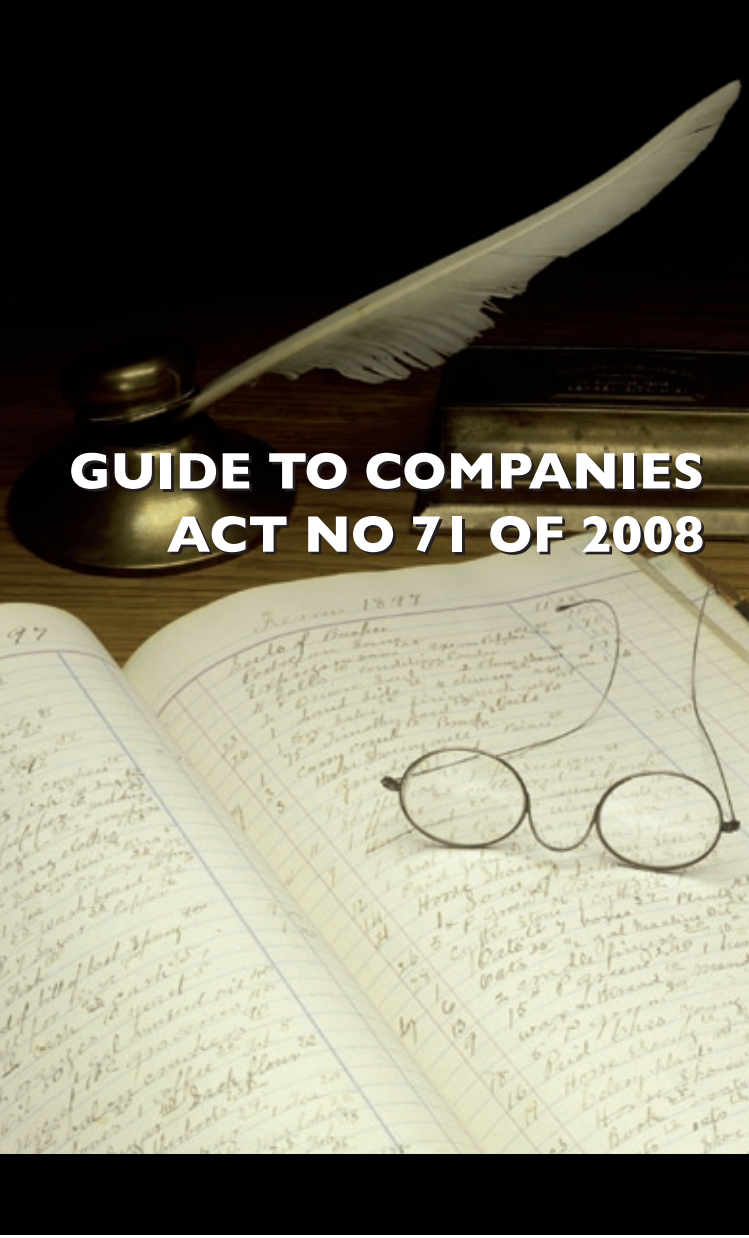

GUIDE TO COMPANIES ACT NO 71 OF 2008

PINTO RUSSELL

NOTES ON THE GUIDE TO COMPANIES-ACT NO 71 OF 2008

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

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

The Act was signed by the President on the 9th April 2009 and gazetted in Gazette No. 32121 (Notice No. 421). It will come into operation on a date still to be 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 it, anticipated to be 1 July 2010.

In terms of sec 223 of this Act the Minister is required to publish certain regulations which may affect the implementation and interpretation of the Act. At the time of publication of this guide, none of regulations contemplated have yet been published by the Minister.

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

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

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

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COMPANIES ACT 2008

1. INTRODUCTION

- The Companies Act, no 71 of 2008 ("the new Act") replaces both the Companies Act of 1973 and Corporate Laws Amendment Act no 24 of 2006. The Close Corporations Act, 1984 will be amended as provided for in Schedule 5 (see page 50 relating to transitional arrangements).

- "This is the most fundamental reform of company law for over 30 years" – Tshediso Matona (Director General of the Department of Trade & Industry (DTI);

- The Act was formed against the backdrop of a general Corporate Reform Policy, published by the DTI in 2004, its vision being that "company law should promote the competitiveness and development of the South African economy..... by encouraging entrepreneurship.....and..... employment opportunities by simplifying the procedures for forming companies and reducing costs associated with the formalities of forming a company....."

- The purposes of the Act are, inter alia, to promote compliance with the Bill of Rights as provided for in the Constitution in the application of company law, to encourage transparency and high standards of corporate governance and provide for the balancing of rights and obligations of shareholders and directors.

New Regulatory Bodies Introduced by the Act

- Previously known as CIPRO (the Companies Intellectual Property & Registration Office) will as from the general effective date of the new Act be known as CIPC – the Companies and Intellectual Property Commission,

- Companies Tribunal (CT)

- Take-Over Regulation Panel (TORP or Panel)

- Financial Reporting Standards Council (FRSC)

2. CATEGORISATION OF COMPANIES

The Act provides for two categories of companies, namely for profit and not for profit companies.

FOR PROFIT

(a) state owned company (SOC Ltd); [Audit required]

(b) a private company [Proprietary Limited or (Pty) Ltd] if:

(i) its not a state owned company

(ii) its Memorandum of Incorporation (MOI)

(aa) prohibits it offering any of its securities to the public &

(bb) restricts the transferability of its securities,

(**Note:** no limit on number of shareholders (previously was limit of 50) and a share no longer has a nominal or par value.)

(c) a personal liability company (Incorporated or Inc) if

(i) it meets the criteria for a private company;

(ii) its MOI states that it is a personal liability company

{i.e that the directors & past directors are jointly & severally liable together with the company, for the debts & liabilities of the company that were contracted during their respective terms of office}

(**Note:** these are the old Section 53(b) companies)

(d) a public company, [Limited or Ltd] in any other case [Audit required]

(**Note:** min number of incorporators is reduced from 7 to 1)

NOT FOR PROFIT

Name to be followed by suffix "NPC" , {previously Section 21 Companies}

{Incorporated for a public benefit or an object relating to one or more cultural or social activities, or communal or group interests}

For Profit Companies:

* 1 or more persons (including juristic persons) may incorporate;
* 1 or more directors required, 3 or more for public (Ltd) companies;
* no limit on number of shareholders;
* a share issued by a pre-existing company (before repeal of Company's Act 1973) & held by a shareholder immediately before the effective date of the Act continues to have all rights associated with it immediately before the effective date;

NOT For Profit Companies:

* 3 or more persons (including juristic persons) may incorporate;
* 3 or more directors required,
* with/without members ie an NPC without members can be incorporated
* can have voting or non-voting members
* membership can be held by juristic persons, including profit companies
* each voting member has at least one vote and the vote of each member is of equal value to the vote of each other voting member on any matter to be determined by vote of the members,exept to the extent that the company's MOI provides otherwise;

Note: a company's MOI may provide for a higher minimum no of directors as those described above. SOC's & Public (Ltd) companies subject to enhanced accountability and transparency requirements, such as an audit. Others only if MOI provides for it **(see page 31)**

» An external company is a foreign company (for profit or not for profit), that is carrying on business or non-profit activities within the RSA. Such a company must register with CIPC within 20 business days after it first begins to conduct business or non-profit activities within RSA.

3. COMPANY FORMATION & REGISTRATION

- (Chapter 2, Part B of the Act)

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

Registration

- Registration is effected by signature of the MOI by the requisite number of persons and by filing it together with the prescribed Notice of Incorporation at CIPC, together with payment of the prescribed fee.

Legal Status of companies

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

The Memorandum of Incorporation (MOI)

- A brief MOI replaces a 2 part Memorandum & Articles of Association. This is the sole governing document of the company.
- It must be consistent with the Act and is void to the extent it contravenes or is inconsistent with the Act;
- It may incorporate "special conditions" applicable to the company and any requirement for the amendment of any such condition. It may prohibit the amendment of any particular provision of the MOI in which case the Notice of Incorporation must clearly point this out, and also indicate its location in the MOI. In this case, the name of the company must have RF immediately following it (Ring fencing).

Additional rules and shareholder agreements

- Except to the extent that a company's MOI provides otherwise, the Board may make, amend or repeal any necessary or incidental rules relating to the governance of the company in respect of matters not addressed in the Act or the MOI - by publishing a copy of its rules to the shareholders and filing a copy thereof with the Commission;

- Once ratified, the MOI (and rules) are binding between the company and the shareholder(s) and between the shareholders themselves and between the company and each director or prescribed officer or any other person serving the company as a member of the audit committee or as a member of a committee of the board;

- The shareholders may enter into any shareholders agreement with one another as long as it is consistent with the Act and the MOI ,

- Any rule or provision in any shareholders agreement which is inconsistent with the Act or MOI is void to the extent of its inconsistency,

» **NPC's are required to insert in their MOI's the following statements:** (a) that the company is not for profit (b) that sets out one or more of the public benefit objects of the company (c) that applies all of its assets and income (however derived) to advance its stated objects as set out in its MOI (d) that names a particular not for profit company or trust or voluntary association to receive any net assets upon the winding up of the company or sets out the manner in which the directors at the time of winding up the company may determine which not for profit company or trust or voluntary association will receive such net assets.

Amendment of MOI

- A company's MOI can be amended by resolution if the amendment is:

  - proposed by the Board OR by the holders of at least 10% of the voting shares and

  - approved by the shareholders by formal or informal **special resolution** (this second requirement is not applicable to NPC's-that have no voting members);

Annual returns

- Annual returns are required to be submitted by every category of company including external companies in the prescribed form with the prescribed fee and within the prescribed period after the end of the anniversary of the date of its incorporation. A public company requiring an audit will be required to submit a copy of its financial statements with the return.

4. COMPANY NAME, REGISTERED OFFICE & RECORDS

- (Chapter 2, Part A of of the Act)

4.1 COMPANY NAME

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

Criteria for names of companies

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

A. in any language together with any:

- Letters, numbers, punctuation marks
- Any of the following symbols +, &, #,, %,=;
- Any other symbol if permitted
- Round brackets used in pairs
- The registration number, followed by (Pty) Ltd

B. in the case of a For Profit company, may be just the registration number of the company, followed by "South Africa", or RF (ring fencing) if applicable, and the appropriate suffix to indicate the category of company (see page 4);

C. may not be the same as or confusingly similar to the name of another company or entity (unless it forms part of a group of companies using similar names), or registered trade mark, or a name registered for use in terms of the Business Names Act 1960 or a mark word or expression which is restricted or protected in terms of the Merchandise Marks Act 1941 or

D. must not falsely imply or suggest or mislead a person to believe incorrectly that the company is part of any other person or entity or is an organ of state or a court or is owned/managed by person(s) having a particular educational designation or is

owned or enjoys the patronage of any foreign state, head of government or international organisation,

E. Must not be offensive and must not include any word or symbol that in isolation or in context may constitute propaganda for war, incitement to imminent violence or advocate hatred based on race, ethnicity, gender or religion or to cause harm.

Reservation of names

- Name reservation will be available to protect one or more names but will not be a requirement;
- If names are reserved, the reservation will last for a period of 6 months initially which may be extended on application, and which may be transferred;
- If the name in the Notice of Incorporation is the same as that of a registered company or reserved name, the Commissioner may use the registration number as the name in the interim, i.e the registration number followed by "South Africa";
- If the Commissioner believes the name is in contravention of C and D listed above, it may require the applicant to serve a copy of its application to any interested party whom it believes to have an interest in the use of the proposed name by the applicant. The interested person may apply to the Companies Tribunal for a determination (see table on page 47 - Section 160 – remedies and enforcement section);
- If the Commissioner believes the name is in contravention of E above, it may refer the application and name reservation to the South African Human Rights Commission, which in turn may apply to the Companies Tribunal for a determination and order also in terms of Section 160.

Change of Name

- Company required to file a Notice of Name Change and a copy of the Special resolution & the prescribed fee; (see page 7 re amendments of MOI's for requirements);

Registered use of name and number

- A company must ensure that its registered name and number are clearly stated in legible characters in all notices and other official publications of the company including those in electronic format, and in all bills of exchange, promissory notes, cheques and orders for money or goods, and in all letters, delivery notes, invoices, receipts and letters of credit of the company;
- Misleading use or non-use of the full name and registration number is an offence;
- If any document does not contain the name and number and a court concludes that another person was reasonably misled by the exclusion of these details, it may make an appropriate order allocating any liability to or among any of the company's incorporators, shareholders or directors (to the extent that it is just and equitable to do so in the circumstances);

4.2 REGISTERED OFFICE

- Every company & external company must:

  A continuously maintain a registered office in RSA, and indicate such in its Notice of Incorporation;

  B file a Notice of Change of Registered Office with the Commission if the address changes from time to time (subject to the requirements of the MOI);

4.3 RECORDS

- Must be kept in written form; or
- In a form or manner that allows the documents & information that comprise the records to be convertible into written form within a reasonable time (see page 35 section relating to electronic communications) and
- For a period of at least seven years.

5. COMPANY FINANCE AND CAPITAL

- (Chapter 2, Part D)

GENERAL

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

SHARES

- A share issued by a company is movable property, transferable in any manner provided for in the Act or other legislation;
- It does not have a nominal or par value. Share values to be determined by the market;

- A company may not issue shares to itself.

Section 36: Authorisation for shares

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

Section 38: Issue of shares

- The board has the power to issue shares;

Section 39: Pre-emptive right to be offered shares

- Every shareholder in a private company (and a personal liability company) has a pre-emptive right to be offered and to subscribe (within a reasonable amount of time) for a % of any shares issued or proposed to be issued equal to the voting power of that shareholders general voting rights immediately before the offer was made.
- However, a company's MOI may limit, negate or restrict this right with respect to any or all classes of shares of that company.

Section 40: Consideration for shares

- The Board may issue authorised shares only for adequate consideration or other benefit to the company or as a capitalisation share without consideration as contemplated in Section 47, or in terms of conversion rights;

- When the company has received the consideration or other benefit approved by its Board for the issuance of those shares, they will be fully paid and the company must issue them and cause the name of the holder to be entered on the company's securities register;

- If the shares are issued in exchange for an instrument which is not negotiable by the company (e.g promissory note) or by future services or benefits (or future consideration), the consideration is regarded as having been received and the shares fully paid only when the instrument is negotiated by the company or the party has fulfilled his/her obligation in terms of the contract. However, upon receiving the instrument or entering the agreement, the company is required to issue the shares immediately and cause these to be transferred to a third party to be held in trust and later transferred to the subscribing party in accordance with a trust agreement.

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

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

- S41(2): Subsection 1 (above) does not apply where the issue of shares* is (i) under a contract underwriting the shares* (ii) in the exercise of a pre-emptive right (as per above) (iii) in proportion to existing holdings on the same terms and conditions as have been offered to all the shareholders of the

company or to all the shareholders of the class or classes of shares being issued (iv) pursuant to an employee share scheme that satisfies the requirements of Section 97 or (v) on the same terms and conditions as have been offered to members of the public;

- S41(3): An issue of shares* requires approval of the shareholders by special resolution if the voting power of the shares that are issued or issuable as a result of the transaction** will be equal to or exceed 30% of the voting power of all the shares of that class held by the shareholders immediately before the transaction**;

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

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

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

Section 44: Financial Assistance for the subscription of securities

- The board may authorise the company to provide financial assistance by way of a loan, guarantee, the provision of security or otherwise to any person for the purpose of or in connection with the subscription of any option, or any securities, issued or to be issued by the company or a related or inter-related company or for the purchase of any securities of the company or a related or inter-related company subject to the requirements set out on page 59 relating to conditions and consequences of lending financial assistance.

LOANS OR OTHER FINANCIAL ASSISTANCE TO DIRECTORS: Section 45:

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

Note: "financial assistance" in section 44 and 45 does not include lending money in the ordinary course of business by a company whose primary business is the lending of money, and additionally in re S45 - an advance to meet legal expenses re a matter concerning the company or an amount to defray the persons expenses for removal at the company's request.

Section 46: Distributions to be authorised by the board

- No distribution may be made by the company unless it is pursuant to an existing legal obligation of the company or a court order or has been authorised by the board by resolution and immediately after giving effect to the authorisation it reasonably appears that the company would satisfy the solvency and liquidity test, and the board resolution acknowledges that the board has applied the solvency and liquidity test by reference to the accounting records and financial statements and reasonably concluded that the company will satisfy that test immediately after completing the proposed distribution;

- A director of a company may be held liable to the extent set out in S77(3)(e)(vi) if the circumstances set out in the second part of Annexure G on page 59 are met.

6. DIRECTORS

- (Chapter 2, Part F)

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

NON-ELIGIBLE & DISQUALIFIED DIRECTORS: Section 69

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

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

Section 69(8)(a):

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

Section 69(8)(b):

1. an unrehabilitated insolvent
2. is prohibited in terms of any public regulation to be a director
3. any person removed from an office of trust because of misconduct involving dishonesty
4. any person convicted of offences involving fraud, theft, forgery, perjury or an offence involving fraud, misrepresentation or dishonesty or in connection with the promotion, formation or management of a company or under this Act, the Insolvency Act, CC's Act , Competition Act, FICA, Security Services Act, Prevention and Combating of Corruption Activities Act

Note: despite the disqualifications listed in 3 and 4 contained in S69(8)(b) above, a person may still act as a director of a private company under certain circumstances – see Annexure F on page 58 (leniency);

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

DELINQUENT DIRECTORS & DIRECTORS ON PROBATION: Section 162

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

immediately preceding the application, was a director of the company;

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

BOARD OF DIRECTORS: Section 66 & 70

- The MOI may provide for the direct appointment and removal of directors by any person named therein;
- The Board may discharge a director for various reasons, including negligence or dereliction of duty;
- A profit company {not a SOC Ltd} must allow for shareholders to elect a minimum of 50% of the directors, and 50% of the alternate directors [Note: as the majority of directors should be non-executive directors it would suffice for only non-executive directors to be elected]. Each director to be appointed by a separate resolution;
- Decisions of the Board shall be valid even if the number of directors is below the minimum set out by the Act or the MOI. A director may be appointed on a temporary basis;
- Minimum number of directors per category of company as per page 4/5.

BOARD COMMITTEES: Section 72

- Board Committees may appoint non-directors to a Committee; (as long as they are not disqualified or ineligible);
- Such persons shall not have a vote. The Board may delegate to the Committee any of the authority of the Board;
- The definition of "director" in the Act includes a member of a Committee of the Board or the Audit Committee for purposes of those sections which deal with qualification, eligibility,

directors personal financial interests, liability and indemnification.

- The creation of a committee, delegation of authority or action taken does not alone satisfy or constitute compliance by a director with the required duty of a director to the company;
- The Minister may by regulation prescribe that a company or category of company have a social and ethics committee if it is desirable in the public interest, having regard to annual turnover, size of workforce or the nature and extent of its activities.

BOARD MEETINGS: Section 73

- A director may call a meeting of the board at any time and a Board meeting is obligatory if called for by:
  - at least 2 of the directors or;
  - in the case of a Board with 12 or more directors, 25% of the directors require it.
- Board meetings may be held with certain or all the directors using electronic communication (EC), see requirements on page 35;
- The board may determine from time to time the requirement for notice for meetings, as long as this complies with the MOI or rules and no meeting may be convened without notice to all the directors;
- A majority of the directors must be present in person or by electronic communication before a vote may be called at the meeting;
- Each director has one vote on a matter before the board, and a majority of votes cast on a resolution is sufficient to approve that resolution, and in the case of a tied vote, the chair may cast a deciding vote if he has not previously voted. In all other instances the motion is not carried.

REMOVAL OF DIRECTORS: Section 71

- Despite anything to the contrary in the MOI or rules or agreement between a company and director or between any shareholders and a director, a director may be removed by an ordinary resolution adopted at a shareholders meeting by the persons entitled to exercise voting rights in an election of that director provided that director has been given notice of the meeting and the resolution and has been afforded a reasonable opportunity to make a presentation in person or through a respresentative to the meeting before the resolution is put to vote.

PERSONAL FINANCIAL INTERESTS OF DIRECTOR: Section 75

- A director (including one appointed as a member of a Board Committee), is required to disclose his personal financial interest in respect of a matter to be considered at a meeting of the board (this is also applicable to a related person to him);
- He must disclose his interest before it is considered by a meeting of the Board and recuse himself by leaving the meeting, without taking part in the discussion [Note: the Companies Act 1973 did not require the director to recuse himself];
- This section does not apply to certain directors in certain circumstances (see Annexure F on page 58 (leniency and exemptions).

CODIFIED REGIME OF DIRECTORS DUTIES: Section 76

- A codified regime of directors' duties is introduced in the Act.
- Section 66 places a positive duty on the directors to manage the company.
- Section 76 applies to certain non-directors, i.e to persons appointed to committees who are not

directors, for example a member of the audit committee, alternate directors, and a prescribed officer.

- Section 76 does not exclude the common law - thus the common law duties that are not expressly amended by Section 76 or those that are not in conflict with it, will still apply.
- Section 76 states that a director must exercise the powers and perform the functions of director in good faith and for proper purpose, in the best interests of the company, and with a degree of care, skill and diligence that may reasonably be expected of such a person. See Annexure C on page 55 for an expansion of Section 76.

GENERAL LIABILITY OF DIRECTORS & OFFICERS: Section 77

A director, is liable for:

- a breach of a fiduciary duty;
- for losses, damages or cost resulting from breach of Sections 75, 76(2), 76(3)(a) or (b) (see above);
- delict – breach of a duty as per S76(3)(a), or a duty as per MOI;
- S77(3)(a) - for acting in the name of the company despite knowing he did not have the authority to do so;
- S77(3)(b) - acquiescing to carrying on of company's business despite knowing that it was being conducted contra to Section 22 (reckless trading);
- S77(3)(c) - party to an act or omission by the company despite knowing that it was calculated to defraud a creditor, employee or shareholder;
- for signing or consenting to the publication of AFS or a prospectus which contains an untrue statement;
- for knowingly consenting to the issue of shares, which had not been authorised;

- for granting unauthorised options;
- for agreeing to the granting of financial assistance to directors or other parties, when not in accordance with requirements (Section 45) [see below];
- for knowingly failing to vote against a share purchase which did not accord with legislative requirements;
- Section 46- a director will only be liable for failing to vote against a distribution if immediately after so voting, the company failed to satisfy the solvency and liquidity test and this was reasonably predictable;

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

Action to recover loss, damages or costs may not commence more than 3 years after the act or omission.

INDEMNIFICATION AND DIRECTORS' INSURANCE:

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

- Any agreement, provision in the MOI, resolution which directly or indirectly relieves a director of liability in regard to the duties contemplated in sections 75 and 76 (above) and liability contemplated in section 77 is void;

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

- The provisions of this section are in addition to any common law consistent with the section;
- A company may,if authorised in its MOI:

  (a) advance expenses to a director to defend litigation in any proceedings arising out of his/her service to the company;

  (b) directly or indirectly indemnify the director for expenses as per (a) above irrespective of whether it has advanced those expenses if the proceedings are (i) abandoned or exculpate the

director or (ii) arise in respect of any liability for which the company may indemnify the director, however may not so indemnify the director if:

(i) the director has had proceedings instituted against him/her regarding Sections 77(3)(a) to (c) [see para above] or for (ii) willful misconduct or breach of trust (unless (s)he has been exculpated);

- A company may not indirectly or directly pay any fine that may be imposed on the director convicted of an offence in terms of national legislation.

Section 78(7): Directors' Insurance:

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

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

In addition to personal liability, Section 214 of the Act makes a person guilty of an offence if he is party to falsification of any accounting records of a company, with a fraudulent purpose, knowingly provided false or misleading information and was knowingly party to conduct prohibited by Section 22 (see below) or an act or omission by a business calculated to defraud a creditor employee or security holder of the company or is party to the preparation or approval dissemination or publication of financial statements or summaries or a prospectus or written statement that contained an untrue statement.

Section 20

Each shareholder has a claim for damages (a personal claim) against any person including a director who fraudulently or due to gross negligence causes the company to do anything inconsistent with the Act or a limitation, restriction or qualification in terms of Section 20 (unless the action has been ratified by shareholders).

Section 22

A company must not carry on its business recklessly,

with gross negligence with intent to defraud any person or for any fraudulent purpose or trade under insolvent circumstances.

Section 218: Civil actions

A shareholder can also have a claim against the directors or any person who contravenes the Act for damages for any loss or damaged suffered as a result of that contravention – ie the action does not need to be fraudulent or carried out with gross negligence for a valid claim.

NB: The Act does not render an agreement or resolution or the MOI or rules that are prohibited or void in terms of the Act, void per se – a Court has to first declare it to be void.

Ultra Vires Defences:

- The duty to act intra vires requires that a director must ensure that (s)he act on behalf of the company only to the extent permitted by the powers and authority conferred upon him/her by law, the company's statutes (the MOI), the shareholders, and fellow directors;
- Where a director acts ultra vires, the shareholders may ratify the transaction retrospectively by special resolution or may elect to repudiate the action, whereupon the erring director may be held personally liable to the company for any loss suffered by the company as a result thereof.
- An action cannot be ratified if it is in contravention of the Act.
- One or more shareholders directors or other interested persons may institute proceedings to restrain the company from doing anything inconsistent with any of the limits, restrictions or qualifications without prejudice to any rights to damages of a third party who obtained such rights in good faith and did not have actual knowledge of the limit, restriction or qualification (see also page 6 relating to ring fencing).

7. SHAREHOLDERS

- (Chapter 2, Part F)

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

Proxies

- A shareholder or an agent of the shareholder may appoint one or more proxies to participate in and vote at a meeting of shareholders;
- A proxy is entitled to exercise or abstain from exercising any voting right of the shareholder without direction, except if the MOI or the instrument appointing the proxy directs him/her.

Notices

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

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

Failure to give required notice or a defect in the notice may be condoned if:

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

Compulsary AGM's

- A public company must convene the first Annual

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

Meetings

- The Board or any other person specified in the company's MOI or rules may call a meeting of shareholders at any time.
- A company must hold a meeting when:
  - The board is required by the Act or the MOI to refer a matter to shareholders for decision (this relates to fundamental transactions);
  - Whenever required in terms of Section 70(3) to fill a vacancy on the Board;
  - When required by the MOI;
  - When an AGM of a public company is required;
  - When one or more written and signed demands for a meeting are delivered to the company which demand describes the purpose of the meeting and the aggregate of the demands for substantially the same purpose are made and signed by the holders of at least 10% of the shares entitled to be voted in respect of the matter that is proposed for consideration at the meeting.

Resolutions:

- Every resolution adopted is either:
  - **A special resolution** -adopted by holders of at least 75% of the voting rights exercised on the resolution – unless the company's MOI permits a lower percentage of voting rights to approve the special resolution or one or more lower percentage of voting rights to approve special resolutions concerning one or more particular matters provided there must at all times be a margin of at least 10 percentage points between the requirements for approval of an ordinary

resolution and a special resolution on any matter.

- **An ordinary resolution** – supported by holders of at least a majority (51%) of the voting rights exercised on that resolution – unless the company's MOI requires a higher percentage of voting rights to approve the ordinary resolution or one or more higher percentage of voting rights to approve ordinary resolutions concerning specific matters, provided there must at all times be a margin of at least 10 percentage points between the requirements for approval of an ordinary resolution and a special resolution on any matter.
- Note: the minimum % of 51% will however still apply in the removal of a director under Section 71 (see page 20).

Quorum:

Votes quorum

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

Person quorum

- Irrespective of the votes quorum if a company has more than 2 shareholders, a meeting may not begin or a matter may not be debated unless at least 3 shareholders are present and the requirements of the "votes" quorum above are also met.

8. ACCOUNTING RECORDS, FINANCIAL STATEMENTS, ANNUAL FINANCIAL STATEMENTS AND AUDIT

- (Chapter 2 Part C of the Act)

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

- Some key provisions are as follows:

Section 28 Accounting records

- A company must keep accurate and complete accounting records in one of the official languages of RSA at its registered office (a) as necessary to enable the company to satisfy its obligations in terms of the Act or any other law with respect to the preparation of financial statements and (b) including any prescribed accounting records to be kept in the prescribed manner and form.
- It is an offence for the company to fail to keep accounting records as prescribed with an intent to deceive or mislead or to falsify these records or permit a person to do so.

Section 29 Financial statements

- If a company provides any financial statements (including annual financial statements) to any person for any reason, these must:

  (a) Satisfy the financial reporting standards as to form and content, if any such standards are prescribed;

  (b) Present fairly the state of affairs and business of the company, and explain the transactions and financial position of the company;

  (c) Show the company's assets, liabilities and equity as well as its income and expenses and any other prescribed information;

  (d) Set out the date on which the statements were produced and the accounting period to which they apply;

(e) Bear on the first page a prominent note indicating;

(i) Whether the statements – (in compliance with any applicable requirements of this Act:

(aa) have been audited;

(bb) if not audited, have been independently reviewed;

(cc) have not been audited or independently reviewed;

(ii) The name, professional designation (if any) of the individual who prepared or supervised the preparation of the statements.

Any such statements must not be false or misleading in any material respect or incomplete in any material particular. A company may provide any person with a summary - however these must also comply with prescribed requirements – and non-compliance is an offence – Sections 29 and 218.

Form and Content

S29(4) The Minister after consulting with the Financial Reporting Standards Council (FRSC) may make regulations prescribing the financial reporting standards or the form and content requirements for summaries.

Any such regulations must:

(a) Promote sound and consistent accounting practices;

(b) In the case of financial reporting standards, must be consistent with the International Financial Reporting Standards of the International Accounting Standards Board (IASB);

(c) May establish different standards applicable to

(i) profit and non-profit companies;

(ii) different categories of profit companies.

S29(6) It is an offence to prepare or be party to the preparation of any financial statement knowing that

those statements do not comply with international reporting standards.

Section 30: Annual financial statements (AFS)

- A company is required to produce AFS each year within **6 months** after the end of its financial year which:

  (a) are audited in the case of a public company or

  (b) in the case of any other company, -

    (i) be audited if so required by the regulations (whereby the Minister may make regulations and different requirements for different categories of companies), taking into account whether it is desirable in the public interest, having regard to the economic or social significance of the company as indicated by-

      (aa) its annual turnover;

      (bb) the size of its workforce;

      (cc) the nature and extent of its activities or;

    (ii) be either audited voluntarily at the option of the company or independently reviewed unless it has exempted (see Annexure F on page 58 leniency and financial reporting table on page 34).

S30(3) They must include an auditors report if the statements are audited, and a report by the directors with respect to the state of affairs, the business and profit or loss of the company or group of companies (if the company is part of a group) including any matter considered material in enabling the shareholders to appreciate the company's state of affairs, and any prescribed information.

S30(4)-(6) If the AFS are required to be audited, they must contain extensive information about any remuneration received by a director or prescribed officer as set out in the Act.

Section 76(5)(b) states that directors of a company may rely on information provided by accountants. See also Section 214 (refer to page 23).

9. ENHANCED ACCOUNTABILITY AND TRANSPARENCY

- Chapter 3

Public companies and SOC's Ltd (in this section referred to as "relevant companies") must also comply with additional requirements set out in Chapter 3 of the Act [private companies, personal liability companies and NPC's are not required to however they can voluntarily do so].

Chapter 3 requires the relevant companies to: Appoint a company secretary, an auditor and establish an audit committee.

Company Secretary

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

Appointment & rotation of auditor (S90)

- Upon its incorporation and each year at its annual meeting, relevant company must appoint an auditor, who must be a registered auditor and acceptable to its audit committee;
- The auditor must not be a director, prescribed officer, or employee or consultant of the company who was or has been engaged for more than one year in the maintenance of any of the company's financial records or the preparation of any of its financial statements or a director, officer or employee of a person performing the secretarial work for the company. Neither must the auditor be a person who, alone or with a partner or employees, habitually or regularly performs the duties of secretary or bookkeeper of the company, or is related to any such person, or a person who at any time during the five financial years immediately preceding the date of appointment was a person contemplated above;
- Any firm appointed as auditor must, in order to

be a valid appointment, specify the name of the individual member of the firm who will undertake the audit and that individual must also meet the requirements of the paragraph above, and;

- The same individual may not serve as the auditor or designated auditor for more than **five consecutive financial years;**
- If an individual has served as auditor or designated auditor for **two or more consecutive financial years** and then ceases to be the auditor, that individual may not be appointed again until after the expiry of at least 2 further financial years;
- Section 93 sets out the rights and restricted functions of auditors and cannot perform any services that would place him in a conflict of interest as determined by the Independent Regulatory Board for Auditors (IRBA) in terms of the Auditing Profession Act OR any other services determined by its audit committee;

Audit committee (S94)

- At each AGM, the relevant company (not the board of directors) must elect an audit committee for the following financial year (subject to certain exemptions); It must have at least three members who must be non-executive directors of the company.

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

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

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

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

(d) to determine the nature and extent of non-audit services the auditor may provide to the company;

(subject to the provisions of Chapter 3)

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

(f) to insert into the AFS to be issued in re that financial year, a report describing how the audit committee carried out its functions and stating whether or not the audit committee is satisfied that the auditor was independent, and commenting in any way the committee considers appropriate on the financial statements, the accounting practices and internal financial control of the company and;

(g) to receive and deal appropriately with any complaints from within or outside the company relating to the accounting practices or internal audit of the company or to the content or auditing of its financial statements or to any related matter;

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

(i) to perform other functions determined by the board.

- A company must pay all expenses reasonably incurred by its audit committee including the fees of any consultant or specialist engaged by the committee to assist it with its duties (if the audit committee considers it appropriate).

Note: If a holding company has an audit committee, the subsidiary does not require one.

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

Section 159: Confidential disclosures

- A relevant company must directly or indirectly –
  - Establish and maintain a system to receive confidential disclosures of any person as contemplated in Section 159 (ref section on Whistle-blowers on page 46) and act on them, and

- Routinely publicise the availability of that system to directors, secretaries, other officers, employees, registered trade unions of the company, a supplier of goods or services to a company or an employee of such a supplier.

- Register of Officers.

- A public interest company must keep a register of its directors, auditors & secretaries;

TABLE-REPORTING REQUIREMENTS

ENTITY	AGM	ACC RECDS	FS / AFS*	AUDIT/ INDEP REVIEW**	CO SEC	OPT ***
CC's	No	Yes	Yes	Acc officer report	No	Yes
Private co.	No	Yes	Yes	Yes - audit OR indep. review**	No	Yes
Private co. (owner managed)	No	Yes	Yes	No - exempted	No	Yes
Personal liability (Inc)	No	Yes	Yes	Yes - audit OR indep. review**	No	Yes
Public co. (Ltd)	Yes	Yes	Yes	Yes - audit, auditor, audit committee	Yes	N/A
SOC Ltd	Yes	Yes	Yes	Yes - audit, auditor, audit committee	Yes	N/A

* within 6 months of FYE, pepared according to IFRS of the IASB. FS / AFS required to indicate with a note if been audited, reviewed or un-audited;

** independent review : Minister regulation to prescribe manner, form & procedures & professional qualifications of persons who may conduct such reviews. Also may be required by Regulation taking into account whether desirable in the public interest, having regard to the economic or social significance of the company as indicated by its annual turnover, size of workforce, or nature and extent of its activities, and subject to regulation that may establish different standards for profit and non-profit companies & categories of for profit companies.

*** Act does not require it but MOI can require it (voluntary audit / review).

10. ELECTRONIC SIGNATURES, COMMUNICATION & SUBSTANTIAL COMPLIANCE

- (Chapter 1 Part A)

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

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

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

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

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

- An unaltered electronically or mechanically generated reproduction of any document other than a share certificate may be substituted for the original for any purpose for which the original could be used in terms of the Act;
- Section 51(2) relating to shares and share transfer forms states that a signature contemplated in terms of subsection (1)(b) (the certificate) may be affixed to or placed on the certificate by autographic, mechanical or electronic means;
- Documents can also be published, provided or delivered by electronic communication in a manner and form which enables them to be conveniently printed within a reasonable amount of time and at a reasonable cost or by giving notice (eg via a weblink) of its availability, a summary thereof and instructions for receiving the complete document;
- Thus Proxy forms, annual financial statements, prospectuses and annual reports may be lawfully created, signed, retained and sent electronically. Proxies sent electronically are valid for up to one year;

- S6(10) If in terms of this Act a notice is required to be given or published to any person, it is sufficient that the notice is transmitted electronically directly to that person in a manner and form such that the notice can conveniently be printed by the recipient within a reasonable time and at a reasonable cost;

- A notice of meeting to shareholders as contemplated in Section 62 may be "in writing or electronic form" (unless the company's MOI provides otherwise);

- Faxes, telephone communications and conference calls – are all electronic communications which are suitable for establishing a "virtual" presence for purposes of meetings as contemplated in the Act. Section 63 relates to shareholders meetings and Section 73 refers to Board meetings of Directors and provides that a meeting of shareholders and directors respectively may be conducted entirely by electronic communication or if held in person, one or more of the shareholders, directors or proxies may participate by electronic communication – so long as the methods employed enables all persons participating to simultaneously communicate with each other without an intermediary and to participate effectively in that meeting (and so long as the MOI allows for it). In such a case the notice of that meeting must inform shareholders thereof, access to the medium or means of electronic communication is at the expense of the shareholder or proxy except to the extent that the company determines otherwise;

- Thus the definition of "present at a meeting" includes a "virtual presence" or representation by electronic proxy;

- Record retention will be complied with if an electronic original or reproduction is retained in terms of S15 of the Electronic Communications and Transactions Act 25 of 2002;

- Refer to page 10 for requirements regarding generating, maintaining and holding company records and registered office in SA.

11. BUSINESS RESCUE

- (Chapter 6 of the Act)

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

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

- Business rescue means proceedings to facilitate the rehabilitation of a company that is financially distressed* by providing for:

  - the temporary supervision of the company and the management of affairs, business and property;

  - a temporary moratorium on the rights of claimants against the company or in respect of property in its possession;

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

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

"affected person" in this section means: in relation to a

company, (i) a shareholder or creditor of the company, (ii) any registered trade union representing employees of the company (iii) if any of the employees are not represented by a registered trade union each of those employees or their respective representatives.

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

Company resolution to begin proceedings (Section 129)

- The Board may resolve that the company voluntarily begin business rescue proceedings and place the company under supervision the board has reasonable grounds to believe that (a) the company is financially distressed and (b) there appears to be a reasonable prospect of rescuing the company;

- Once the resolution is filed, the company must within five business days (a) publish a notice of the resolution and its effective date to every affected person including a sworn statement of the facts relevant to the grounds on which the board resolution was founded and (b) appoint a business rescue practitioner who satisfies the requirements of S138 and who has consented to his/her appointment in writing;

Objections to company resolution (Section 130)

- An affected person may apply to a court for an order:

  (a) setting aside the resolution (any time after the resolution has been filed but before the adoption of the business plan) on the grounds set out in the Act.

  (b) for an order setting aside the appointment of the practitioner on the grounds set out in the Act.

  (c) requiring the practitioner to provide security in an amount and on terms and conditions that the court considers necessary to secure the interests of the company and affected persons;

Court order to begin business rescue proceeings (Section 131)

- An affected person in the paragraph above may apply to court for an order placing the company under supervision and commencing business rescue proceedings, in the event that the company has not taken a resolution as per S129,

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

Sections 132 to 136 deal with duration of proceedings, general moratorium on legal proceedings against the company during Business Rescue, protection of property interests, post commencement finance & the effect of business rescue on employees and contracts.

Effect on shareholders and directors (Section 137)

- During proceedings any alteration in the classification or status of any issued securities of a company – other than by way of transfer of securities in the ordinary course of business, is invalid except if the court otherwise directs or such alteration is contemplated in and approved in the business rescue plan;

- The Board and directors must continue to perform and exercise their functions and powers – subject to the authority of the practitioner, and have a duty to the company to exercise any management function within the company in accordance with the express instructions of the practitioner, to the extent that it is reasonable to do so, and remains bound by the requirements of S75 concerning personal financial interests . Any action taken by the Board and/or directors that requires supervisor approval is void unless so approved.

Sections 138 to 143 (Part B) deal with the Qualifications of Practitioners, their removal and replacement, general powers and duties, investigation of affairs of the company, directors co-operation with the practitioner and remuneration of the practitioner.

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

- The Act protects the interests of workers by recognising them as creditors of the company with a voting interest to the extent of any unpaid remuneration;

- An employee is thus a preferred unsecured creditor in regard to any monies which became due and payable by the company at any time before the beginning of the company's business rescue proceedings and which have not been paid to that employee before the beginning of those proceedings;

- During proceedings each employee may elect to exercise any rights as a creditor either directly or by proxy through their registered trade union, and are entitled to:

  (a) notice of each significant court proceeding, decision, meeting and;

  (b) to participate in court proceedings;

  (c) to form a committee of employee's representatives and;

  (d) to be consulted by the practitioner during the development of the business rescue plan;

  (e) to be present and make a submission to the meeting of holders of voting interests before a vote is taken on any proposed business plan;

  (f) to vote with creditors on a motion to approve a proposed business plan to the extent that the employee is a creditor and;

  (g) if the plan is not adopted, to propose the development of an alternative plan or to present an offer to purchase the interests of one or more affected persons.

Section 145 – participation by creditors

- Each creditor is also entitled to the same rights as per (a), (b) and (g) listed above and to formally

participate in the proceedings to the extent provided for in the Chapter and also informally by making proposals to the practitioner. In addition each creditor is entitled to vote to amend, approve or reject a plan in a manner contemplated in Section 153.

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

Section 146 – participation by holders of company securities

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

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

- Within ten business days after being appointed, the practitioner must convene and preside over a first meeting of creditors (S147) and first meeting of employee's representatives (S148).

THE BUSINESS RESCUE PLAN (PART D)

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

- The practitioner, (after consulting with creditors, other affected persons and management of the company) must prepare a Business Rescue Plan for consideration and possible adoption at a meeting to determine the future of the company;

- Sections 150(2) and (3) and (4) sets out the list of information and Annexure that the plan should comprise of;

- The plan must be published by the company within

25 business days after the date on which the Practitioner was appointed;

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

- Section 152: At the meeting the plan will either be preliminarily adopted or rejected. It will be preliminarily approved if it is supported by the holders of more than 75% of the creditors' voting interests that were voted and the votes in support of the plan included at least 50% of the independent creditors voting interests, if any, that were voted;

- If rejected, it may be considered further only in terms of Section 153;

- If adopted, the plan is binding on the company and on each of the creditors and every holder of the company's securities of the company whether or not they were present at the meeting, or voted in favour or not of the plan, or in the case of creditors, whether or not they proved their claims against the company;

- The company, under the direction of the practitioner must take all necessary steps to satisfy the conditions on which the plan is contingent and to implement the plan as adopted;

- When the plan has been substantially implemented, the practitioner must file with the Commission, a "Notice of the Substantial Implementation of the Business Rescue Plan".

Discharge of Debts and Claims (Section 154)

- The plan might provide that if it is implemented in accordance with its terms and conditions, a creditor who has acceded to the discharge of the whole or part of a debt owing to them will lose the right to enforce the relevant debt or part of it;

- If a business rescue plan has been approved and implemented a creditor is not entitled to enforce any debt owed by the company immediately before the beginning of the business rescue process except to the extent provided for in the business rescue plan.

12. DISSOLUTION AND DEREGISTRATION

- (Part G of Chapter 2 of the Act)

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

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

Dissolution

- A solvent company may be dissolved by: *(A) voluntary winding up – initiated by the company and conducted either by the company or by its creditors as determined by special resolution of the shareholders of the company (Section 80) or (B) by court order (Section 81)*

- The procedure for applying for its dissolution as per the above 2 methods is set out in Part G of Chapter 2 and Item 9 of Schedule 5 of the Act;

Voluntary winding up

- The company remains a juristic person and retains all powers as such while it is being wound up (voluntarily) however from the beginning of the process, it must stop carrying on its business except to the extent required for the beneficial winding up of the company, and all of the directors powers cease except to the extent specifically authorised in the case of winding up by the company – by the liquidator or the shareholders in a general meeting or in the case of a winding up by creditors – the liquidator or the creditors.

By Court order

Applicants can be :

- **The company** (special resolution by shareholders), or the shareholders are deadlocked in voting power;
- **Business rescue practitioner** - when it becomes apparent that there is no reasonable prospect of the business being rescued;
- **Creditors**
- **Shareholder(s)** – (a) when there is a deadlock between them or (b) with leave of the court, the directors, prescribed officers or other persons in control of the company are acting in a manner that is fraudulent or otherwise illegal or that the company's assets are being misapplied or wasted;
- **Director(s)** – on basis of deadlock;
- **CIPC or the Take-over Regulation Panel** – where the directors, prescribed officers or other persons in control of the company are acting in a manner that is fraudulent or otherwise illegal and a compliance issue has been issued and the company has failed to comply and within the previous five years enforcement proceedings in terms of the Act or the CC's Act were taken against the company its directors, prescribed officers or other persons in control of the company for substantially the same conduct resulting in an administrative fine, or conviction for an offence.

- If at any time after the company has adopted a special resolution contemplated herein (relating to the voluntary winding up) or after application to court, it is determined that the company is or may be insolvent, a court on application by an interested person may order that the company be wound up as an insolvent company.
- When the affairs of the company are completely wound up and a Court order of Final Liquidation made, the Master must file a Certificate to this effect together with the Court Order to the Commissioner, who then records the dissolution and removes the company name from the Register.

Inactivity

CIPC **may** deregister the company only if:

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

Where the Commissioner has-

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

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

- When the Commissioner deregisters as per (a), (b) and (c) above, any assets of the company are for five years after the date of deregistration, trust property held for the joint benefit of the deregistered company, any person having an interest in its assets, and the state. Thereafter the assets will be forfeited to the State.
- Any interested party may apply to CIPC during the five year period, to re-instate the registration of the company and to court for an order transferring the assets to the company so held in trust;
- Once the company is dissolved and deregistered, its name is removed from the Companies Register;
- The removal of its name does not affect the liability of any former director or shareholder (or any other person) in respect of any act or omission that took place before deregistration, which may be enforced as if the company's name was never so removed from the register.

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

13. REMEDIES & ENFORCEMENT

- (Chapter 7 of the Act)

REMEDIES

The Act introduces a new regime to protect "whistle-blowers" and in addition to retaining certain existing remedies, introduces the remedies as contained in paragraphs A, B and C in the shaded section on pages 47 to 49 below;

- Any person, or a person acting on behalf of another, or as a member of a group or class of affected persons, or a person acting in the public interest, (with leave of the court) or an association acting in the interest of its members may :

  - Attempt to resolve any dispute with or within a company through alternative dispute resolution or

  - apply to a **Companies Tribunal**, - in any matter arising under the Act or

  - apply to the **High Court** for appropriate relief in terms of the Act or

  - file a complaint with the Commission or Takeover Regulation Panel (Part D);

Protection of whistle-blowers

(Section 159 of Chapter 7 of the Act)

- Any shareholder, director, company secretary, prescribed officer, employee, a registered trade union or other representative of the employees, supplier of goods or services to the company, or employee of such a supplier - who has reasonable grounds to suspect that the company or any of its directors or employees have contravened the Act, or a law mentioned in Schedule 4 or or any statutory obligation or is engaged in conduct that has or is likely to endanger the health and safety of any individual or damage the environment or has unfairly discriminated or condoned unfair discrimination in contravention of the Consitution or Unfair Discrimination Act 2000 or has contravened any other legislation that could expose the company to an actual or contingent risk of liability or is inherently prejudicial to the interests of the

company & in good faith discloses this information to the Commission, Companies Tribunal, Panel a regulatory authority, an exchange, legal adviser, a director, prescribed officer, company secretary, auditor, board or committee of the company concerned, then that person (the whistle-blower), has qualified privilege in respect of that disclosure and will be immune from any civil, criminal or administrative liability for that disclosure,

- If a person who has made such a disclosure is subjected to express or implied threats or conduct that causes detriment to him/her by any other person, then (s)he will be entitled to compensation for damages suffered;
- *Any provision of a company's MOI or an agreement is void to the extent it purports to limit or negate this Section 159;*
- *A public company and SOC Ltd must establish a system for confidential disclosures (see page 31 (enhanced accountability section).*

Remedies and Enforcement

(I) Rights to seek specific remedies [Part B]

Section 160: Company Names

See page 9 relating to company names and applications to Companies Tribunal or Human Rights Commission.

Section 161: Rights of Securities holders

A holder of issued securities may apply to Court for an order regarding any rights of the securities holder in terms of the Act or MOI, or rules or any applicable debt instrument or an order to protect any such right or to rectify any harm done to the securities holder by the company or director(s) in consequence of a contravention by the latter of the Act MOI, rules.

Section 162: Directors

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

Section 163: Relief from oppressive or prejudicial conduct:

A shareholder,or director of a company may apply to Court for relief if any act or ommission of the company or related person or the business of the company or related person is being carried out in a certain way or the powers of a director prescribed officer or person related are being exercised in a manner that is oppressive or unfairly prejudicial to or unfairly disregards the interests of the applicant.

See Section 164: re

Dissenting shareholder's appraisal rights & Section 165 re Derivative actions.

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

As an alternative to applying for relief i.t.o Part B & D, a person could file a complaint to the Company Tribunal or an accredited entity [alternative dispute resolution agent (ADR)], for a resolution by mediation, conciliation or arbitration. The decision by the Tribunal re a notice, order or decision taken by the Commission or Panel is BINDING on the Commission or Panel. Dispute resolution may result in a CONSENT ORDER between the parties which would then be confirmed by the court. If so confirmed the order may include an award for damages, which will not preclude that person applying for an award of CIVIL damages unless the consent order includes an award for damages to that person The Companies Tribunal is self funded - the person applying for relief may thus do so at very little cost.

(III) Complaints to Commission or Take-Over Regulation Panel ("the Panel") (Part D)

Any person can file a complaint with the Panel or the Commission who may direct that an investigator conducts an investigation or may issue a notice to the complainant that it will NOT investigate further (if the grounds appear frivolous or vexatious). After receiving the report from the Investigator, the Panel or Commission may issue a report and either (a) excuse the respondent or (b) issue a notice of non-referral to

the complainant or (c) refer the matter to the Tribunal or another ADR agent to resolve OR (d) in re the Commission, propose a meeting with relevant parties with a view to resolving the matter or (e) commence proceedings in Court or (f) refer the matter to the National Prosecuting Authority (if an alleged offence has been committed) OR (g) issue a compliance notice to the respondent. If the respondent complies a Compliance Certificate is issued. Failure to comply may result in a Court (on application by the Commission or Panel) imposing an administrative fine not exceeding the greater of: 10% of the respondents turnover for the period during which the company failed to comply and the maximum amount of admin fine being R1 million.

Anti-Avoidance –Section 6

A court on application by the CIPC or TRP may declare an agreement, transaction, scheme, resolution or provision of a company's MOI or rules to be primarily or substantially intended to defeat or reduce the effect of a prohibition or requirement established by or in terms of an unalterable provision of the Act and can void it to the extent that it defeats or reduces the effect of a prohibition or requirement established by or in terms of an unalterable provision of the Act. Note – it will only effectively be void if a court declares it void – however liability can still follow (common law).

ENFORCEMENT

- The Act aims to decriminalise sanctions where possible & rather to enforce company law administratively via the appropriate bodies listed in paragraphs A, B and C above;
- There are very few remaining offences – only those arising out of a refusal to respond to a summons, to give evidence, perjury and the situation where, in order to improve corporate accountability, the Act states that it will be an offence, punishable by a fine or up to ten years imprisonment for a director to commit a breach of confidence (Section 213) or sign or agree to a false or misleading financial statement or prospectus, or to be reckless in the conduct of the company's business (Section 214) (see page 21 - directors liability).

14. TRANSITIONAL ARRANGEMENTS

- (Schedule 5)

Companies

- Every pre-existing company incorporated under the Companies Act 1973 or recognised as an existing company will continue as if incorporated and registered under the new Act with the existing name and registration number;
- An existing company may file within two years of the general effective date of the new Act, an amendment to its MOI to harmonise it with the Act and if necessary a notice of name change and copy of a special resolution under Section 16 to alter its name to meet the requirements of the Act;
- A Section 21 and Section 53(b) company will be deemed to have amended its MOI from the general effective date of the new Act to expressly state that it is an NPC or personal liability company respectively;
- A company falling within the definition of a SOC in terms of new Act, will be deemed to have amended its MOI from the general effective date of the new Act to have changed its name (SOC Ltd);
- A company limited by guarantee (other than a Section 21 company) may file a notice within 20 business days after the general effective date electing to become a For Profit company. If not, it is deemed to have amended its MOI from the effective date to expressly state that it is a "NPC" and to change its name accordingly.

Continued application of 1973 Act to winding up and liquidation

- Chapter 14 of the 1973 Act will continue to apply with respect of the INSOLVENT winding up and liquidation of companies under the new Act.

Close Corporations (CC's)

- CC's continue to exist for an indefinite period or until deregistered or dissolved in terms of the Close Corporations Act.
- CC's can continue to be registered until Section 13 of the new Act comes into operation and thereafter no further registrations of CC's and no company can be converted to a CC.

Conversion of CC to Company

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

Financial Statements and accounting records of CC's

- The same requirements as per Section 28, 29, 30 (see pages 28-30) applies to CC's unless it has been dormant or on application to and exemption by CIPC, or if the CC has only one member;
- However if there is only one member and (s)he is disqualified to act as such and (s)he manages the CC, financial statements must be prepared;
- If it appears necessary to protect the interests of any members of the CC or desirable in the public interest, having regard to the economic or social significance of the CC as indicated by its annual turnover, the size of its workforce or the nature and extent of its activities, CIPC may issue an administrative notice requiring an exempt CC to prepare AFS in future and until further notice;
- The CC may also voluntarily make the enhanced accountability and transparency provisions of Chapter 3 applicable;
- The Minister, after consulting the FRSC may make regulations prescribing financial reporting standards or the form and content requirements for summaries of financial statements.

Management of CC's & disqualified members

- Disqualification as director also excludes person from managing a CC unless (s)he is the sole member or (s)he or other persons (all of whom are related to that disqualified member) and all of whom together hold 100% members interest, have consented in writing to his/her participation;
- Probationary members can manage the CC to the extent the court order allows it.

Business Rescue and winding up of CC's

- Chapter 6 will also apply to CC's (Business Rescue)
- Chapter 9 of the CC's Act will continue to be applied under Chapter 14 of the Companies Act 1973 relating to insolvent winding up and thereafter in terms of the new (company) winding up legislation.

15. APPLICATION AND INTERPRETATION OF ACT

- Where there are conflicts with the Companies Act 2008 and a provision of any other national legislation,

  (a) the provisions of both Acts will apply concurrently to the extent that its is possible to apply and comply with one of the inconsistent provisions without contravening the second, and

  (b) if there is inconsistency beween the Companies Act and any of the following legislation, the latter will prevail:

  - The Promotion of Access to Information Act 2 of 2000;
  - The Auditing Profession Act 26 of 2005;
  - The Labour Relations Act 66 of 1995;
  - The Public Finance Management Act 1 of 1999;
  - The Promotion of Administrative Justice Act 3 of 2000
  - The Banks Act
  - The Securities Services Act 36 of 2004 [except in re S49(4)]

  (c) In all other instances, the Companies Act 2008 will apply [except in re ss 84(2) and 118(4)]

ANNEXURE A: PROBATIONARY DIRECTORS

A court may make an order placing a person under probation if:

(a) while serving as a director (s)he (i) improperly supported a resolution despite the inability of the company to satisfy the solvency & liquidity test (ii) acted in a manner inconsistent with the duties of a director (iii) acted in a manner or supported the company in an action contemplated in section 163 (oppressive or prejudicial conduct or abuse of separate juristic personality of company) OR;

(b) within a period of ten years after the effective date, (s)he had been a director of more than 1 company or managing member of more than 1 CC and two or more of such companies or CC's (concurrently, sequentially or unrelated) which failed to fully pay all of its creditors or meet any of its obligations (except under a business rescue plan or a compromise with creditors) during the time (s)he was a Director or member.

An order made re (a) and (b) above shall be made subject to the court's being satisfied that certain circumstances existed to justify the declaration.

An order made re (a) and (b) above may be subject to any conditions the court considers appropriate including limiting the application of the declaration to 1 or more category of company & subsists for 5 years from the date of the order.

A person on probation may apply to court to set aside the order at any time more than two years after it was made.

A court may order as a condition applicable to the declaration that the person be supervised by a mentor in any future participation as a director/member of CC while the order remains in force or be limited to serving as a director of a private company or a company of which that person is sole shareholder.

ANNEXURE B: DELINQUENT DIRECTORS

A court may make an order declaring a person a delinquent director if:

(a) (s)he consented to serve as a director or acted as director while ineligible or disqualified as contemplated in Section 69 unless (s)he was acting as per a court order or unless the conditions listed in para (e) Annexure F are met.

(b) while under a court order of probation, acted as a director in a manner contravening that order;

An order made re (a) & (b) above is unconditional and subsists for the lifetime of the person so declared.

(c) while a director, grossly abused that position, took personal advantage of information, contrary to Section 76, intentionally or by gross negligence inflicted harm on the company, acted in a manner amounting to gross negligence, willful misconduct, breach of trust, or acted in a manner as set out in Section 77(3)(a)(b) or (c) ref page 21 (liability);

(d) has repeatedly been subject to a compliance notice;

(e) has at least twice been personally convicted of an offence or administrative fine;

(f) within a period of five years was a director of one or more companies or participated in the control of a juristic person subject to administrative fines and (s)he was a director at the time of the contravention and the court is satisfied that the declaration of delinquency is justified having regard to the nature of the contraventions.

An order made re (c)–(f) above may be subject to any conditions the court considers appropriate & subsists for seven years from the date of the order.

A person declared delinquent i.t.o (b) to (f) may apply to court to suspend the order & substitute an order of probation at any time more than three years after the order or to set aside the order at any time more than two years after it was so suspended

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

Note: all ref to director applies to members of CC's in this section.

ANNEXURE C: CODIFIED REGIME OF DIRECTORS DUTIES

- S76(3)(a) a director is required to act in good faith & for a proper purpose &;
- S76(3)(b)in the best interests of the company;
- S76(3)(c) each director is subject to a duty to exercise a degree of care, skill & diligence that would reasonably be expected of a person with general knowledge skill & experience reasonably expected of that person when carrying out the functions of a director;
    - the director's judgement as to whether an action or decision is in the best interests of the company is reasonable (i) if the director has taken diligent steps to become informed about the subject matter of the decision and (ii) does not have a material personal financial interest in the subject matter of the decision (nor does a related person) (and it is a decision that a reasonable person in a similar position could hold in comparable circumstances) and the director has complied with Section 75 (disclosure of financial interests-see above) and (iii) the director made a decision or supported the decision of a committee and had a rational basis for believing that the decision was in the best interests of the company;
    - in discharging any duty contemplated in this section the director is entitled to rely on the performance by any of the persons to whom the board may have delegated formally or informally duties to perform one or more of the board's functions that are delegable under law or any financial reports or statements or one or more employees of the company whom the director reasonably believes to be reliable & competent, legal counsel, accountants or any financial reports or statements prepared by any of these persons, a committee of the board of which the director is not a member.

ANNEXURE D: SOLVENCY AND LIQUIDITY TEST

Section 4(1): a company satisfies the solvency and liquidity test at a particular time if, considering all reasonably foreseeable financial circumstances of the company at that time -

(a) the assets of the company or, if the company is a member of a group of companies, the aggregate assets of the company as fairly valued equal or exceed the liabilities of the company or if the company is a member of a group of companies, the aggregate liabilities of the company, as fairly valued, and;

(b) it appears that the company will be able to pay its debts as they become due in the course of business for a period of - (i) 12 months after the date on which the test is considered; or (ii) in the case of a distribution contemplated in para (a) of the definition of 'distribution' in section 1, 12 months following that distribution.

Section 4(2): for the purposes contemplated in (1)

(a) any financial information to be considered concerning the company must be based on -

(i) accounting records which satisfy requirements of S28;

(ii) financial statements which satisfy requirements of S29 (b) subject to para (c) the board or any other person applying the solvency and liquidity test to a company must (i) consider a fair valuation of the company's assets and liabilities including any reasonably foreseeable contingent assets & liabilities irrespective of whether or not arising as a result of the proposed distribution and (ii) may consider any other valuation of the company's assets and liabilities that is reasonable in the circumstances and;

(c) unless the MOI provides otherwise, a person applying the test in re of a distribution contemplated in para (a) of the definition of 'distribution' in S1 is not to be regarded as a liability any amount that would be required if the company were to be liquidated at the time of the distribution to satisfy the preferential rights upon liquidation of shareholders whose preferential rights on liquidation are superior to the preferential rights on liquidation of those receiving the distribution.

ANNEXURE E: RELATED AND INTER-RELATED PERSONS AND CONTROL

Section 2(1)(a): an individual is related to another individual if (i) they are married or live together in a relationship similar to marriage (ii) are seperated by no more than two degrees of natural or adopted consanguinity or affinity;

Section 2(1)(b): an individual is related to a juristic person if the individual directly or indirectly controls the juristic person (as determined in accordance with subsection (2) - see below*

Section 2(1)(c): a juristic person is related to another juristic person if: (i) either of them directly or indirectly controls the other or the business of the other -see below* (ii) either is a subsidiary of the other or (iii) a person directly or indirectly controls each of them or the business of each of them - see below*

Section 2(1)(d): two 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.

**Control: a person controls a juristic person (JP) or its business if;*

(a) in the case of a JP that is a company, (i) that JP is a subsidiary of that 1st person (ii) that 1st person together with any related or inter-related person is (aa)directly or indirectly able to exercise control over the majority of voting rights associated with the securities of that company (bb) has the right to appoint directors who control the majority of votes at a meeting of the Board;

(b) in the case of a JP that is a C, the 1st person owns the majority of members interest or controls/has right to control majority of members votes;

(c) in the case of a JP that is a trust, the 1st person has the ability to control the majority of votes of trustees or appoint majority of trustees or appoint or change the majority of beneficiaries;

(d) that 1st person has the ability to materially influence the policy of the JP.

ANNEXURE F: LENIENCY /EXEMPTIONS FOR CERTAIN COMPANIES - (S57)

A For Profit company (other than SOC).

Where only one person holds beneficial interest in all securities issued by the company (eg only one shareholder).

(a) less onerous reporting requirements;

(b) no notice requirements (simplified decision making);

(c) S59-65 do not apply (re shareholders meetings-notice, conduct, quorum, resolutions) ie no need for compliance with internal formalities;

(d) exempted from audit or independent review of FS or AFS (unless voluntarily done);

Where there is only one director who is also the sole shareholder

(e) the disqualifications listed in S69(8)(b)(iii) & (iv) (see page 16) a person may still act as a director if all the shares are held by him/her or by him/her together with persons related to him/her (see Annexure E on page 57) and they all consented in writing to his continued position as director;

(f) no notice requirements for board meeting;

(g) S75(2)(b): requirement for disclosure of directors personal financial interest does not apply.

Where there is only one director

(h) S57(3) no notice or other compliance with internal formalities required [S71(3)-(7), S73, S74 not applicable] (i) may enter a contract in which (s)he or a related person has a personal financial interest after obtaining an ordinary resolution of shareholders.

Where every director is also a shareholder

(j) S30(2) – exempted from audit or independent review of FS or AFS (unless voluntarily decides to do so) unless the company has only one director and he/she continues to act as such despite being disqualified (as per S69(12)–then exemption falls away;

(k) diminished need to seek shareholder approval for certain board actions;

(l) no notice or other internal formalities re referral by Board for shareholders decisions;

(m) less onerous reporting requirements (see table page 34);

(n) when acting in capacity as shareholders, no need to comply with S73-78 relating to meetings, duties, obligations, standards of conduct, liabilities & indemnification of directors.

(o) flexibility re disqualification: if disqualified, can still be a director.

ANNEXURE G: CONDITIONS FOR LENDING FINANCIAL ASSISTANCE

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

(a) the particular provision of financial assistance is –

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

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

(b) the board is satisfied that –

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

(ii) the terms under which the financial assistance is proposed to be given are fair and reasonable to the company (this applies to S44 only).

Any resolution by the Board to provide financial assistance that is inconsistent with Section 44 OR Section 45 or any prohibition, restriction or requirement in the company's MOI is VOID and any director who voted in favour of such a resolution or approved an agreement providing the assistance is liable to the extent set out in section 77(3(e)(iv) in re Section 44 and Section 77(3)(e)(v) in re Section 45 read with Section 218 (IE is only effectively void once declared so by a court) - if the director (a) was present at the meeting when the board approved the resolution or agreement, or participated in the making of such a decision in terms of section 74; and (b) failed to vote against the resolution or agreement despite knowing that the provision of financial assistance was inconsistent with this section or a prohibition, condition or requirement contemplated in the MOI.