a) to assist in the resolution of disputes as contemplated in Part C of Chapter 7;
and
- (b) on application, to arbitrate in respect of orders, notices or decisions of the Commission or the Takeover Regulation Panel in terms of this Act, and make decisions that are binding on the Commission or Takeover Regulation Panel, as contemplated in section 167 (3).

Part C – Takeover Regulation Panel

197. Establishment of Takeover Regulation Panel

- (1) There is hereby established a juristic person to be known as The Takeover Regulation Panel, which
 - (a) has jurisdiction throughout the Republic;
 - (b) is independent, and subject only to the Constitution and the law;
 - (c) must exercise its functions in accordance with this Act; and
 - (d) must perform its functions impartially and without fear, favour, or prejudice, and in as transparent a manner as is appropriate having regard to the nature of the specific function.
- (2) Each organ of state must assist the Takeover Regulation Panel to maintain its independence and impartiality, and to perform its functions effectively.
- (3) In carrying out its functions, the Takeover Regulation Panel may—
 - (a) have regard to international developments in the field of company law; or
 - (b) consult any person, organisation or institution with regard to any matter.

198. Composition of the Takeover Regulation Panel

- (1) The Takeover Regulation Panel comprises -
 - (a) the Commissioner, or a person delegated by the Commissioner;
 - (b) the Commissioner of the Competition Commission established by section 19 of the Competition Act, 1998 (Act No. 89 of 1998), or a person delegated by that Commissioner;

-
- (c) three persons designated by each exchange named for the purpose by the Minister by notice in the Gazette; and
 - (d) not more than 13 other persons appointed by the Minister on the basis of their knowledge and experience in the regulation of securities and takeovers.
- (2) At any time, The Takeover Regulation Panel may co-opt additional members for a particular purpose and a limited period.
- (3) Persons designated, appointed or co-opted to be members of The Takeover Regulation Panel -
- (a) must have the qualifications, and satisfy the further requirements set out in section 206; and
 - (b) are subject to the provisions of sections 207 to 209.
- (4) Members of The Takeover Regulation Panel -
- (a) contemplated in subsection (1) (a) or (b) serve so long as they hold the relevant office referred to in that subsection;
 - (b) designated in terms of subsection (1) (c), serve for a term of three years unless replaced earlier by the designating entity;
 - (c) appointed in terms of subsection (1) (d), serve for a term of three years; or
 - (d) co-opted in terms of subsection (2), serve until the completion of the purpose for which they were co-opted.
- (5) A person whose term of service as a member of The Takeover Regulation Panel has expired may be designated, appointed or co-opted to serve for a further term, or terms without limit, subject to the requirements of subsection (3) and section 206.

199. Chairperson and Deputy Chairpersons

- (1) The Minister may designate -

- (a) one of the members of the Takeover Regulation Panel to be the Chairperson of the Panel; and
 - (b) two of its members to be deputy chairpersons of the Panel.
- (2) Either deputy chairperson may exercise and perform the powers and duties of the chairperson whenever the chairperson is unable to do so or while the office of chairperson is vacant.

200. Meetings of the Takeover Regulation Panel

- (1) The Chairperson of the Takeover Regulation Panel -
- (a) may determine the date, time and place for meetings of the Panel; and
 - (b) presides at meetings of the Panel, if present.
- (2) In the absence of the Chairperson, and both deputy chairpersons, at a meeting of the Panel the members present may choose one of their number to preside at the meeting.
- (3) The quorum for a meeting of the Takeover Regulation Panel may be determined by the Takeover Regulations.
- (4) The member presiding at a meeting of the Takeover Regulation Panel may determine the procedure at the meeting.
- (5) The decision of a majority of the members of The Takeover Regulation Panel present at any meeting at which there is a quorum is the decision of the Panel.
- (6) If there is an equality of votes on any question before a meeting of the Takeover Regulation Panel, the member presiding at the meeting may cast a second, deciding vote.
- (7) Proceedings of The Takeover Regulation Panel are valid despite any vacancy that existed on the Panel at the time, or the absence of any member during any part of those proceedings.

- (8) The Takeover Regulation Panel may delegate any of its powers to the chairperson, any member of the Executive or any committee that the Panel may establish.

201. Executive of the Takeover Regulation Panel

- (1) The Takeover Regulation Panel may appoint -

- (a) an Executive Director; and
- (b) a Deputy Executive Director.

on terms and conditions determined by the Panel, subject to the requirements of the Public Service Administration Act.

- (2) The Executive Director may -

- (a) perform any function of the Takeover Regulation Panel, subject to -
 - (i) this Act and the Takeover Regulations; and
 - (ii) the policies and direction of the Panel; and

- (b) appoint other officers and employees as are required for the proper performance of functions of the Takeover Regulation Panel.

- (3) The deputy Executive Director may perform any function of the Executive Director when the office of the Executive Director is vacant, or when the Executive Director is absent or is for any reason unable to perform functions of that office.

202. Functions of the Takeover Regulation Panel

- (1) The Takeovers Regulation Panel is responsible to -

- (a) regulate affected transactions and offers to the extent provided for, and in accordance with, Chapter 5 and the Takeover Regulations;

- (b) investigate complaints with respect to affected transactions and offers, in accordance with Part D of Chapter 7; and
 - (c) consult with the Minister in respect of additions, deletions or amendments to the Takeover Regulations.
- (2) The Takeovers Regulation Panel may -
 - (a) consult with any person at the request of any interested party with a view to advising on the application of a provision of Chapter 5, or the Takeover Regulations;
 - (b) issue information on current policy in regard to proposed transactions contemplated in Chapter 5, to serve as guidelines for the benefit of persons concerned in such proposed transactions;
 - (c) receive and deal with representations relating to any matter with which it may deal in terms of this Act; and
 - (d) perform any other function assigned to it by legislation.
- (3) In exercising its powers and performing its functions, the Panel has no authority to judge the commercial advantages or disadvantages of any transaction or proposed transaction.

203. The Takeover Special Committee

- (1) There is hereby established a committee of the Takeover Regulation Panel, to be known as The Takeover Special Committee.
- (2) The Takeover Special Committee consists of -
 - (a) a Chairperson, who must be an attorney or advocate whether practicing or not; and
 - (b) at least two other persons -

each of whom must be designated from time to time by The Takeover Regulation Panel from among those of its members appointed by the Minister.

- (3) The Takeover Special Committee may hear and decide -
 - (a) each referral made to it by the panel in terms of section 172; and
 - (b) any other matter that the Executive refers to it.
- (4) Subject to this Act and the Takeover Regulations, the chairperson of The Takeover Special Committee may determine the procedure relating to any hearing of any matter referred to the committee.
- (5) The decision of a majority of the members of The Takeover Special Committee is the decision of The Takeover Special Committee and in the case of an equality of votes, the chairperson has a second, deciding vote.

Part C – Financial Reporting Standards Council

204. Composition of Council

- (1) The Minister must establish a committee, to be known as the Financial Reporting Standards Council consisting of -
 - (a) four persons, each of whom is registered and practicing as an auditor;
 - (b) two persons each of whom is responsible for preparing financial statements on behalf of public interest companies;
 - (c) one person responsible for preparing financial statements for limited interest companies;
 - (d) four users of financial statements;
 - (e) two persons knowledgeable in company law;
 - (f) one person nominated by the executive officer of the Financial Services Board; and
 - (g) one person each nominated by every exchange that imposes adherence to financial reporting standards as a listing requirementeach of whom may be appointed by the Minister, to serve for a term of three years.
- (2) The Minister must select candidates –
 - (a) with the qualifications, knowledge and experience necessary to further the objective of the Council; and
 - (b) appoint the chairperson and deputy chairperson of the Council.
- (3) A person may be re-appointed to the Council, subject to section 206.
- (4) Persons appointed as members of the Council -

- (a) must satisfy the requirements of section 206; and
- (b) are subject to sections 207 to 209.

205. Functions of Financial Reporting Standards Council

- (1) The Financial Reporting Standards Council is responsible to consult with the Minister on the making of regulations establishing financial reporting standards, as contemplated in section 96 (7) to (9).
- (2) The Minister may from time to time, after consultation with the Financial Services Board, specify, by proclamation in the *Gazette*, types or categories of public interest companies to be monitored in terms of section 188 (3)(b).

Part E – Administrative Provisions Applicable to Agencies**206. Qualifications for membership**

- (1) To be eligible for appointment, designation or co-option as The Companies Ombud or a member of the Takeover Regulation Panel, or the Financial Reporting Standards Council, and to continue to hold that office, a person must, in addition to satisfying any other specific requirements set out in this Act—
 - (a) not be subject to any disqualification set out in subsection (2); and
 - (b) have submitted to the Minister a written declaration stating that the person—
 - (i) is not disqualified in terms of subsection (2); and
 - (ii) does not have any interests referred to in subsection (2)(b).
- (2) A person may not become, or continue to be, The Companies Ombud, or a member of the Takeover Regulation Panel, or the Financial Reporting Standards Council, if that person—
 - (a) is an office-bearer of any party, movement, organisation or body of a partisan political nature;
 - (b) personally or through a spouse, partner or associate has or acquires an interest in a business or enterprise, which may conflict or interfere with the proper performance of the duties of a member of the Ombud, Panel, or Committee;
 - (c) is disqualified in terms of section 89 from serving as a director of a company;
 - (d) is subject to an order of a competent court holding that person to be mentally unfit or disordered; or
 - (e) has been convicted of an offence, other than those contemplated in section 89 (5), committed after the Constitution of the Republic of South Africa, 1993 (Act No. 199 of 1993), took effect, and sentenced to imprisonment without the option of a fine.

- (3) For the purpose of subsection (2)(b), a financial interest does not include an indirect interest held in any fund or investment if the person contemplated in that subsection has no control over the investment decisions of that fund or investment.

207. Conflicting interests of agency members

- (1) The Companies Ombud or a member of the Takeover Regulation Panel, or the Financial Reporting Standards Council, must promptly inform the Minister in writing after acquiring an interest that is, or is likely to become, an interest contemplated in section 206 (2)(b).
- (2) The Companies Ombud or a member of the Takeover Regulation Panel, or the Financial Reporting Standards Council, must not—
- (a) engage in any activity that may undermine the integrity of the Companies Ombud, the Takeovers Regulation Panel or the Financial Reporting Standards Council, as the case may be;
 - (b) attend, participate in or influence the proceedings during a meeting of The Companies Ombud, the Takeover Regulation Panel, or the Financial Reporting Standards Council, as the case may be if, in relation to the matter being considered, that member has an interest—
 - (i) contemplated in section 206 (2)(b); or
 - (ii) that precludes that person from performing the functions of The Companies Ombud or a member of the Takeover Regulation Panel, or the Financial Reporting Standards Council, in a fair, unbiased and proper manner;
 - (c) vote at any meeting of the Ombud, Panel or Council, as the case may be, in connection with a matter contemplated in paragraph (b);
 - (d) make private use of, or profit from, any confidential information obtained as a result of performing that person's functions as The Companies Ombud or a

member of the Takeover Regulation Panel, or the Financial Reporting Standards Council; or

- (e) divulge any information referred to in paragraph (d) to any third party, except as required as part of that person's official functions as The Companies Ombud or a member of the Takeover Regulation Panel, or the Financial Reporting Standards Council.
- (3) If, at any time, it appears to The Companies Ombud or a member of the Takeover Regulation Panel, or the Financial Reporting Standards Council that a matter being considered at a meeting concerns an interest of that member referred to in subsection (2)(b), that member must—
- (a) immediately and fully disclose the nature of that interest to the meeting; and
 - (b) withdraw from the meeting to allow the remaining members to discuss the matter and determine whether the member should be prohibited from participating in any further proceedings concerning that matter.
- (4) The disclosure by a person in terms of subsection (3)(a), and the decision by The Companies Ombud, the Takeover Regulation Panel, or the Financial Reporting Standards Council in terms of subsection (3)(b), must be expressly recorded in the minutes of the meeting in question.
- (5) Proceedings of The Companies Ombud, the Takeover Regulation Panel, or the Financial Reporting Standards Council, and any decisions taken by a majority of the members present and entitled to participate in those decisions, are valid despite the fact that—
- (a) a member failed to disclose an interest as required by subsection (3); or
 - (b) a member who had such an interest attended those proceedings, participated in them in any way, or directly or indirectly influenced those proceedings.

208. Resignation, removal from office and vacancies

- (1) The Companies Ombud, or a member of the Financial Reporting Standards Council, may resign by giving to the Minister—
 - (a) one month written notice; or
 - (b) less than one month written notice, with the approval of the Minister.
- (2) A member of the Takeover Regulation Panel may resign by giving written notice jointly to the Minister and the relevant entity responsible for the designation of that member, if any.
- (3) The Minister, after taking the steps required by subsection (5), may remove The Companies Ombud or a member of the Takeover Regulation Panel or the Financial Reporting Standards Council only if that member has—
 - (a) become disqualified in terms of section 206 (2);
 - (b) acted contrary to section 207 (2);
 - (c) failed to disclose an interest or withdraw from a meeting as required by section 207 (3); or
 - (d) neglected to properly perform the functions of their office.
- (4) Before removing a person from office in terms of subsection (3), the Minister must afford the person an opportunity to state a case in defence of their position.

209. Conflicting interests

- (1) The Commissioner, and each other employee of the Companies and Intellectual Property Commission, and the Executive Director, and each other employee of the Takeover Regulation Panel, must not—
 - (a) engage in any activity that may undermine the integrity of the Commission or Panel, as the case may be;

- (b) participate in any investigation, hearing, or decision concerning a matter in respect of which that person has a personal financial interest;
- (c) make private use of, or profit from, any confidential information obtained as a result of performing that person's official functions in the Commission or panel; or
- (d) divulge any information referred to in paragraph (c) to any third party, except as required as part of that person's official functions within the Commission or panel.

210. Appointment of inspectors and investigators

- (1) The Commissioner and the Executive Director —
 - (a) may each appoint any suitable employee of the Commission or Takeover Regulation Panel, as the case may be, or any other suitable person employed by the State, as an inspector; and
 - (b) must issue each inspector with a certificate in the prescribed form stating that the person has been appointed as an inspector in terms of this Act.
- (2) When an inspector performs any function of an inspector in terms of this Act, the inspector must—
 - (a) must be in possession of a certificate of appointment issued to that inspector in terms of subsection (1); and
 - (b) must show that certificate to any person who—
 - (i) is affected by the inspector's actions in terms of this Act; and
 - (ii) requests to see the certificate; and
 - (c) has the powers -
 - (i) set out in Part E of Chapter 7; and

-
- (ii) of a peace officer as defined in section 1 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), and may exercise the powers conferred on a peace officer by law.
- (3) The Commissioner and Executive Director may each appoint or contract with any suitably qualified person to assist the Commission, or the Panel, as the case may be, in carrying out its functions, including, but not limited to, conducting research, audits, inquiries or other investigations on behalf of the Commission or Panel, as the case may be, but a person appointed in terms of this subsection (3) is not an inspector within the meaning of this Act.
 - (4) The Commissioner or Executive Director, as the case may be, in consultation with the Minister and with the concurrence of the Minister of Finance, may determine the remuneration, allowances, benefits, and conditions of appointment of each employee of the Commission or Panel, as the case may be.
 - (5) The Minister, with the concurrence of the Minister of Finance, may determine the remuneration to be paid to a person appointed in terms of this section, if that person is not in the full-time service of the Commission or Panel, as the case may be.

211. Finances

- (1) The Commission, The Companies Ombud and the Takeovers Regulation Panel, are each financed from -
 - (a) money appropriated by Parliament;
 - (b) any fees payable in terms of this Act;
 - (c) income derived from their respective investment and deposit of surplus money in terms of subsection (2); and
 - (d) other money accruing from any source.
- (2) The financial year of each of the Commission, The Companies Ombud, and the Takeovers Regulation Panel is the period of 12 months beginning 1 April each year,

and ending on the following 31 March, except that, in each case, the first financial year -

- (a) begins on the date that the section of this Act establishing that entity came into operation; and
- (b) ends on the next following 31 March.

212. Reviews and reports to Minister

- (1) At least once every five years, the Minister must conduct an audit review of the exercise of the functions and powers of the Commission, The Companies Ombud, the Takeovers Regulation Panel, and the Financial Reporting Standards Council.
- (2) In addition to any other reporting requirement set out in this Act, the Commission, Ombud and Panel must each report to the Minister at least once every year on its activities, as required by the Public Finance Management Act, 1999 (Act No. 1 of 1999).
- (3) As soon as practicable after receiving a report of a review contemplated in subsection (1), or after receiving a report contemplated in subsection (2), the Minister must table it in Parliament.

213. Confidential information

- (1) When submitting information to the Commission, The Takeover Regulation Panel, The Companies Ombud, or an inspector or investigator appointed in terms of this Act, a person may claim that all or part of that information is confidential.
- (2) Any claim contemplated in subsection (1) must be supported by a written statement explaining why the information is confidential.
- (3) The Commission, Takeover Regulation Panel, Companies Ombud, inspector or investigator, as the case may be, must -
 - (a) consider a claim made in terms of subsection (1); and

- (b) immediately make a decision on the confidentiality of the information and access to that information, which decision may or may not be supported by reasons.
- (4) Section 173, read with the changes required by the context, applies to a decision in terms of subsection (3).
- (5) When making any ruling, decision or order in terms of this Act, the Commission, The Takeover Regulation Panel, or The Companies Ombud may take confidential information into account.
- (6) If any reasons for a decision in terms of this Act would reveal any confidential information, the Commission, The Takeover Regulation Panel, The Companies Ombud, as the case may be, must provide a copy of the proposed reasons to the party claiming confidentiality at least 5 business days before publishing those reasons.
- (7) Within 5 business days after receiving a copy of proposed reasons in terms of subsection (6), a party may apply to the court for an appropriate order to protect the confidentiality of the relevant information.

Chapter 9 - Offences, Miscellaneous Matters and General Provisions

Part A – Offences and Penalties

214. Breach of confidence

- (1) It is an offence to disclose any confidential information concerning the affairs of any person obtained –
 - (a) in carrying out any function in terms of this Act; or
 - (b) as a result of initiating a complaint, or participating in any proceedings in terms of this Act.
- (2) Subsection (1) does not apply to information disclosed -
 - (a) for the purpose of the proper administration or enforcement of this Act;
 - (b) for the purpose of the administration of justice; or
 - (c) at the request of the Commission, the Takeover Regulation Panel, an inspector or investigator, the Companies Ombud, or a court entitled to receive the information; or
 - (d) when required to do so by any court or under any law.

215. Reckless conduct and non-compliance

- (1) A person is guilty of an offence if the person –
 - (a) signed, or consented to the publication of a -
 - (i) financial statement that was false or misleading in a material respect; or
 - (ii) a prospectus, or a written statement contemplated in section 66, that contained an “untrue statement” as defined and described in section 60

knowing that, or with reckless disregard as to whether, the statement was false, misleading or untrue, as the case may be; or

- (b) was knowingly a party to -
 - (i) the reckless carrying on of a business; or
 - (ii) an act or omission by a business calculated to defraud a creditor, employee or security holder of the company, or with another fraudulent purpose.
- (2) It is an offence to fail to satisfy a compliance notice issued in terms of section 172, but no person may be prosecuted for such an offence in respect of a particular compliance notice if the Commission or Takeover Regulation Panel, as the case may be, has applied to a court in terms of section 172 (7) (a) for the imposition of an administrative fine in respect of that person's failure to comply with that notice.

216. Hindering administration of Act

- (1) It is an offence to hinder, oppose, obstruct or unduly influence the Commission, the Takeover Regulation Panel, the Companies Ombud, an inspector or investigator, or a court when any of them is exercising a power or performing a duty delegated, conferred or imposed by this Act.
- (2) A person commits an offence who -
 - (a) does anything calculated to improperly influence -
 - (i) the Commission, the Takeover Regulation Panel, the Companies Ombud, an inspector or investigator concerning any matter connected with an investigation; or
 - (ii) the Companies Ombud in any matter before it;
 - (b) anticipates any findings of the Commission, the Takeover Regulation Panel, the Companies Ombud, an inspector or investigator in a way that is calculated to improperly influence the proceedings or findings;

- (c) does anything in connection with an investigation or hearing that would have been contempt of court if the proceedings had occurred in a court of law;
- (d) refuses to attend when summoned, or after attending, refuses to answer any question or produce any document as required by the summons;
- (e) knowingly provides false information to the Commission, the Takeover Regulation Panel, the Companies Ombud, an inspector or investigator;
- (f) improperly frustrates or impedes the execution of a warrant to enter and search, or attempts to do so;
- (g) acts contrary to or in excess of a warrant to enter and search;
- (h) without authority, but claiming to have authority in terms of section 178 -
 - (i) enters or searches premises; or
 - (ii) attaches or removes an article or document.

217. Penalties

Any person convicted of an offence in terms of this Act, is liable -

- (a) in the case of a contravention of section 214 (1), or 215 (1), to a fine or to imprisonment for a period not exceeding 10 years, or to both a fine and imprisonment; or
- (b) in any other case, to a fine or to imprisonment for a period not exceeding 12 months, or to both a fine and imprisonment.

218. Magistrate's Court jurisdiction to impose penalties

Despite anything to the contrary contained in any other law, a Magistrate's Court has jurisdiction to impose any penalty provided for in section 217.

Part B – Miscellaneous matters

219. Civil actions

- (1) Nothing in this Act renders void an agreement, resolution or provision of an agreement, resolution, Memorandum of Incorporation or rules of a company that is prohibited, void, voidable or may be declared unlawful in terms of this Act, unless a court declares that agreement, resolution or provision to be void.
- (2) Any person who contravenes any provision of this Act is liable to any other person for any loss or damage suffered by that person as a result of that contravention.
- (3) The provisions of this section do not affect the right to any remedy that a person may otherwise have.

220. Limited time for initiating complaints

- (1) A complaint in terms of this Act may not be initiated by, or made to, the Commission or the Takeover Regulation Panel, more than three years after –
 - (a) the act or omission that is the cause of the complaint; or
 - (b) in the case of a course of conduct or continuing practice, the date that the conduct or practice ceased.
- (2) A complaint may not be prosecuted in terms of this Act against any person that is, or has been, a respondent in proceedings under another section of this Act relating substantially to the same conduct.

221. Serving documents

Unless otherwise provided in this Act, a notice, order or other document that, in terms of this Act, must be served on a person, will have been properly served when it has been either -

- (a) delivered to that person; or
- (b) sent by registered mail to that person's last known address.

222. Proof of facts

- (1) In any proceedings in terms of this Act, if it is proved that a false statement, entry or record or false information appears in or on a book, document, plan, drawing or computer storage medium, the person who kept that item must be presumed to have made the statement, entry, record or information, unless the contrary is proved; and
- (2) A statement, entry or record, or information, in or on any book, document, plan, drawing or computer storage medium is admissible in evidence as an admission of the facts in or on it by the person who appears to have made, entered, recorded or stored it unless it is proved that that person did not make, enter, record or store it.

223. Substantial Compliance

- (1) If a provision of this Act requires a document to be signed or initialled -
 - (a) by or on behalf of a person, that signing or initialling may be effected by use of an electronic signature, or an advanced electronic signature, as defined in the Electronic Communications and Transactions Act, 2002 (Act No. 25 of 2002); or
 - (b) by two or more persons, it is sufficient if -
 - (i) all of those persons sign a single original of the document, in person or as contemplated in paragraph (a); or
 - (ii) each of those persons signs a separate duplicate original of the document, in person or as contemplated in paragraph (a), and in such a case, the several signed duplicate originals, when combined, constitute the entire document.

-
- (2) 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 this Act.
- (3) If a form of document is prescribed by or in terms of this Act for any purpose -
- (a) it is sufficient if the person required to prepare or complete such a document does so in a form that satisfies all of the substantive requirements of the prescribed form; and
 - (b) any deviation from the design or content of the prescribed form does not invalidate the action taken by the person preparing or completing that document, unless the deviation –
 - (i) negatively affects the substance of the document; or
 - (ii) is calculated to mislead.
- (4) If a manner of delivery of a notice or document is prescribed by or in terms of this Act for any purpose -
- (a) it is sufficient if the person required to deliver such a document or notice does so in a manner that satisfies all of the substantive requirements as prescribed; and
 - (b) any deviation from the prescribed manner does not invalidate the action taken by the person delivering that document or notice, unless the deviation –
 - (i) reduces the probability that the intended recipient will receive the document or notice; or
 - (ii) is calculated to mislead.

224. State Liability

The State, the Commission, the Tribunal, the Commissioner, an inspector, or any state officer or similar person having duties to perform under this Act, is not liable for any loss

sustained by or damage caused to any person as a result of any *bona fide* act or omission relating to the performance of any duty under this Act, unless gross negligence is proved.

Part C – Regulations, Consequential matters and Commencement

225. Regulations

- (1) The Minister -
 - (a) may make any regulations expressly authorised or contemplated elsewhere in this Act, in accordance with subsection (2);
 - (b) in consultation with the Commission, and by notice in the Gazette, may make regulations for matters relating to the functions of the Commission, including -
 - (i) forms;
 - (ii) time periods;
 - (iii) information required;
 - (iv) additional definitions applicable to those regulations;
 - (v) filing fees;
 - (vi) access to confidential information; and
 - (vii) manner and form of participation in Commission procedures;
 - (c) in consultation with the Chairperson of the Takeovers Regulation Panel, and by notice in the Gazette, may make –
 - (i) regulations for matters relating to the functions of the panel, respectively; and
 - (ii) rules for the conduct of matters before the Panel; and
 - (d) may make regulations regarding –
 - (i) any forms required to be used for the purposes of this Act; and

- (ii) in general, any incidental matter that may be considered necessary or expedient to prescribe in order to achieve the objects of this Act.
- (2) Before making any regulations in terms of subsection (1)(a) or (c), the Minister must publish the proposed regulations for public comment.
- (3) A regulation in terms of this Act must be made by notice in the Gazette.

226. Consequential amendments, repeal of laws and transitional arrangements

- (1) Subject to subsection (3), the following laws are hereby repealed:
 - (a) The Companies Act, 1973 (Act No.61 of 1973).
 - (b) The Close Corporations Act, 1984 (Act No. 69 of 1984), subject to Item 2 of Schedule 6.
- (2) The laws referred to in Schedule 4 are hereby amended in the manner set out in that Schedule.
- (3) The repeal of the laws specified in subsection (1) does not affect the transitional arrangements, which are set out in Schedule 6.

227. Short title and commencement

This Act is called the Companies Act, 2007, and comes into operation on a date fixed by the President by proclamation in the Gazette, which may not be earlier than one year following the date on which the President assented to this Act.

SCHEDULE 1

Forms of Memorandum of Incorporation

The standard optional forms of Memorandum of Incorporation for profit, and not for profit, companies respectively will be drafted after the public consultation period.

SCHEDULE 2

Members and Directors of Not For Profit Companies

1. Incorporators of a not for profit company

The incorporators of a not for profit company are its -

- (a) first directors, and
- (b) its first members, if its Memorandum of Incorporation provides for it to have members.

2. Members

- (1) A not for profit company is not required to have members, but its Memorandum of Incorporation may provide for it to do so.
- (2) If the Memorandum of Incorporation of a not for profit company provides for the company to have members, it -
 - (a) must not restrict or regulate, or provide for any restriction or regulation of, that membership in any manner that amounts to unfair discrimination in terms of section 23 of the Constitution;
 - (b) must not presume the membership of any person, deem a person to be a member, or provide for the automatic or ex officio membership of any person, on any basis other than life-time membership awarded to a person for service to the company or to the public benefit purposes set out in the company's Memorandum of Incorporation;
 - (c) may allow for membership to be held by juristic persons, including but not limited to, for profit companies;

-
- (d) may provide for no more than two classes of members, that is voting and non-voting members, respectively; and
 - (e) must set out –
 - (i) the qualifications for membership;
 - (ii) the process for applying for membership;
 - (iii) any initial or periodic cost of membership in any class;
 - (iv) the rights and obligations, if any, of membership in any class; and
 - (v) the grounds on which membership may, or will, be suspended or lost.
 - (3) Each voting member of a not for profit company has at least one vote.
 - (4) The vote of each member of a not for profit company is of equal value to the vote of each other voting member on any matter to be determined by vote of the members, except to the extent that the company's Memorandum of Incorporation provides otherwise.
 - (5) If a not for profit company has members, the requirement in section 26(2)(a) to maintain a securities register must be read as requiring the company to maintain a membership register.

3. Directors

- (1) If a not for profit company has members, the Memorandum of Incorporation must –
 - (a) set out the basis on which the members choose the directors of the company; and
 - (b) if any directors are to be elected by the voting members, provide for the election each year of at least one-third of those directors.
- (2) If a not for profit company has no members, the Memorandum of Incorporation must set out the basis on which directors are to be appointed by its board, or other persons.

SCHEDULE 2 : Members and Directors of Not For Profit Companies

Section 3

SCHEDULE 3

Public Offerings of Shares and other Securities

1. Interpretation

For the purposes of this Schedule, unless the context otherwise indicates-

- (a) in respect of any property hired or proposed to be hired by a company –
 - (i) “**vendor**” includes the lessor; and
 - (ii) “**purchase money**” include the consideration for the lease;
- (b) “**mining company**” includes a company that carries on or proposes to carry on mining, development or prospecting for or exploitation of any mineral resources, or that acquires or proposes to acquire any mineral rights thereto or options thereon;
- (c) “**property**” includes movable and immovable property and, without limiting the generality thereof, shares in any other body corporate but does not include any property if its purchase price is not material; and
- (d) “**vendor**” includes any person who, directly or indirectly, sells or otherwise disposes of any property to a company.

2. Rights offers

- (1) A company desiring to issue a letter of allocation must file -
 - (a) a copy of -
 - (i) the letter of allocation for registration;
 - (ii) any document required in the circumstances by section 64 (6);

each certified by not less than two directors of the company, as a true copy of the original approved by the relevant exchange;

(b) any contract referred to in a document contemplated in paragraph (a), with a translation in an official language, if the contract is not in an official language; and

(c) the prescribed fee.

(2) Upon registering the documents referred to in sub item (1), the Commissioner must give notice of the registration to the company concerned or the person who submitted them on behalf of the company.

(3) Every letter of allocation that is issued must-

(a) state on the face of it that a copy of it, together with copies of all other documents referred to in sub item (1), have been registered as required by this Item; and

(b) be accompanied by a copy of every document referred to in sub item (1).

(4) Sub item (3)(b) does not apply to any letter of allocation issued in connection with a renunciation of part of the rights to subscribe in terms of the rights offer.

(5) The provisions of sections 60 (5) and (6), 64, 67, 69 and 70, and of Items 5 and 6, each read with the changes required by the context, apply to a rights offer and all documents issued in connection with it.

3. General requirements for a prospectus

(1) Every prospectus issued must -

(a) state on the face of it that a copy thereof has been registered as required by this Act; and

-
- (b) specify or refer to statements included therein specifying any documents required by to be endorsed on or attached to or to accompany a prospectus when filed.
- (2) The information required to be stated in a prospectus must -
 - (a) be set out in print or type;
 - (b) be not be less conspicuous than that in which any additional matter is printed or typed; and
 - (c) be set out in separate paragraphs under the headings included in this Part B of this Schedule.
 - (3) As far as possible the general matter of a prospectus must be presented in narrative form and statistical matter in tabular form.

4. Contracts and translations thereof to be attached to prospectus

- (1) A prospectus must not be registered unless there is attached to it -
 - (a) a copy of any material contract required by this Schedule to be stated in a prospectus; or
 - (b) in the case of a contract not reduced to writing, a memorandum giving full particulars thereof.
- (2) If any part of a contract contemplated in sub-item (1) is in a language that is not an official language, a certified translation, in an official language, of that part of the contract must be attached to the contract.

5. Where the issue is underwritten

- (1) A prospectus containing a statement to the effect that the whole or any portion of the issue of the securities offered to the public, has been or is being underwritten may not be registered until a copy of the underwriting contract has been filed, together with a

sworn declaration stating that to the best of the deponent's knowledge and belief the underwriter is and will be in a position to carry out his obligations even if no shares are being applied for.

- (2) A declaration contemplated in sub-item (1) must be sworn by the person named as underwriter or, if the underwriter is a company, by each of two directors of that company, or if it has only one director, by that director.
- (3) If an offer is made in respect of which no prospectus is required by this Act, the copy of the contract and sworn declaration referred to in sub item (1) must be filed not later than the date of the proposed offer of shares.

6. Signing, date and date of issue, of prospectus

- (1) A prospectus in respect of an offer for the subscription of shares of a company must be signed by every person named therein as a director of the company or by an agent authorized in writing by a director to sign on behalf of that director.
- (2) A prospectus in respect of any other offer must be signed by -
 - (a) every person making the offer, or by an agent authorized by that person in writing to sign on their behalf;
 - (b) if the person making the offer is a company or firm –
 - (i) by two directors of the company, or if it has only one director, by that director;
 - (ii) by not less than one-half of the partners in the firm; or
 - (iii) by an agent authorized by any director or partner in writing to sign on their behalf.
- (3) If a prospectus has been signed by or on behalf of directors of a company or partners in a firm as provided in subsection (2), every director of that company or partner in that firm is deemed to have authorized the issue of the prospectus irrespective

whether that director or partner signed it, unless it is proven that it was issued without the director or partner's knowledge, authority or consent.

- (4) Every signature to a prospectus must be dated, and the latest of those dates is deemed to be the date of the prospectus.
- (5) The date of registration of a prospectus is the date of the issue of the prospectus unless the contrary is proven.

7. Registration of prospectus

- (1) A prospectus may not be registered unless the requirements of this Act have been complied with and it has been filed for registration, together with any prescribed documents, within fourteen days after the date of that prospectus.
- (2) As soon as the Commission has registered a prospectus it must send notice of the registration to the person who filed the prospectus for registration.
- (3) A prospectus may not be issued more than three months after the date of the of its registration, and if a prospectus is so issued, it is deemed to be unregistered.

PART 2

A prospectus must -

- (a) deal with each of the applicable Items of this Schedule under its prescribed heading but not necessarily in the same order;
- (b) in each case by means of a number in brackets, or otherwise, refer to the applicable Item number of this Schedule; and
- (c) In the last paragraph of the prospectus under the heading - 'Paragraphs of Schedule 3 which are not applicable' – list the numbers of any Items of this Schedule that are not applicable.

8. Name, address and incorporation

- (1) The name and address of the registered office and of the transfer office, the date of incorporation of the company and, if an external company, the country in which it is incorporated and the date of registration in the Republic.
- (2) If the company is a subsidiary, the name and address of the registered office of its holding company, or of any body corporate which, had it been registered under the Act, would have been its holding company.

9. Directors and management

- (1) The names, occupations and addresses of the directors and proposed directors of the company (specifying the chairman and managing director, if any), and their nationalities, if not South African.
- (2) The term of office for which any director has been or is to be appointed, the manner in and terms on which any proposed director will be appointed and particulars of any right held by any person relating to the appointment of any director.
- (3) Particulars of any remuneration or proposed remuneration of the directors or proposed directors in their capacity as directors, managing directors or in any other capacity, whether determined by the Memorandum of Incorporation or not, by the company and any subsidiary.
- (4) If the business of the company or its subsidiary or any part thereof is managed or is proposed to be managed by a third party under a contract, the name and address (or the address of its registered office, if a company) of the third party and a description of the business so managed or to be managed.
- (5) The borrowing powers of the company and its subsidiary exercisable by the directors and the manner in which that borrowing powers may be varied.

10. Auditor

The name and address of the auditor of the company.

11. Attorney, banker, stockbroker, trustee and underwriter

The names and addresses of the attorney, banker, stockbroker, trustee, if any, and underwriter, if any.

12. Secretary

The name, address and professional qualifications, if any, of the secretary of the company.

13. History, state of affairs and prospects of company

- (1) The general history of the company and its subsidiary stating, inter alia-
 - (a) the length of time during which the business of the company and of any subsidiary has been carried on;
 - (b) brief particulars of any alteration of capital during the preceding three years;
 - (c) a summary of any offers of shares of the company to the public for subscription or sale during the preceding three years, the prices at which those shares were offered, the number of shares allotted in pursuance thereof and whether issued to all shareholders in proportion to their shareholdings and, if not, to whom issued, the reasons why the shares were not so issued and the basis of allotment;
 - (d) the date of conversion into a public company.
- (2) A general description of the business carried on or to be carried on by the company and its subsidiary and, if the company or its subsidiary carries on or proposes to carry on, two or more businesses that are material having regard to the profits or losses,

SCHEDULE 3 : Public Offerings of Shares and other Securities

Section 13

assets employed or to be employed or any other factor, information as to the relative importance of each such business.

- (3) The situation, area and tenure of the principal immovable property held or occupied by the company and its subsidiary including, in the case of leasehold property, the rental and unexpired term of the lease.
- (4) Details of any change in the business of the company, if material, during the past five years.
- (5) A general description giving a fair presentation of the state of affairs of the company and its subsidiary, including-
 - (a) the name, date and place of incorporation and the issued or stated capital of its subsidiary, together with details of the shares held by the holding company, and the main business of its subsidiary and the date on which it became a subsidiary; and
 - (b) if material, a statement as to the estimated commitments of the company and its subsidiary for the purchase and erection of buildings, plant and machinery, the estimated date of completion and the commencement of the operational use thereof.
- (6) For the company and each subsidiary, in respect of each of the preceding five years, particulars of-
 - (a) the profits or losses before and after tax;
 - (b) the dividends paid;
 - (c) the dividends paid in cents per share; and
 - (d) the dividend cover for each year;

or, if the company is a holding company, the same information, with any changes required by the context, for the company in consolidated form.

-
- (7) If any part of the proceeds of the issue of shares is to be applied, directly or indirectly, to the acquisition by the company or its subsidiary of the shares of any other company or body corporate, in consequence of which that company or that body corporate will become a subsidiary of the company, in respect of each of the preceding five years, the same particulars relating to that company or body corporate as are required by sub-item (6) and a general history of each such company or body corporate, as required by sub items (1) and (2).
 - (8) If any part of the proceeds of the issue of shares is to be applied, directly or indirectly, to the acquisition by the company or its subsidiary of a business undertaking, in respect of each of the preceding five years, particulars relating to that business undertaking of-
 - (a) the profits before and after tax;
 - (b) its general history.
 - (9) The opinion of the directors, stating the grounds therefor, as to the prospects of the business of the company and of its subsidiary and of any subsidiary or business undertaking to be acquired.

14. Purpose of the offer

A statement of the purpose of the offer giving reasons why it is considered necessary for the company to raise the capital offered, and if the capital offered is more than the amount of the minimum subscription referred to in Item 28, the reasons for the difference between the capital offered and that minimum subscription.

15. Share capital of the company

- (1) Particulars of the share capital-
 - (a) the stated capital, the number of shares authorised, and issued, and the classes of shares;

- (b) a description of the respective preferential conversion and exchange rights, rights to dividends, profits or capital of each class, including redemption rights and rights on liquidation or distribution of capital assets;
- (c) the number of founders' and management or deferred shares, if any, and the special rights attaching thereto.

16. Loans

- (1) Details of material loans, including debentures, to the company and to its subsidiary at the date of the prospectus, stating-
 - (a) whether each such loans is secured or unsecured;
 - (b) the names of the lenders if not debenture-holders;
 - (c) the amount, terms and conditions of repayment;
 - (d) the rates of interest on each loan; and
 - (e) details of the security, if any;
 - (f) details of material loans by the company or by its subsidiary, other than in the ordinary course of business, at the date of the prospectus, stating-
 - (i) the date of the loan;
 - (ii) the person to whom made;
 - (iii) the rate of interest;
 - (iv) if the interest is in arrear, the last date on which it was paid and the extent of the arrears;
 - (v) the period of the loan;
 - (vi) the security held;

- (vii) the value of that security and the method of valuation;
- (viii) if the loan is unsecured, the reasons therefor; and
- (ix) if the loan was made to another company, the names and addresses of the directors of that company.

17. Options or preferential rights in respect of shares

- (1) The substance of any agreement or proposed agreement whereby any option or preferential right of any kind was or is proposed to be given to any person to subscribe for any shares of the company or its subsidiary, giving the number and description of any such shares, including, in regard to the option or right, particulars of-
 - (a) the period during which it is exercisable;
 - (b) the price to be paid for shares subscribed for under it;
 - (c) the consideration given or to be given for it;
 - (d) the names and addresses of the persons to whom it was given, other than to existing shareholders as such or to employees under a bona fide staff option scheme;
 - (e) if given to existing shareholders as such, material particulars thereof; and
 - (f) any other material fact or circumstance concerning the granting of such option or right.
- (2) For the purpose of this Item, “subscribing for shares” includes acquiring them from a person to whom they were allotted, or were agreed to be allotted, with a view to that person offering them for sale.

18. Shares issued or to be issued otherwise than for cash

The number of shares that, within the preceding two years, were issued or were agreed to be issued by the company or its subsidiary to any person, otherwise than for cash, and the consideration for which those shares were issued or were agreed to be issued, and the value of the property, if any, acquired or to be acquired.

19. Property acquired or to be acquired

- (1) Particulars of any immovable property or other property of the nature of fixed assets purchased or acquired by the company or its subsidiary or proposed to be purchased or acquired, the purchase price of which is to be defrayed in whole or in part out of the proceeds of the issue, or is to be or was within the preceding two years paid in whole or in part in securities of the company or its subsidiary, or out of the funds of the company or its subsidiary, whether in cash or shares, or the purchase or acquisition of which has not been completed at the date of the prospectus, and the nature of the title or interest therein acquired or to be acquired by the company or its subsidiary.
- (2) Details of the consideration given, or to be given, for the acquisition of any such property, specifying the value payable for goodwill, if any.
- (3) The names and addresses of the vendors and the consideration received or to be received by each.
- (4) Brief particulars of any transaction relating to the property completed within the preceding two years in which any vendor of the property to the company or its subsidiary or any person who is or was at the time of the transaction a promoter or a director or proposed director of the company had any interest, direct or indirect: Provided that where the vendors or any of them are a partnership, the members of the partnership shall not be treated as separate vendors.
- (5) Particulars of the price at which any such property which is immovable property or an option over immovable property was purchased or sold within three years prior to the date of the prospectus where any promoter or director had any interest, directly or

indirectly, in such transaction or where any promoter or director was a member of a partnership, syndicate or other association of persons which had such an interest, with the dates of any such purchases and sales and the names of any such promoter or director, and the nature and extent of his interest; for the purposes of this subparagraph, shares of a company, the major asset of which is immovable property, shall be deemed to be immovable property.

20. Amounts paid or payable to promoters

The amount paid within the preceding two years or proposed to be paid to any promoter, or to any partnership, syndicate or other association of which that promoter is or was a member, and the consideration for that payment, and any other benefit given to the promoter, partnership, syndicate or other association within the same period or proposed to be given, and the consideration for the giving of that benefit, and the promoter's name and address.

21. Commissions paid or payable in respect of underwriting

The amount, if any, or the nature and extent of any consideration, paid within the preceding two years, or payable as commission to any person (including commission so paid or payable to any sub-underwriter who is a promoter or director or officer of the company) for subscribing or agreeing to subscribe, or procuring or agreeing to procure subscriptions for any shares of the company, the name, occupation and address of each such person, particulars of the amounts underwritten or sub-underwritten by each and the rate of the commission payable for such underwriting or sub-underwriting contract with such person; and if such person is a company, the names of the directors of such company and the nature and extent of any interest, direct or indirect, in such company of any promoter, director or officer of the company in respect of which the prospectus is issued.

22. Preliminary expenses and issue expenses

The amount or estimated amount of preliminary expenses, if incurred within two years of the date of the prospectus, and the persons by whom any of those expenses were paid or are

payable, and the amount or estimated amount of the expenses of the issue and the persons by whom any of those expenses were paid or are payable.

23. Material contracts

- (1) The dates and the nature of, and the parties to, every material contract entered into by the company or its subsidiary, not being a contract entered into in the ordinary course of the business carried on or proposed to be carried on by the company or its subsidiary or a contract entered into more than two years before the date of the prospectus, and a reasonable time and place at which any such contract or a copy thereof may be inspected.
- (2) A brief summary of existing contracts or proposed contracts, either written or oral, relating to the directors' and managerial remuneration, royalties, and secretarial and technical fees payable by the company and its subsidiary.

24. Interest of directors and promoters

- (1) Full particulars of the nature and extent of any material interest, direct or indirect, of every director or promoter in the promotion of the company and in any property proposed to be acquired by the company out of the proceeds of the issue, and where the interest of such director or promoter consists in being a member of a partnership, company, syndicate or other association of persons, the nature and extent of the interest of such partnership, company, syndicate or other association, and the nature and extent of such director's or promoter's interest in the partnership, company, syndicate or other association.
- (2) Full particulars of the nature and extent of any material interest, direct or indirect, of every director or promoter in the property acquired or proposed to be acquired by the company or its subsidiary during the three years preceding the date of the prospectus.
- (3) A statement of all sums paid or agreed to be paid within the three years preceding the date of the prospectus to any director or to any company in which he is beneficially interested or of which he is a director, or to any partnership, syndicate or other

association of which he is a member, in cash or shares or otherwise, by any person either to induce him to become or to qualify him as a director, or otherwise for services rendered by him or by the company, partnership, syndicate or other association in connection with the promotion or formation of the company.

25. Particulars of the offer

- (1) Particulars of the shares offered, including-
 - (a) the class of shares;
 - (b) the number of shares offered;
 - (c) the issue price; and
 - (d) other conditions of the offer.
- (2) Particulars of the debentures offered, including-
 - (a) the class of debentures;
 - (b) the conditions of the debentures;
 - (c) if the debentures are secured, particulars of the security, specifying the property comprising the security and the nature of the title to the property; and
 - (d) other conditions of the offer.

26. Time and date of the opening and of the closing of the offer

The time and date of the opening and of the closing of the subscription lists or of the offer.

27. Issue price

- (1) The amount payable by way of premium, if any, on each share which is to be issued or was issued in the five years preceding the date of the prospectus, stating the dates

of issue, the reasons for any such premium, and, where some shares were or are to be issued at a premium and other shares at par or at a lower premium, also the reasons for the differentiation, and how any such premium was or is to be dealt with.

- (2) If no par value shares are to be issued or were issued within five years preceding the date of the prospectus, the dates of issue, the price at which they are to be or were issued, and the reasons for any differentiation.

28. Minimum subscription

- (1) The minimum amount which, in the opinion of the directors, must be raised by the issue of the shares in order to provide the sums, or, if any part thereof is to be defrayed in any other manner, the balance of the sums required to be provided, in respect of each of the following matters:
- (a) The purchase price of any property purchased or to be purchased which is to be defrayed in whole or in part out of the proceeds of the issue;
 - (b) any preliminary expenses payable by the company, and any commission payable to any person in consideration of his agreeing to subscribe for, or of his procuring or agreeing to procure subscriptions for, any shares of the company;
 - (c) the repayment of any moneys borrowed by the company and its subsidiary in respect of any of the foregoing matters;
 - (d) working capital, stating the specific purposes for which it is to be used and the estimated amount required for each such purpose;
 - (e) any other expenditure, stating the nature and purposes thereof and the estimated amount in each case; and
 - (f) the amounts to be provided in respect of the matters aforesaid otherwise than out of the proceeds of the issue, and the sources from which those amounts are to be provided.

29. Statement as to adequacy of capital

A statement that in the opinion of the directors the issued capital of the company (including the amount to be raised in pursuance of this offer) is adequate for the purposes of the business of the company and of its subsidiary, and if they are of the opinion that it is inadequate, the extent of the inadequacy and the manner in which and the sources from which the company and its subsidiary are or are to be financed.

30. Statement as to listing on stock exchange

A statement as to whether or not an application has been made for a listing of the shares offered and, if so, the name of the relevant exchange.

31. Requirements for prospectus of mining company

- (1) A report by an expert containing information appropriate to the subject matter of the prospectus and including, if applicable-
 - (a) a statement describing briefly the geological characteristics of the occurrence;
 - (b) details of previous operations and production relevant to the workability and pay ability of the proposed mining operations;
 - (c) survey, drilling and borehole results;
 - (d) ore reserves;
 - (e) an interpretation of the information available with reference to the viability of the project.
- (2) Material information not otherwise required by this Schedule relating to the mineral rights, or any other right to mine, mining title, including any Government mining lease, and immovable property available for the mine, including, if applicable-
 - (a) whether the aforesaid is owned by the company, or in process of transfer or is under option or lease;

- (b) the name of the farm on and district in which each is situated;
 - (c) the area of each;
 - (d) the aggregate price or other consideration for which they were or are to be acquired;
 - (e) relevant details of any option as aforesaid.
- (3) A statement by the directors of the plans for reaching the production stage or for increasing output, including information regarding-
- (a) shaft sinking and development;
 - (b) capital expenditure for each material stage of development.

32. Report by auditor of company

- (1) A report by the auditor of the company with respect to-
- (a) profits or losses and assets and liabilities, in accordance with subparagraph (2) or (3) of this paragraph, as the case requires; and
 - (b) the rates of the dividends, if any, paid by the company in respect of each class of shares of the company in respect of each of the five financial years immediately preceding the issue of the prospectus, giving particulars of each such class of shares on which such dividends were paid and particulars of the cases in which no dividends were paid in respect of any class of shares in respect of any of those years, and, if no annual financial statements were made out in respect of any part of the period of five years ending on a date three months before the issue of the prospectus, a statement of that fact.
- (2) If the company has no subsidiary, the report -
- (a) in regard to profits or losses, must deal with the profits or losses of the company in respect of each of the five financial years immediately preceding the issue of the prospectus; and

-
- (b) in regard to assets and liabilities, must deal with the assets and liabilities of the company at the last date to which the annual financial statements of the company were made out.
- (3) If the company has a subsidiary, the report -
- (a) in regard to profits or losses, must deal separately with the company's profits or losses as provided by subparagraph (2), and in addition, deal-
- (i) as a whole with the combined profits or losses of all subsidiaries, as far as they concern members of the company; or
- (ii) individually with the profits or losses of each subsidiary, so far as they concern members of the company; or
- (iii) as a whole with the consolidated profits or losses of the company and (so far as concerns members of the company) of all subsidiaries; and
- (b) in regard to assets and liabilities, must deal separately with the company's assets and liabilities as provided by subparagraph (2) and, in addition, deal-
- (i) as a whole with the combined assets and liabilities of all subsidiaries, indicating the interests therein of members other than the company; or
- (ii) individually with the assets and liabilities of each subsidiary, indicating the interests therein of members other than the company; or
- (iii) as a whole with the consolidated assets and liabilities of the company and all subsidiaries, indicating the interests therein of members other than the company;
- (c) if a subsidiary incurred losses, must state the amounts of such losses and the manner in which provision was made therefor.
- (4) The auditor be satisfied, as far as reasonably practicable, that, except as stated in the report-

- (a) the debtors and creditors do not include any accounts other than trade accounts;
- (b) the provisions for doubtful debts are adequate;
- (c) adequate provision has been made for obsolete, damaged or defective goods, and for supplies purchased at prices in excess of current market prices;
- (d) intercompany profits in the group have been eliminated;
- (e) there have been no material changes in the assets and liabilities of the company and of any subsidiary since the date of the last annual financial statements.

33. Report by auditor where business undertaking to be acquired

If the proceeds, or any part of the proceeds, of the issue of the shares or any other funds are to be applied directly or indirectly in the purchase of any business undertaking, a report made by an auditor named in the prospectus on-

- (a) the profits or losses of the business undertaking in respect of each of the five financial years preceding the date of the prospectus; and
- (b) the assets and liabilities of the business undertaking at the last date to which the financial statements of the business undertaking were made out.

34. Report by auditor where body corporate will become a subsidiary

- (1) If the proceeds or any part of the proceeds of the issue of the shares are to be applied, directly or indirectly, in any manner resulting in the acquisition by the company or its subsidiary of shares of any other body corporate by reason of which or of anything to be done in consequence thereof or in connection therewith, that body corporate will become a subsidiary of the company, a report made by an auditor named in the prospectus on-

-
- (a) the profits or losses of the other body corporate in respect of each of the five financial years preceding the date of the prospectus; and
 - (b) the assets and liabilities of the other body corporate at the last date to which the annual financial statements of the body corporate were made out.
- (2) The report must-
- (a) indicate how the profits or losses of the other body corporate dealt with by the report would, in respect of the shares to be acquired, have concerned members of the company and what allowance would have fallen to be made, in respect of assets and liabilities so dealt with, for holders of other shares, if the company had at all material times held the shares to be acquired; and
 - (b) where the other body corporate has a subsidiary, or, had it been a company in terms of the Act, would have had a subsidiary, deal with the profits or losses and the assets and liabilities of the body corporate and its subsidiary and such other body corporate as would have been its subsidiary if it had been a company in terms of the Act, in the manner provided by paragraph 25 (3) in relation to the company and its subsidiary.

35. Auditor not qualified to make reports

A report by an auditor required by this Schedule must not be made by any auditor who is a director, officer or employee or a partner of or in the employment of a director, officer or employee of the company or of the company's subsidiary or holding company or of any other subsidiary of the holding company.

36. Qualification in respect of references to period of five years

If in the case of a company which has been carrying on business, or of a business undertaking which has been carried on, for less than five years, the annual financial statements of the company or business undertaking have only been made out in respect of four years, three years, two years, or one year, this Part of this Schedule shall have effect as

if references to four years, three years, two years or one year, as the case may be, were substituted for references to five years.

37. Adjustment of figures in reports

Any report required by this Part of this Schedule shall either indicate by way of note any adjustments as regards the figures of any profits or losses or assets and liabilities dealt with by the report which appear to the persons making the report necessary or shall make these adjustments and indicate that adjustments have been made.

38. Report by directors as to material changes

A report by the directors of the company setting out any material change in the assets or liabilities of the company or any subsidiary which may have taken place between the last date to which the annual financial statements of the company or any subsidiary, as the case may be, were made out, and the date of the prospectus.

SCHEDULE 4

Consequential Amendments

Any required consequential amendments will be drafted after the public consultation process has been completed.

SCHEDULE 5 : Legislation to be enforced by Commission

Section 38

SCHEDULE 5

Legislation to be enforced by Commission

As contemplated in section 188, the Commission will be responsible for the enforcement of various Acts, which will be listed in this Schedule.

SCHEDULE 6

Transitional Arrangements

1. Interpretation

- (1) In this Schedule—
 - (a) "effective date" means the date on which this Act, or any relevant provision of it, came into operation in terms of section 227;
 - (b) "general effective date" means the date on which section 1 of this Act came into operation;
 - (c) "previous Act" means the Companies Act, 1973 (Act No. 61 of 1973).
- (2) A reference in this Schedule—
 - (a) to a section by number, is a reference to the corresponding section of—
 - (i) the previous Act, if the number is followed by the words "of the previous Act"; or
 - (ii) this Act, in any other case; or
 - (b) to an item or a sub-item by number is a reference to the corresponding item or sub item of this Schedule.
- (3) Despite any other provision of this Act –
 - (a) the Minister, by notice in the Gazette, may determine a date on which the Companies and Intellectual Property Commission may assume the exercise of any particular function or power assigned to it in terms of this Act; and
 - (b) until a date determined by the Minister in terms of paragraph (a) –

SCHEDULE 6 : Transitional Arrangements

Section 2

- (i) the Commission may not perform that particular function or exercise that particular power; and
- (ii) the Minister has the authority to, and bears the responsibility of, exercising any such function or performing any such power assigned by this Act to the Commission.

2. Delayed repeal of Close Corporations Act

- (1) Despite section 227, the President may not bring section 226 (1)(b) into operation until –
 - (a) a date at least 10 years after the general effective date of this Act; and
 - (b) the Minister has reported to Parliament in the manner required by sub-item (2).
- (2) No earlier than 8 years after the general effective date of this Act, the Minister must report to Parliament on the implementation of this Act, the utility of continuing the dual system of incorporation of companies under this Act and the Close Corporations Act, and the advisability at that time of the repeal of the Close Corporations Act.
- (3) If section 226 (1)(b) has not been brought into operation within 12 years after the general effective date of this Act, it is deemed to have been repealed.
- (4) Until the earlier of the effective date of section 226 (1)(b), or the date on which that provision is deemed to have been repealed in terms of sub-item (3), –
 - (a) Section 27 of the Close Corporations Act, 1984 (Act 69 of 1984) is suspended, as if its repeal had been brought into operation on the general effective date; and
 - (b) Part IX of the Close Corporations Act, 1984 (Act 69 of 1984) must be administered in connection with -
 - (i) the provisions of the previous Act referred to in Item 6, until the date determined in terms of Item 6 (3); and

- (ii) thereafter, in accordance with the legislation contemplated in Item 6 (3).

3. Pending filings

- (1) Any matter filed with the Registrar under the Companies Act, 1973 (Act No. 61 of 1973), and not fully addressed immediately before the effective date, must be concluded by the Registrar in terms of that Act, despite its repeal.
- (2) A company that is incorporated and registered in terms of sub-item (1) is deemed to -
 - (a) have been registered in terms of the Companies Act, 1973 (Act No. 61 of 1973); and
 - (b) be a pre-existing company for all purposes of this Act.

4. Continuation of pre-existing companies

- (1) As of the effective date, every pre-existing company that was --
 - (a) incorporated in terms of the Companies Act, 1973 (Act No. 61 of 1973); or
 - (b) recognised as an “existing company” in terms of the Companies Act, 1973 (Act No. 61 of 1973)continues to exist as a company, as if it had been incorporated and registered in terms of this Act, with the same name and registration number previously assigned to it.
- (2) The asset value, turnover and number of employees of a company contemplated in this Item during any period, up to three years, that the company existed before the general effective date of this Act are each to be regarded when applying the thresholds contemplated in section 9 (1)(b) for the purpose of determining whether that company is a public interest company.

5. Conversion of close corporations

- (1) A juristic person incorporated in terms of the Close Corporations Act, 1984, irrespective whether it was a pre-existing company, or was incorporated after the general effective date -
 - (a) must file a Notice of Conversion in the prescribed manner and form, within one year after the later of -
 - (i) the general effective date; or
 - (ii) the date on which that juristic person first satisfies any of the criteria of a public interest company, set out in section 9 (1)(b); or
 - (b) may file a Notice of Conversion in the prescribed manner and form, at any time.
- (2) A Notice of Conversion must be accompanied by –
 - (a) a certified copy of a special resolution approving the conversion of the close corporation;
 - (b) either a new Memorandum of Incorporation, or an amendment to the company's Memorandum of Incorporation, consistent with the requirements of this Act, in either case;
 - (c) a statement of the paid-up share capital, if any for an amount not greater than the excess of the fair value of the assets to be acquired by the company, over the liabilities to be assumed by the company by reason of the conversion: Provided that the company may treat any portion of such excess not reflected as paid-up share capital, as distributable reserves; and
 - (d) a statement by the close corporation's accounting officer, based on the performance of the officer's duties under the Close Corporations Act, 1984, that the officer is not aware of any contravention of that Act by the close corporation or its members or of any circumstances that may render the

members of the close corporation together with the close corporation jointly and severally liable for the corporation's debts; and

- (e) the prescribed filing fee.
- (3) Section 16, read with the changes required by the context, applies with respect to the filing of a Notice of Conversion, as if it were a Notice of Incorporation in terms of this Act.
 - (4) If, upon the coming into operation of section 226 (1)(b), there remain any companies that were incorporated under the Close Corporations Act, 1984 at any time, and that have not converted in terms of this Item –
 - (a) each such company is deemed to have filed a Notice of Conversion on the effective date of section 226 (1)(b); and
 - (b) The provisions of Item 4, and Item 6, read with the changes required by the context, apply to each such company as from the effective date of section 226 (1)(b).
 - (5) The Commissioner must cancel the registration of each close corporation in terms of the Close Corporations Act, 1984 upon its conversion in terms of this Item.
 - (6) Every member of a close corporation converted under this Item is entitled to become a shareholder of the company resulting from that conversion, but the shares or the nominal value of the shares to be held in the company by the members individually need not necessarily be in proportion to the members' interests as stated in the founding statement of the close corporation concerned
 - (7) The Commissioner must give notice in the Gazette of the conversion of a close corporation into a company.
 - (8) On the registration of a company converted from a close corporation, all the assets, liabilities, rights and obligations of the corporation vest in the company.
 - (9) Any legal proceedings instituted before the registration by or against the corporation, may be continued by or against the company, and any other thing done by or in

respect of the corporation, is deemed to have been done by or in respect of the company.

- (10) Despite the conversion of a close corporation, the juristic person that existed as a close corporation before the conversion continues to exist as a juristic person, but in the form of a company.

6. Continued application of Companies Act, 1973 to winding up and liquidation

- (1) Despite the repeal of the Companies Act, 1973, until the date determined in terms of sub-item (3), Chapter 14 of that Act, other than sections 343 to 346 and 348 to 353, continue to apply with respect to the winding up and liquidation of companies under this Act, as if that Act had not been repealed, subject to sub-item (2).
- (2) If there is a conflict between a provision of the Companies Act, 1973 that continues to apply in terms of sub-item (1), and a provision of this Act, the provision of this Act prevails.
- (3) The Minister, by notice in the Gazette, may -
- (a) determine a date on which this Item ceases to have effect, but no such notice may be given until the Minister is satisfied that alternative legislation has been brought into force adequately providing for the winding up and liquidation of insolvent companies; and
 - (b) prescribe ancillary rules as may be necessary to provide for the efficient transition from the provisions of the repealed Act, to the provisions of the alternative legislation contemplated in paragraph (a).

7. Memorandum of Incorporation and Rules

- (1) Every pre-existing company incorporated in terms of section 21 of the Companies Act, 1973 (Act No. 61 of 1973) is deemed to have amended its Memorandum of Incorporation as of the effective date to expressly state that it is a not for profit company.

-
- (2) At any time within two years immediately following the general effective date, a company contemplated in Item 4 may file, without charge -
 - (a) an amendment to its Memorandum of Incorporation to bring it in harmony with this Act; and
 - (b) if necessary, a notice of name change and copy of a special resolution contemplated in section 21 (1), to alter its name to meet the requirements of this Act.
 - (3) During the period of two years immediately following the general effective date, if there is a conflict between a provision of this Act, and a provision of a company's Memorandum of Incorporation, the latter provision prevails, except to the extent that this Schedule provides otherwise.
 - (4) Despite Chapter 7, during the two year period referred to in sub-item (3), until a company contemplated in Item 4 has filed an amendment contemplated in sub-item (1), neither the Commission nor the Takeover Regulation Panel may issue a compliance notice to that company with respect to conduct that is inconsistent with the company's Memorandum of Incorporation.
 - (5) If a company contemplated in Item 4 had adopted any binding provisions, under whatever style or title, comparable in purpose and effect to the rules of a company contemplated in section 14 (5), those provisions continue to have the same force and effect -
 - (a) as of the general effective date, for a period of two years, or until changed by the company; and
 - (b) after the two year period, to the extent that they are consistent with this Act.

8. Pre-incorporation contracts

Section 18 does not apply with respect to a pre-existing company.

9. Company finance and governance

- (1) A person holding office as a director, secretary or auditor of a pre-existing company immediately before the effective date, continues to hold that office as of the effective date, subject to the company's Memorandum of Incorporation, and this Act.
- (2) A person contemplated in sub-item (1) who is disqualified by this Act from being a director, secretary or auditor, is deemed to have resigned that office as of the effective date.
- (3) A vacancy in the office of director, secretary or auditor of a pre-existing company as of the effective date is to filled in accordance with this Act.
- (4) Despite anything to the contrary in a company's Memorandum of Incorporation, the provisions of this Act respecting -
 - (a) the duties, conduct and liability of directors apply to every director of a pre-existing company as of the effective date;
 - (b) rights in terms of this Act of shareholders to receive any notice or have access to any information apply as from the effective date to every pre-existing company;
 - (c) meetings of shareholders or directors, and adoption of resolutions apply as from the effective date to every pre-existing company; and
 - (d) the matters set out in Chapter 5 apply as from the effective date to every pre-existing company.
- (5) Approval of any distribution, financial assistance, insider share issues, or options, are subject to this Act, even if any such action had been approved by a company's shareholders before the effective date, despite anything to the contrary in the company's Memorandum of Incorporation.
- (6) A right of any person to seek a remedy in terms of this Act applies with respect to conduct pertaining to a pre-existing company and occurring before the effective date,

unless the person had commenced proceedings in a court in respect of the same conduct before the effective date.

- (7) Despite section 37 (1) –
 - (a) 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, continue to have the nominal or par value assigned to them when issued; and
 - (b) section 51 (6) does not apply with respect to any shares contemplated in paragraph (a).
- (8) We need to consider an appropriate transition rule relating to offerings and prospectus outstanding at the effective date.

10. Company names and name reservations

- (1) Any reservation of a name by the Registrar in terms of the Companies Act, 1973 that was in effect immediately before the effective date, is deemed to be a reservation in terms of section 20 of this Act, as of the effective date, subject to sub-item (2).
- (2) If the Commissioner believes that a reserved name contemplated in sub-item (1) does not satisfy the requirements of section 19 –
 - (a) the Commissioner must notify the person for whose use the name was reserved, inviting the person to request the reservation of a substitute name that does satisfy the requirements of this Act; and
 - (b) the person concerned may file a request contemplated in paragraph (a), at no charge, any time within 120 days after the date of the Commissioner’s notice.

11. Preservation and continuation of court proceedings and orders

- (1) Any proceedings in any court in terms of the previous Act immediately before the effective date are continued in terms of that Act, as if it had not been repealed.

- (2) Any order of a court in terms of the previous Act, and in force immediately before the effective date, continues to have the same force and effect as if that Act had not been repealed, subject to any further order of the court.

12. General preservation of regulations, rights, duties, notices and other instruments

- (1) Any right or entitlement enjoyed by, or obligation imposed on, any person in terms of any provision of the previous Act, that had not been spent or fulfilled immediately before the effective date is a valid right or entitlement of, or obligation imposed on, that person in terms of any comparable provision of this Act, as from the date that the right, entitlement or obligation first arose, subject to the provisions of this Act.
- (2) A notice given by any person to another person in terms of any provision of a previous Act must be considered as notice given in terms of any comparable provision of this Act, as from the date that the notice was given under the previous Act.
- (3) A document that, before the effective date, had been served in accordance with a previous Act must be regarded as having been satisfactorily served for any comparable purpose of this Act.
- (4) An order given by an inspector, in terms of any provision of a previous Act, and in effect immediately before the effective date, continues in effect, subject to the provisions of this Act.

13. Transition of regulatory agencies

- (1) The person who occupied the post of CEO of the Companies and Intellectual Property Registration Office immediately before the general effective date, must be regarded as having been appointed on the general effective date as the Commissioner in terms of section 190, for a term to be determined by the Minister.
- (2) A person in the employ of the Companies and Intellectual Property Registration Office or the Office of Companies and Intellectual Property Enforcement in the Department becomes an employee of the Commission on the effective date.

-
- (3) The transfer of departmental employees to the Commission must be effected in accordance with -
 - (a) section 197 of the Labour Relations Act, 1995 (Act No. 66 of 1995); and
 - (b) any collective agreement reached between the State and the trade union parties of the Departmental Chamber of the Public Service Bargaining Council before the effective date.
 - (4) A person mentioned in sub-item (2) remains subject to any decisions, proceedings, rulings and directions applicable to that person immediately before the effective date, and any proceedings against such a person, that were pending immediately before the effective date, must be disposed of as if this Act had not been enacted.
 - (5) Any person transferred in terms of sub-item (3) -
 - (a) remains a member of the Government Employees' Pension Fund mentioned in section 2 of the Government Employees' Pension Law, 1996; and
 - (b) is entitled to pension and retirement benefits as if that person were in service in a post classified in a division of the public service mentioned in section 8(1)(a)(i) of the Public Service Act.
 - (6) As of the general effective date—
 - (a) all movable assets of the state which were used by or which were at the disposal of the Companies and Intellectual Property Registration Office and the Office of Company and Intellectual Property Enforcement in the Department immediately before the effective date, except those assets excluded by the Minister, become the property of the Commission;
 - (b) all contractual rights, obligations and liabilities of the Company and Intellectual Property Registration Office are vested in the Commission;
 - (c) all financial, administrative and other records of the Company and Intellectual Property Registration Office, including all documents in the possession of the

SCHEDULE 6 : Transitional Arrangements

Section 14

Department immediately before the effective date, must be transferred to the Commission; and

- (d) the assets and liabilities of the Securities Regulation Panel established by section 440B of the Companies Act, 1973 are transferred to and are assets and liabilities, respectively, of the Takeover Regulation Panel.
- (7) On the general effective date, the person, if any, holding office immediately before that date, as a member, Chairperson, deputy chairperson or Executive Director of the Securities Regulation Panel appointed in terms of the Companies Act, 1973, is deemed to have been appointed as a member, Chairperson, deputy chairperson or Executive Director, respectively of the Takeover Regulation Panel in terms of this Act.
- (8) The registers of companies, names, and delinquent directors, respectively, as maintained by the Companies and Intellectual Property Registration Office in terms of the previous Act are each continued as the register of companies, names, and directors, respectively, required to be established by the Companies and Intellectual Property Commission in terms of this Act.

14. Continued investigation and enforcement of previous Acts

- (1) Despite the repeal of the previous Acts -
 - (a) any investigation by the Minister or the Registrar in terms of the previous Act and pending immediately before the effective date, may be continued by the Commission;
 - (b) any investigation or other matter being considered by the Securities Regulation Panel in terms of the previous Act and pending immediately before the effective date, may be continued by the Takeover Regulation Panel; and
 - (c) for a period of three years after the effective date—
 - (i) the Commission may exercise any power of the Registrar, or the Takeover Regulation Panel may exercise any power of the Securities

Regulation Panel, in terms of the previous Act to investigate and prosecute any breach of that Act that occurred during the period of three years immediately before the effective date, subject to sub-item (2); and

(ii) a court may make any order that could have been made in the circumstances by a court under that Act.

(2) In exercising authority under subsection (1), the Commission or Takeover Regulation Panel, respectively, must conduct the investigation or other matter in accordance with the previous Act.

15. Regulations

On the effective date, and for a period of 60 business days after the effective date, the Minister may make any regulation contemplated in the Act without meeting the procedural requirements set out in section 225 or elsewhere in this Act, provided the Minister has published such proposed regulations in the Gazette for comment for at least 30 business days.