

DEPARTMENT OF TRADE AND INDUSTRY

NO. 969

21 SEPTEMBER 2018

COMPANIES AMENDMENT BILL 2018**INVITATION FOR THE PUBLIC TO COMMENT ON THE DRAFT COMPANIES
AMENDMENT BILL**

I, Dr Rob Davies, Minister of Trade and Industry, hereby publish the Companies Amendment Bill for public comment.

Interested persons may submit written comments on the proposed Bill within sixty (60) calendar days from the date of publication to:

Director-General, Department of Trade and Industry
For Attention: Mr Desmond Ramabulana
Private Bag X84
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Dr Rob Davies, MP
Minister of Trade and Industry
30 August 2018

REPUBLIC OF SOUTH AFRICA

COMPANIES AMENDMENT BILL

*(As introduced in the National Assembly (proposed section 76); explanatory
summary of Bill published in Government Gazette No. of) (The English text
is the official text of the Bill)*

(MINISTER OF TRADE AND INDUSTRY)

[B —2018]

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GENERAL EXPLANATORY NOTE:

[] Words in bold typed in square brackets indicate omissions from existing enactment
_____ Words underlined with solid line indicate insertions in existing enactments.

BILL

To amend the Companies Act, 2008, so as to change the definition of securities; to clarify when a Notice of Amendment of a Memorandum of Incorporation takes effect; to empower a court to validate the irregular creation, allotment or issue of shares; to clarify how shares which are not fully paid are to be dealt with; to exempt a company from the requirements applicable to financial assistance between a company and its subsidiaries; to amend the instances where approval of shareholders will be required for any share buybacks by the company; to extend the definition of an employee share scheme to include those where there are purchases of shares of a company; to limit the circumstances under which a private company will be a regulated company; to deal with the composition of the social and ethics committee and its functions; and to ensure differentiation of duties between the chairperson of the Tribunal and the executive director thereof; and to provide for matters related thereto.

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

Amendment of section 1 of Act 71 of 2008, as amended by section 1 of Act 3 of 2011 and section 111 of Act 19 of 2012

1. Section 1 of the Companies Act, 2008 (Act No.71 of 2008)(hereinafter referred to as the principal Act), is hereby amended—

(a) by the insertion after the definition of "**Banks Act**" of the following definitions:

" 'B-BBEE Act' means the Broad-Based Black Economic Empowerment Act, 2003 (Act No.53 of 2003);

'B-BBEE Commission' means the Broad-Based Economic Empowerment Commission as established in terms of the B-BBEE Act;"

(b) by the substitution for the definition of "**securities**" of the following definition:

" 'securities' means any shares, debentures or [other instruments] any options in respect thereof, irrespective of their form or title, issued or authorised to be issued by a profit company;" and

(c) by the insertion after the definition of "**this Act**" of the following definition:

" 'Treasury Regulations' means any regulation made under the Public Finance Management Act, 1999 (Act No. 1 of 1999)."

Amendment of section 16 of Act 71 of 2008, as amended by section 11 of Act 3 of 2011

2. Section 16 of the principal Act is hereby amended by the substitution in subsection (9) for paragraph (b) of the following paragraph:

"(b) in any other case, 10 business days after receipt of the Notice of Amendment, if the Commission, after the expiry of the 10 business days, has not endorsed the Notice of Amendment or has failed to deliver a rejection of the Notice of Amendment to the company with reasons:"

Amendment of section 25 of Act 71 of 2008

3. Section 25 of the principal Act is hereby amended by the substitution in subsection (2) for the words preceding paragraph (a) of the following words:

"(2) A company must file a notice, which the Commission must publish as prescribed, setting out the location or locations at which any particular records referred to in section 24 are kept or from which they are accessible if those records—".

Amendment of section 26 of Act 71 of 2008, as amended by section 17 of Act 3 of 2011

4. Section 26 of the principal Act is hereby amended—

(a) by the substitution in subsection (1) for paragraph (c) of the following paragraph:

"(c) the reports to annual meetings [**annual financial statements,**]
as mentioned in section 24(3)(c)(i)[**and(ii)**];"

(b) by the insertion in subsection (1) after paragraph (c) of the following paragraph:

"(cA) the annual financial statements as stipulated in section 24(3)(c)(ii);"

- (c) by the substitution for subsection (2) of the following subsection:

"(2) A person not contemplated in subsection (1) has a right to inspect **[or] and** copy, upon payment of no more than the prescribed maximum charges for any such inspection and any copy, the information contained in the records referred to in subsection(1)(a), (b), (d) and (e) [the securities register of a profit company, or the members register of a non-profit company that has members, or the register of directors of a company, upon payment of an amount not exceeding the prescribed maximum fee for any such inspection]."

- (d) by the substitution in subsection (4) for paragraph (a) of the following paragraph:

"(a) for a reasonable period during business hours at a location referred to in section 25(1);"

- (e) by the substitution for subsection (5) of the following subsection:

"(5) Where a person receives a request in terms of subsection (4)(b) it must within **[14] five** business days comply with the request by providing the opportunity to inspect or copy the register concerned to the person making such request."; and

- (f) by the deletion of subsection (6).

Amendment of section 30 of Act 71 of 2008, as amended by section 20 of Act 3 of 2011

5. Section 30 of the principal Act is hereby amended by the substitution in subsection (4) for paragraph (a) of the following paragraph:

"(a) the remuneration, as defined in subsection (6), and benefits received by each director, or **[individual holding any prescribed office]** prescribed officer in the company, and each individual must be named;"

Insertion of section 30A in Act 71 of 2008

6. The following section is hereby inserted in the principal Act after section 30:

"Duty to prepare directors' remuneration report

30A. (1) The directors of a public company must prepare a directors' remuneration report for each financial year of the company.

(2) The directors' remuneration report must, in the prescribed manner, consist of the following parts:

(a) The background statement;

(b) an overview of the main provisions of the company's policy on remuneration; and

(c) an implementation report containing details of remuneration and benefits awarded to individual directors.

(3) The directors' remuneration report must be approved by the board and signed on behalf of the board by a director of the company.

(4) The director's remuneration report of a company must be presented to the shareholders at the annual general meeting."

Amendment of section 31 of Act 71 of 2008, as amended by section 21 of Act 3 of 2011

7. Section 31 of the principal Act is hereby amended by the substitution in subsection (4) for the words preceding paragraph (a) of the following words:

"It is an offence for a company, director or officer of a company, to—".

Amendment of section 33 of Act 71 of 2008, as amended by section 23 of Act 3 of 2011

8. Section 33 of the principal Act is hereby amended—

(a) by the substitution in subsection (1) for paragraph (a) of the following paragraph:

"(a) a copy of its latest annual financial statements [, if it is required to have such statements audited in terms of section 30(2) or the regulations contemplated in section 30(7); and];"; and

(b) by the insertion in subsection (1) after paragraph (a) of the following paragraph:

"(aA) a copy of the company's securities register as required in terms of section 50; and".

Insertion of section 38A in Act 71 of 2008

9. The following section is hereby inserted in the principal Act after section 38:

"Validation of irregular creation, allotment or issuing of shares

38A. (1) Where a company purports to create, allot or issue shares, by virtue of any provision of this Act, the Memorandum of Incorporation of the company, any other law or otherwise, and the creation, allotment or issuing of those shares is invalid or the terms of creation, allotment or issue are inconsistent with, or not authorised by, those provisions, a court may—

(a) upon receipt of an application made by the company or by any interested person; and

(b) after satisfying itself that it is just and equitable to do so, make an order validating the creation, allotment or issue of these shares or confirming the terms of the creation, allotment or issue, subject to such conditions as may be imposed by the court.

(2) When making an order under subsection (1), the court must direct that a copy be lodged with the Commission.

(3) Upon the registration of the copy of the court order by the Commission in terms of subsection (1), and after the payment of all prescribed fees by the company, if any, the shares must be deemed to have been validly created, allotted or issued upon the terms of the creation, allotment or issue of the shares and subject to the conditions imposed by the court.".

Amendment of section 40 of Act 71 of 2008, as amended by section 28 of Act 3 of 2011

10. Section 40 of the principal Act is hereby amended by the substitution in subsection (5)(b) for subparagraph (ii) of the following subparagraph:

"(ii) cause the issued shares to be transferred to a third party, to be held ~~[In trust]~~ by the third party as a stakeholder in terms of a stakeholder agreement but not as agent for either the company or the subscribing party, and later transferred to the subscribing party in accordance with ~~[a] the trust agreement;~~".

Amendment of section 45 of Act 71 of 2008, as amended by section 31 of Act 3 of 2011

11. Section 45 of the principal Act is hereby amended—
(b) by the substitution for the heading of the following heading:

"[Loans or other financial assistance to directors] Financial assistance to directors and group of companies"; and

(b) by the insertion after subsection (2) of the following subsection:

"(2A) The provisions of subsection (2) do not apply to the giving by a company of financial assistance to, or for the benefit of, its own subsidiary."

Amendment of section 48 of Act 71 of 2008, as amended by section 32 of Act 3 of 2011

12. Section 48 of the principal Act is hereby amended by the addition of the following subsection:

"(9) A decision by the board of a company as contemplated in subsection (2)(a) must be approved by a special resolution of the shareholders of the company—

(a) if any shares are to be acquired by the company from—

- (i) a director;
- (ii) a prescribed officer of the company; or
- (iii) a person related to a director or a prescribed officer; or

(b) if it entails the acquisition of shares in the company other than due to—

- (i) a pro rata offer made to all the shareholders of the company or a particular class of shareholders of the company; or
- (ii) transactions effected in the ordinary course on a recognised stock exchange on which shares of the company are traded."

Amendment of section 56 of Act 71 of 2008, as amended by section 36 of Act 3 of 2011

13. Section 56 of the principal Act is hereby amended by the substitution in subsection (7) for the words preceding paragraph (a) of the following words:

"A company [~~that falls within the meaning of 'regulated company' as set out in section 117 (1)(i)~~] must—".

Amendment of section 61 of Act 71 of 2008, as amended by section 39 of Act 3 of 2011

14. Section 61 of the principal Act is hereby amended—

- (a) by the deletion in subsection (8) of the word "and" at the end of paragraph (a)(ii); and
- (b) by the addition in subsection 8(a) of the following subparagraphs:

"(iv) a social and ethics committee report; and

(v) a remuneration report.".

Amendment of section 72 of Act 71 of 2008, as amended by section 47 of Act 3 of 2011

15. Section 72 of the principal Act is hereby amended—

- (a) by the insertion after subsection (3) of the following subsection:

"(3A) (a) A public company or a state-owned company must appoint a social and ethics committee at each annual general meeting.

(b) A social and ethics committee must comprise of at least three members, unless—

- (i) the company is a subsidiary of another company that has established a social and ethics committee; and
- (ii) the social and ethics committee of the other company referred to in subparagraph (i) performs the functions required under this section, on behalf of the subsidiary company.

(c) Each member of the social and ethics committee of a public company or state-owned company must—

- (i) be a director or a prescribed officer of the company, who satisfies any applicable requirements prescribed in terms of subsection (5A)(a) and (b);
- (ii) not be involved in the day-to-day management of the company's business or have been so involved at any time during the previous financial year; or
- (iii) not be related to any director who falls within any of the criteria set out in subparagraph (ii).";

(b) by the substitution for subsection (5) of the following subsection:

"(5) A company that falls within a category of companies that are required in terms of this section and regulations to appoint a social and ethics committee must—

- (a) publish the intention to lodge an application for exemption with the Tribunal, in a prescribed manner ; and
- (b) apply to the Tribunal in the prescribed manner and form, for an exemption from the requirement, and the Tribunal may grant such exemption if it is satisfied that—

 - (i) the company has satisfied the requirement to establish some form of formal mechanism within its structures, substantially to perform the functions of the social and ethics committee in terms of this section and the regulations; or
 - (ii) it is not reasonably necessary in the public interest to require the company to have a social and ethics committee, having regard to the nature and extent of the structure and activities of the company." ; and
- (c) by the insertion after subsection (5) of the following subsection:

"(5A) (a) A social and ethics committee appointed in terms of subsection (4) must comprise of not less than three directors or prescribed officers of the company, and at least one director must not be involved in the day-to-day management of the company, and must not have been so involved within the previous three financial years, unless—

 - (i) the company is a subsidiary of another company that has established a social and ethics committee; and

(ii) the social and ethics committee of the other company referred to in subparagraph (i) performs the functions required under this section on behalf of the subsidiary company.

(b) The Minister may prescribe the minimum qualification requirements for members of a social and ethics committee as he or she deems necessary to ensure that any such committee, taken as a whole, comprises persons with adequate relevant knowledge and experience to equip the committee to perform its functions.

(c) The first members of a social and ethics committee may be appointed by—

(i) the incorporators of a company; or

(ii) the board of the company, within 40 business days after the incorporation of the company.

(d) The board must appoint a person to fill any vacancy on the social and ethics committee within 40 business days after the vacancy arises.

(e) The Minister may prescribe the functions that must be performed by a social and ethics committee.

(f) A social and ethics committee must prepare a report in the prescribed manner and form, which must be externally assured.

(g) A social and ethics committee report must be presented to shareholders at a shareholders meeting."

Amendment of section 90 of Act 71 of 2008, as amended by section 55 of Act 3 of 2011

16. Section 90 of the principal Act is hereby amended—

(a) by the substitution for subsection (1A) of the following subsection:

"(1A) A company referred to in section 84(1)(c)(i), or a company that is required only in terms of its Memorandum of Incorporation to have its annual financial statements audited as contemplated in section 34(2) and 84(1)(c)(ii), must appoint an auditor [—

(a) in accordance with subsection (1), if the requirement to have its annual financial statements audited applies to that company when it is incorporated; or

(b) at the annual general meeting at which the requirement first applies to the company, and each annual general meeting thereafter.] at a shareholder's meeting at which the requirement first applies to the company, and annually at the shareholders meeting thereafter."; and

(b) by the substitution in subsection (2)(b) for subparagraph (v) of the following subparagraph:

"(v) a person who, at any time during the [**five**] two financial years immediately preceding the date of appointment, was a person contemplated in any of subparagraphs (i) to (iv); or";

Amendment of section 95 of Act 71 of 2008, as amended by section 58 of Act 3 of 2011

17. Section 95 of the principal Act is hereby amended by the substitution in subsection (1)(c) for subparagraph (i) of the following subparagraph:

"(i) by means of the issue or purchase of shares in the company; or".

Amendment of section 118 of Act 71 of 2008, as amended by section 53 of Act 3 of 2011

18. Section 118 of the principal Act is hereby amended by the substitution in subsection (1)(c) for subparagraph (i) of the following subparagraph:

"(i) at the time of the relevant affected transaction, the private company falls within the provisions of section 84(1)(c); or".

Amendment of section 135 of Act 71 of 2008, as amended by section 86 of Act 3 of 2011

19. Section 135 of the principal Act is hereby amended—

(a) by the insertion after subsection (1) of the following subsection:

"(1A) To the extent that any amounts due by the company to any owner of the property, including a landlord, in respect of any property of such owner or landlord which is the subject of a contract with a company that is placed in business rescue is not paid to such owner or landlord during business rescue by the company from

the date that the company is placed in business rescue proceedings, provided that such amounts do not exceed the aggregate of all disbursements and outgoings, including rates and taxes, electricity and water, paid by such owner or landlord to third parties during the period referred to in this section, the money must be regarded as post-commencement financing that must be paid to such owner in the order set out in subsection (3)(b).";

- (b) by the substitution in subsection (3) for the words preceding paragraph (a) of the following words:

"After payment of the practitioner's remuneration and expenses referred to in section 143, post-commencement finance, rental payment and other claims arising out of the costs of the business rescue proceedings, all claims contemplated—"; and

- (c) by the substitution in subsection (3)(a) for the words preceding subparagraph (i) of the following words:

"in subsection (1) and subsection (1A) will be treated equally, but will have preference over—".

Amendment of section 145 of Act 71 of 2008

20. Section 145 of the principal Act is hereby amended—

- (a) by the deletion in subsection (4) of the word "and" at the end of paragraph (a) and by the substitution in that subsection for the full-stop of the expression "; and" at the end of paragraph (b); and
- (b) by the addition in subsection (4) of the following paragraph:

"(c) an owner of property referred to in section 135(2) has a voting interest equal to the amount referred to in that section."

Amendment of section 160 of Act 71 of 2008, as amended by section 99 of Act 3 of 2011

21. Section 160 of the principal Act is hereby amended by the addition of the following subsection:

"(5) Where the company fails to change the name in terms of the administrative order of the Companies Tribunal issued in terms of subsection (3)(b)(ii), the applicant may approach the Commission to substitute the name of the respondent with its company's registration number followed by "Inc", "(Pty) Ltd", "Limited", "SOC Limited" or "NPC"."

Amendment of section 166 of Act 71 of 2008, as amended by section 105 of Act 3 of 2011

22. Section 166 of the principal Act is hereby amended—

(a) by the substitution for subsection (1) of the following subsection:

"(1) As an alternative to applying for relief to a court, or filing a complaint with the Commission 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 for resolution by mediation, conciliation or arbitration to [—
(a)] the Companies Tribunal[;]."

- [(b) an accredited entity, as defined in subsection (3); or
- (c) any other person.];

(b) by the substitution for subsection (2) of the following subsection:

"(2) If the Companies Tribunal,[or an accredited entity,] to whom a matter is referred for [alternative dispute resolution] mediation, 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 Companies Tribunal [or accredited entity] must issue a certificate in the prescribed form stating that the process has failed.";

(c) by the insertion after subsection (2) of the following subsection:

"(2A) (a) Where the Companies Tribunal has issued a certificate stating that the mediation process in terms of this Act has failed, the affected person may refer the matter to arbitration.

(b) The arbitrator's award is final and binding on the parties."; and

(d) by the deletion of subsections (3), (4) and (5).

Amendment of section 167 of Act 71 of 2008

23. Section 167 of the principal Act is hereby amended by the substitution in subsection (1) for the words preceding paragraph (a) of the following words:

"[If the] The Companies Tribunal [, or an entity accredited in terms of section 166, has resolved, or assisted parties in resolving, a dispute in terms of this Part the Tribunal or accredited entity] may—".

Amendment of section 194 of Act 71 of 2008, as amended by section 112 of Act 3 of 2011

24. Section 194 of the principal Act is hereby amended by the insertion after subsection (1) of the following subsection:

"(1A) (a) The chairperson of the Tribunal is the accounting authority of the Tribunal and is responsible for—

- (i) the proper and control and management of the Tribunal;
- (ii) the effectiveness and efficiency of the Tribunal;
- (iii) all the income and expenditure of the Tribunal;
- (iv) all assets and the discharge of liabilities of the Tribunal; and
- (v) the proper and diligent implementation of the Public Finance Management Act, 1999 (Act No. 1 of 1999), with respect to the Tribunal.

(b) The chairperson may appoint—

- (i) an executive director for a period of five years, who may be reappointed for a further period of five years.
- (ii) one or more senior managers, under such terms and conditions as determined by the chairperson.

(c) The executive director is responsible to perform the executive functions of the Tribunal, subject to—

- (i) this Act and its regulations;
- (ii) the Public Finance Management Act, 1999 (Act No. 1 of 1999), and the Treasury Regulations; and
- (iii) the policies and directions of the Tribunal.

(d) The executive director is responsible for appointing such other employees as may be required for the proper functioning of the Tribunal.

(e) The chairperson must, in consultation with the Minister and the Minister of Finance, determine the remuneration, allowances, benefits and conditions of appointment of—

- (i) the executive director;
- (ii) each member of the Tribunal; and
- (iii) employees of the Tribunal.”.

Amendment of section 195 of Act 71 of 2008, as amended by section 113 of Act 3 of 2011

25. Section 195 of the principal Act is hereby amended—

- (a) by the deletion in subsection (1) of the word "and" at the end of paragraph (b);
- (b) by the substitution in subsection (1) for the full stop of a semi-colon at the end of paragraph (c); and
- (c) by the addition to subsection (1) of the following paragraphs:

"(d) adjudicate on any matters affecting a company as may be referred to it in the prescribed manner by the B-BBEE

Commission in terms of the Broad-Based Black Economic Empowerment Act, 2003 (Act No. 53 of 2003); and
(e) make an appropriate order."

Substitution of section 204 of Act 71 of 2008

26. The following section is hereby substituted for section 204 of the principal Act:

"Functions of Financial Reporting Standards Council

204. (1) The Financial Reporting Standards Council must receive and consider any relevant information relating to the reliability of, and compliance with, financial reporting standards and adapt international reporting standards for local circumstances through the issue of financial reporting pronouncements and consider information from the Commission as contemplated in section 187(3)(b).

(2) For the purposes of this section, "financial reporting pronouncements" may be issued by the Financial Reporting Council and from time to time published in the Gazette in relation to international reporting standards which require adaptation for local circumstances, provided such pronouncements are not in conflict with International Financial Reporting Standards or the International Financial Reporting Standards for small medium enterprises."

Amendment of arrangement of sections of Act 71 of 2008

27. The arrangement of sections of the principal Act is hereby amended—

(a) by the insertion after item 30 of the following item:

"30A. Duty to prepare director's remuneration report";

(b) by the insertion after item 38 of the following item:

"38A. Validation of irregular creation, allotment or issuing of shares "; and

(c) by the substitution for item 45 of the following item:

"45. [Loans or other financial assistance to directors] Financial assistance to directors and group of companies".

Short title and commencement

28. This Act is called the Companies Amendment Act, 2018, and comes into operation on a date to be fixed by the President by proclamation in the *Gazette*.

MEMORANDUM ON THE OBJECTS OF THE COMPANIES AMENDMENT BILL, 2018

1. BACKGROUND

- 1.1 In 2011, the Companies Act, 2008 (Act No. 71 of 2008) ("the Act"), that was a result of the 2004 policy review, came into effect and repealed the Companies Act, 1973. The Act, introduced significant changes by providing for business rescue, simplification of registration, social and ethics committees for public companies, corporate governance including financial accountability and provisions relating to shareholder activism. The Act provides for the establishment of institutions, such as the Companies and Intellectual Property Commission ("the Commission"), Companies Tribunal ("the Tribunal"), Specialist Committee in Company Law, Financial Reporting Standards Council and Takeover Regulations Panel.
- 1.2 The Act, and the Companies Regulations, 2011¹ ("the Regulations"), were implemented in May 2011. The Act was destined for review after five years of implementation.
- 1.3 As a result of the monitoring of the implementation of the Act in the past five years, the Department of Trade and Industry, with the assistance and advice of the established institutions, has compiled and hereby recommend the proposed changes to keep up with the current trends and also close some loopholes in the Act as discovered during the implementation period. The proposed amendments in the Companies Amendment Bill, 2018 ("the Bill"), do not represent changes to the original policy.

2. OBJECTIVES OF THE BILL

The universal purpose of the proposed amendments is to review and identify all the problematic areas resulting from the implementation of the Act and the Regulations as from May 2011. Furthermore, the Bill intends to align the Act with modern international corporate trends.

¹ GNR. 351 of 26 April 2011

3. OVERVIEW OF THE BILL

3.1 Clause 1

Clause 1 of the Bill inserts the definitions of "B-BBEE Act", "B-BBEE Commission", "securities" and "Treasury Regulations" into section 1 of the Act, to enhance the interpretation of the principal Act.

3.2 Clause 2

Clause 2 of the Bill proposes an amendment to section 16 of the Act by requiring that a Notice of Amendment will take effect 10 business days after receipt of the Notice of Amendment, if the Commission, after the expiry of the 10 business days, has not endorsed the Notice of Amendment or has failed to deliver a rejection of the Notice of Amendment to the company with reasons.

3.3 Clause 3

Clause 3 of the Bill proposes an amendment to section 25 of the Act requiring the Commission to publish the notice in a prescribed manner.

3.4 Clause 4

Clause 4 of the Bill proposes an amendment to section 26 of the Act requiring clarifications pertaining to access to companies financial records and information.

3.5 Clause 5

Clause 5 of the Bill proposes an amendment to section 30 of the Act and provides that audited annual financial statements of each company that currently must include particulars showing the remuneration and benefits received by each director, must now also include the remuneration and benefits received by a prescribed officer.

3.6 Clause 6

Clause 6 of the Bill proposes the insertion of section 30A into the Act by imposing the duty to prepare a director's remuneration report and the manner of compiling the report and the presentation thereof.

3.7 Clause 7

Clause 7 of the Bill proposes an amendment to section 31 of the Act by extending the existing statutory offence to a director or an officer of the company, for refusing access to financial statements.

3.8 Clause 8

Clause 8 of the Bill proposes amendments to section 33 of the Act and requires the company to also file a copy of the company's securities register in the company's annual return.

3.9 Clause 9

Clause 9 of the Bill proposes the insertion of section 38A into the Act by giving the court the power to validate the creation, allotment or issue of shares which are otherwise invalid, upon application by a company or an interested party.

3.10 Clause 10

Clause 10 of the Bill proposes an amendment to section 40 of the Act requiring issued shares transferred to a third party to be held by a stakeholder in terms of the stakeholder agreement.

3.11 Clause 11

Clause 11 of the Bill proposes an amendment of section 45 of the Act and proposes that the provision of financial assistance by a company to its subsidiary, does not need the adoption of a special resolution.

3.12 Clause 12

Clause 12 of the Bill proposes an amendment to section 48 of the Act requiring that no special resolution has to be adopted when the company is implementing a *pro rata* share-buyback where the shareholders affected are also the directors of the company.

3.13 Clause 13

Clause 13 of the Bill proposes amendments to section 56 of the Act by omitting the words "that falls within the meaning of the 'regulated company' as set out in section 117(1)(i)" in subsection (7).

3.14 Clause 14

Clause 14 of the Bill proposes amendments to section 61 of the Act by requiring the social ethics committee report and remuneration report to be presented at the shareholders meeting.

3.15 Clause 15

Clause 15 of the Bill proposes amendments to section 72 of the Act by requiring that in respect of the exemption from the appointment of a social and ethics committee, a company must apply for exemptions to the Tribunal in a prescribed manner. It further inserts subsections (3A) and (5A) requiring a social and ethics committee for a public company or state-owned entities and for the composition of the social and ethics committee.

3.16 Clause 16

Clause 16 of the Bill proposes an amendment to section 90 of the Act requiring the appointment of an auditor to be done annually at a shareholders meeting.

3.17 Clause 17

Clause 17 of the Bill proposes the amendment of section 95 of the Act by requiring that the employee share scheme must include the purchase of shares in the company.

3.18 Clause 18

Clause 18 of the Bill proposes the amendment of section 118 of the Act by providing that the Takeover Regulations (made by the Minister in terms of sections 120 and 223 of the Act) apply with respect to an affected transaction or offer involving a private company or its securities, if the private company

falls within the provisions of section 84(1)(c) at the time of the relevant affected transaction.

3.19 Clause 19

Clause 19 of the Bill proposes an amendment of section 135 of the Act by inserting subsection (1A), providing that any amounts due by the company under business rescue to any owner of the property in terms of a contract which the owner of the property has paid to any third party during the business rescue proceedings, will be regarded as post-commencement financing.

3.20 Clause 20

Clause 20 of the Bill proposes amendments to section 145 of the Act by determining the voting interest of the owner of specified property.

3.21 Clause 21

Clause 21 of the Bill proposes amendments to section 160 of the Act by allowing the applicant to approach the Commission to substitute the name of the respondent where the company fails to change the name in terms of an administration order of the Tribunal.

3.22 Clauses 22 and 23

Clause 22 of the Bill amends section 166 of the Act by providing that if the Tribunal has issued a certificate stating that a mediation process has failed, an affected person may refer the matter to arbitration. Clause 23 of the Bill proposes consequential amendments to section 167 of the Act by deleting certain obsolete provisions in section 167(1).

3.23 Clause 24

Clause 24 of the Bill proposes amendments to section 194 of the Act by inserting subsection (1A) conferring certain powers on the chairperson of the Tribunal and the executive director.

3.24 Clause 25

Clause 25 of the Bill proposes amendments to section 195 of the Act by giving the Tribunal the power to adjudicate cases referred to by the B-BBEE Commission.

3.25 Clause 26

Clause 26 of the Bill proposes amendments to section 204 of the Act by giving the Financial Reporting Standards Council the power to issue financial reporting pronouncements.

3.26 Clauses 27

Clause 27 of the Bill proposes an amendment to the arrangement of sections in the principal Act by virtue of the insertion of new provisions into the principal Act.

3.27 Clause 28

Clause 28 provides for the title and commencement of the Bill.

4. DEPARTMENTS/BODIES/PERSONS CONSULTED

The following stakeholders were consulted:

- South African Institute of Chartered Accountants;
- Banking Association of South Africa;
- Independent Regulatory Board for Auditors;
- B-BBEE Commission;
- the Commission;
- Tribunal; and
- Whom Owns Whom (Pty) Ltd.

5. IMPLICATIONS FOR PROVINCES

None

6. FINANCIAL IMPLICATIONS FOR STATE

To be accommodated within the existing budget.

7. PARLIAMENTARY PROCEDURE

- 7.1 The Constitution prescribes the procedure for the classification of Bills. A Bill must be correctly classified so that it does not become inconsistent with the Constitution.
- 7.2 The Bill has been considered against the provisions of the Constitution relating to the tagging of Bills and against the functional areas listed in Schedule 4 (functional areas of concurrent national and provincial legislative competence) and Schedule 5 (functional areas of exclusive provincial legislative competence) to the Constitution.
- 7.3 The established test for classification of a Bill is that any Bill whose provisions in substantial measure fall within a functional area listed in Schedule 4 to the Constitution must be classified in terms of that Schedule. The process is concerned with the question of how the Bill should be considered by the provinces and in the National Council of Provinces. Furthermore, how a Bill must be considered by the provincial legislatures depends on whether it affects the provinces. The more the Bill affects the interests, concerns and capacities of the provinces, the more say the provinces should have on the contents of the Bill.
- 7.4 Therefore the issue to be determined is whether the proposed provisions of the Bill, in substantial measure, fall within a functional area listed in Schedule 4 to the Constitution.
- 7.5 The Bill seeks to provide that in the event of an amendment to a company's Memorandum of Incorporation, the Notice of Amendment will take effect 10 business days after receipt of the Notice of Amendment, if the Commission, after the expiry of the 10 business days, has not endorsed the Notice of Amendment or has failed to deliver a rejection of the Notice of Amendment to the company with reasons.
- 7.6 The Bill provides for the manner (to be prescribed in the regulations) in which the Commission must publish the notice filed by a company in which the

company sets out the location or locations at which any particular company records are kept or from which they are accessible, and also provides clarification pertaining to access a company's financial records and information. The audited annual financial statements of each company that must include particulars showing the remuneration and benefits received by each director, must now include the remuneration and benefits received by a prescribed officer. The Bill proposes the insertion of section 30A into the Act by imposing the duty to prepare a director's remuneration report and the manner of compiling the report and the presentation thereof. The Bill extends the existing statutory offence for refusing access to financial statements to a director and an officer of a company, and the Bill further requires the company to also file a copy of the company's securities register in the company's annual return.

- 7.7 The Bill seeks to insert section 38A into the Act in order to give a court the power to validate the creation, allotment or issue of shares which are otherwise invalid, upon application by a company or an interested party. The Bill requires issued shares transferred to a third party to be held by a stakeholder in terms of the stakeholder agreement. In respect of financial assistance to directors and a group of companies, the Bill proposes that the provision of financial assistance of a company to its subsidiary should not need the adoption of a special resolution. Furthermore, no special resolution has to be adopted when the company is implementing a pro rata share-buyback where the shareholders affected are also the directors of the company.
- 7.8 The Bill provides for the appointment of a social and ethics committee and requires that the committee must prepare and present its report at the shareholders meeting. In respect of exemption from the appointment of a social and ethics committee, a company must apply for exemptions to the Tribunal in a prescribed manner. The Bill requires a social and ethics committee for a public company and a state-owned company and also provides for the composition of the social and ethics committee.

- 7.9 The Bill provides for the appointment of an auditor at a shareholders meeting as per requirement and thereafter annually at the shareholders meeting; that an employee share scheme must include the purchase of shares in the company, in addition to the issue of shares; and that the Takeover Regulations (made by the Minister in terms of sections 120 and 223 of the Act) apply to an affected transaction or offer involving a profit company or its securities, if a company is a private company, a personal liability company or a non-profit company in accordance with section 84(1)(c) of the Act, at the time of the relevant affected transaction.
- 7.10 The Bill provides that any amounts due by the company under business rescue to any owner of the property in terms of a contract which the owner of the property has paid to any third party during the business rescue proceedings, will be regarded as post-commencement financing and that the owner of specified property has a voting interest in business rescue proceedings. The Bill further provides that an applicant may approach the Commission to substitute the name of the respondent where the company fails to change the name in terms of an administration order of the Tribunal.
- 7.11 In respect of disputes concerning the reservation or registration of company names, the Bill provides that if the Tribunal has issued a certificate stating that a mediation process has failed, an affected person may refer the matter to arbitration. The Bill provides that if a court imposes an administrative fine on a company, the court may impose a fine in respect of the respondent's revenue, instead of the turnover, for the period during which the company failed to comply with a compliance notice.
- 7.12 The Bill confers more responsibilities on the Tribunal and, amongst other things, provides that the chairperson of the Tribunal is the accounting authority of the Tribunal and is responsible for—
- the proper control and management of the Tribunal;
 - the effectiveness and efficiency of the Tribunal;
 - all the income and expenditure of the Tribunal;
 - all assets and the discharge of liabilities of the Tribunal; and

- the proper and diligent implementation of the Public Finance Management Act, 1999 (Act No.1 of 1999).

7.13 The Bill seeks to give the Companies Tribunal the power to adjudicate cases referred to it by the B-BBEE Commission established in terms of the Broad-Based Black Economic Empowerment Act, 2003 (Act No.53 of 2003).

7.14 The Bill provides that the Financial Reporting Standards Council must receive and consider any relevant information relating to the reliability of, and compliance with, financial reporting standards and adapt international reporting standards for local circumstances through the issue of financial reporting pronouncements.

7.15 The provisions of the Bill have been carefully examined to establish whether, in substantial measure, they fall within any of the functional areas listed in Schedule 4 to the Constitution.

7.16 In our view the subject matter of the Bill falls within a functional area listed in Schedule 4, namely "Trade". We are therefore of the opinion that this Bill must be dealt with in accordance with the procedure set out in section 76 of the Constitution.

7.17 It is not necessary to refer this Bill to the National House of Traditional Leaders in terms of section 18(1)(a) of the Traditional Leadership and Governance Framework Act, 2003 (Act No. 41 of 2003), since it does not contain provisions pertaining to customary law or customs of traditional communities.