Government Gazette

REPUBLIC OF SOUTH AFRICA

Vol. 526 Cape Town 9 April 2009 **No. 32121**

THE PRESIDENCY

No. 421 9 April 2009

It is hereby notified that the President has assented to the following Act, which is hereby published for general information:–

No. 71 of 2008: Companies Act, 2008.

AIDS HELPLINE: 0800-123-22 Prevention is the cure

(English text signed by the President.)
(Assented to 8 April 2009.)

ACT

To provide for the incorporation, registration, organisation and management of companies, the capitalisation of profit companies, and the registration of offices of foreign companies carrying on business within the Republic; to define the relationships between companies and their respective shareholders or members and directors; to provide for equitable and efficient amalgamations, mergers and takeovers of companies; to provide for efficient rescue of financially distressed companies; to provide appropriate legal redress for investors and third parties with respect to companies; to establish a Companies and Intellectual Property Commission and a Takeover Regulation Panel to administer the requirements of the Act with respect to companies, to establish a Companies Tribunal to facilitate alternative dispute resolution and to review decisions of the Commission; to establish a Financial Reporting Standards Council to advise on requirements for financial record-keeping and reporting by companies; to repeal the Companies Act, 1973 (Act No. 61 of 1973), and make amendments to the Close Corporations Act, 1984 (Act No. 69 of 1984), as necessary to provide for a consistent and harmonious regime of business incorporation and regulation; and to provide for matters connected therewith.

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

ARRANGEMENT OF SECTIONS

CHAPTER 1

INTERPRETATION, PURPOSE AND APPLICATION

Part A

Interpretation

1. Definitions
2. Related and inter-related persons, and control
3. Subsidiary relationships
4. Solvency and liquidity test
5. General interpretation of Act
6. Anti-avoidance, exemptions and substantial compliance

Part B

Purpose and application

7. Purposes of Act
8. Categories of companies

9. Modified application with respect to state-owned companies
10. Modified application with respect to non-profit companies

CHAPTER 2

FORMATION, ADMINISTRATION AND DISSOLUTION OF COMPANIES

Part A

Reservation and registration of company names

11. Criteria for names of companies
12. Reservation of name for later use

Part B

Incorporation and legal status of companies

13. Right to incorporate company
14. Registration of company
15. Memorandum of Incorporation, shareholder agreements and rules of company
16. Amending Memorandum of Incorporation
17. Alterations, translations and consolidations of Memorandum of Incorporation
18. Authenticity of versions of Memorandum of Incorporation
19. Legal status of companies
20. Validity of company actions
21. Pre-incorporation contracts
22. Reckless trading prohibited

Part C

Transparency, accountability and integrity of companies

23. External companies and registered office
24. Form and standards for company records
25. Location of company records
26. Access to company records
27. Financial year of company
28. Accounting records
29. Financial statements
30. Annual financial statements
31. Access to financial statements or related information
32. Use of company name and registration number
33. Annual return
34. Additional accountability requirements for certain companies

Part D

Capitalisation of profit companies

35. Legal nature of company shares and requirement to have shareholders
36. Authorisation for shares
37. Preferences, rights, limitations and other share terms
38. Issuing shares
39. Pre-emptive right to be offered and to subscribe shares
40. Consideration for shares
41. Shareholder approval for issuing shares in certain cases
42. Options for subscription of securities
43. Securities other than shares
44. Financial assistance for subscription of securities

45. Loans or other financial assistance to directors
46. Distributions must be authorised by board
47. Capitalisation shares
48. Company or subsidiary acquiring company's shares

Part E

Securities registration and transfer

49. Securities to be evidenced by certificates or uncertificated
50. Securities register and numbering
51. Registration and transfer of certificated securities
52. Registration of uncertificated securities
53. Transfer of uncertificated securities
54. Substitution of certificated or uncertificated securities
55. Liability relating to uncertificated securities
56. Beneficial interest in securities

Part F

Governance of companies

57. Interpretation and restricted application of Part
58. Shareholder right to be represented by proxy
59. Record date for determining shareholder rights
60. Shareholders acting other than at meeting
61. Shareholders meetings
62. Notice of meetings
63. Conduct of meetings
64. Meeting quorum and adjournment
65. Shareholder resolutions
66. Board, directors and prescribed officers
67. First director or directors
68. Election of directors
69. Ineligibility and disqualification of persons to be director or prescribed officer
70. Vacancies on board
71. Removal of directors
72. Board committees
73. Board meetings
74. Directors acting other than at meeting
75. Director's personal financial interests
76. Standards of directors' conduct
77. Liability of directors and prescribed officers
78. Indemnification and directors' insurance

Part G

Winding-up of solvent companies and deregistering companies

79. Winding-up of solvent companies
80. Voluntary winding-up of solvent company
81. Winding-up of solvent companies by court order
82. Dissolution of companies and removal from register
83. Effect of removal of company from register

CHAPTER 3

ENHANCED ACCOUNTABILITY AND TRANSPARENCY

Part A

Application and general requirements of Chapter

84. Application of Chapter
85. Registration of secretaries and auditors

Part B

Company secretary

86. Mandatory appointment of company secretary
87. Juristic person or partnership may be appointed company secretary
88. Duties of company secretary
89. Resignation or removal of company secretary

Part C

Auditors

90. Appointment of auditor
91. Resignation of auditors and vacancies
92. Rotation of auditors
93. Rights and restricted functions of auditors

Part D

Audit committees

94. Audit committees

CHAPTER 4

PUBLIC OFFERINGS OF COMPANY SECURITIES

95. Application and interpretation of Chapter
96. Offers that are not offers to public
97. Standards for qualifying employee share schemes
98. Advertisements relating to offers
99. General restrictions on offers to public
100. Requirements concerning prospectus
101. Secondary offers to public
102. Consent to use of name in prospectus
103. Variation of agreement mentioned in prospectus
104. Liability for untrue statements in prospectus
105. Liability of experts and others
106. Responsibility for untrue statements in prospectus
107. Time limit as to allotment or acceptance
108. Restrictions on allotment
109. Voidable allotment
110. Minimum interval before allotment or acceptance
111. Conditional allotment if prospectus states securities to be listed

CHAPTER 5

FUNDAMENTAL TRANSACTIONS, TAKEOVERS AND OFFERS

Part A

Approval for certain fundamental transactions

112. Proposals to dispose of all or greater part of assets or undertaking
113. Proposals for amalgamation or merger
114. Proposals for scheme of arrangement
115. Required approval for transactions contemplated in Part
116. Implementation of amalgamation or merger

Part B

Authority of Panel and Takeover Regulations

117. Definitions applicable to this Part, Part C and Takeover Regulations
118. Application of this Part, Part C and Takeover Regulations
119. Panel regulation of affected transactions
120. Takeover Regulations

Part C

Regulation of affected transactions and offers

121. General requirement concerning transactions and offers
122. Required disclosure concerning certain share transactions
123. Mandatory offers
124. Compulsory acquisitions and squeeze-out
125. Comparable and partial offers
126. Restrictions on frustrating action
127. Prohibited dealings before and during an offer

CHAPTER 6

BUSINESS RESCUE AND COMPROMISE WITH CREDITORS

Part A

Business rescue proceedings

128. Application and definitions applicable only to Chapter
129. Company resolution to begin business rescue proceedings
130. Objections to company resolution
131. Court order to begin business rescue proceedings
132. Duration of business rescue proceedings
133. General moratorium on legal proceedings against company
134. Protection of property interests
135. Post-commencement finance
136. Effect of business rescue on employees and contracts
137. Effect on shareholders and directors

Part B

Practitioner's functions and terms of appointment

138. Qualifications of practitioners
139. Removal and replacement of practitioner
140. General powers and duties of practitioner
141. Investigation of affairs of company

142. Directors of company to co-operate with and assist practitioner
143. Remuneration of practitioner

Part C

Rights of affected persons during business rescue proceedings

144. Rights of employees
145. Participation by creditors
146. Participation by holders of company's securities
147. First meeting of creditors
148. First meeting of employees' representatives
149. Functions, duties and membership of committees of affected persons

Part D

Development and approval of business rescue plan

150. Proposal of business rescue plan
151. Meeting to determine future of company
152. Consideration of business rescue plan
153. Failure to adopt business rescue plan
154. Discharge of debts and claims

Part E

Compromise with creditors

155. Compromise between company and creditors

CHAPTER 7

REMEDIES AND ENFORCEMENT

Part A

General principles

156. Alternative procedures for addressing complaints or securing rights
157. Extended standing to apply for remedies
158. Remedies to promote purpose of Act
159. Protection for whistle-blowers

Part B

Rights to seek specific remedies

160. Disputes concerning reservation or registration of company names
161. Application to protect rights of securities holders
162. Application to declare director delinquent or under probation
163. Relief from oppressive or prejudicial conduct or from abuse of separate juristic personality of company
164. Dissenting shareholders' appraisal rights
165. Derivative actions

Part C

Voluntary resolution of disputes

166. Alternative dispute resolution
167. Dispute resolution may result in consent order

Part D

Complaints to Commission or Panel

168. Initiating complaint
169. Investigation by Commission or Panel
170. Outcome of investigation
171. Issuance of compliance notices
172. Objection to notices
173. Consent orders
174. Referral of complaints to court
175. Administrative fines

Part E

Powers to support investigations and inspections

176. Summons
177. Authority to enter and search under warrant
178. Powers to enter and search
179. Conduct of entry and search

Part F

Companies Tribunal adjudication procedures

180. Adjudication hearings before Tribunal
181. Right to participate in hearing
182. Powers of Tribunal adjudication hearing
183. Rules of procedure
184. Witnesses

CHAPTER 8

REGULATORY AGENCIES AND ADMINISTRATION OF ACT

Part A

Companies and Intellectual Property Commission

185. Establishment of Companies and Intellectual Property Commission
186. Commission objectives
187. Functions of Commission
188. Reporting, research, public information and relations with other regulators
189. Appointment of Commissioner
190. Minister may direct policy and require investigation
191. Establishment of specialist committees
192. Constitution of specialist committees

Part B

Companies Tribunal

193 Establishment of Companies Tribunal
194. Appointment of Companies Tribunal
195. Functions of Companies Tribunal

Part C

Takeover Regulation Panel

196. Establishment of Takeover Regulation Panel

197. Composition of Panel
198. Chairperson and deputy chairpersons
199. Meetings of Panel
200. Executive of Panel
201. Functions of Panel
202. Takeover Special Committee

Part D

Financial Reporting Standards Council

203. Establishment and composition of Council
204. Functions of Council

Part E

Administrative provisions applicable to Agencies

205. Qualifications for membership
206. Conflicting interests of agency members
207. Resignation, removal from office and vacancies
208. Conflicting interests of employees
209. Appointment of inspectors and investigators
210. Finances
211. Reviews and reports to Minister
212. Confidential information

CHAPTER 9

OFFENCES, MISCELLANEOUS MATTERS AND GENERAL PROVISIONS

Part A

Offences and penalties

213. Breach of confidence
214. False statements, reckless conduct and non-compliance
215. Hindering administration of Act
216. Penalties
217. Magistrate's Court jurisdiction to impose penalties

Part B

Miscellaneous matters

218. Civil actions
219. Limited time for initiating complaints
220. Serving documents
221. Proof of facts
222. State liability

Part C

Regulations, consequential matters and commencement

223. Regulations
224. Consequential amendments, repeal of laws and transitional arrangements
225. Short title and commencement

SCHEDULE 1

PROVISIONS CONCERNING NON-PROFIT COMPANIES

1. Objects and policies
2. Fundamental transactions
3. Incorporators of non-profit company
4. Members
5. Directors

SCHEDULE 2

CONVERSION OF CLOSE CORPORATIONS TO COMPANIES

1. Notice of conversion of close corporation
2. Effect of conversion on legal status

SCHEDULE 3

AMENDMENT OF LAWS

A: Close Corporations Act, 1984
1. Amendments to Close Corporations Act definitions
2. Limitation of period to incorporate close corporations or convert companies
3. Legal status of close corporations
4. Names of corporations
5. Transparency and accountability of close corporations
6. Rescue of financially distressed close corporations
7. Dissolution of corporations
8. Deregistration of corporations

B: Consequential amendments to certain other Acts listed in Schedule 4

SCHEDULE 4

LEGISLATION TO BE ENFORCED BY COMMISSION

SCHEDULE 5

TRANSITIONAL ARRANGEMENTS

1. Interpretation
2. Continuation of pre-existing companies
3. Pending filings
4. Memorandum of Incorporation and rules
5. Pre-incorporation contracts
6. Par value of shares, treasury shares, capital accounts and share certificates
7. Company finance and governance
8. Company names and name reservations
9. Continued application of previous Act to winding-up and liquidation
10. Preservation and continuation of court proceedings and orders
11. General preservation of regulations, rights, duties, notices and other instruments
12. Transition of regulatory agencies
13. Continued investigation and enforcement of previous Act
14. Regulations

CHAPTER 1

INTERPRETATION, PURPOSE AND APPLICATION

Part A

Interpretation

Definitions

1. In this Act, unless the context indicates otherwise—

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

"agreement" includes a contract, or an arrangement or understanding between or among two or more parties that purports to create rights and obligations between or among those parties;

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

"alternate director" means a person elected or appointed to serve, as the occasion requires, as a member of the board of a company in substitution for a particular elected or appointed director of that company;

"amalgamation or merger" means a transaction, or series of transactions, pursuant to an agreement between two or more companies, resulting in—

(a) the formation of one or more new companies, which together hold all of the assets and liabilities that were held by any of the amalgamating or merging companies immediately before the implementation of the agreement, and the dissolution of each of the amalgamating or merging companies; or

(b) the survival of at least one of the amalgamating or merging companies, with or without the formation of one ore more new companies, and the vesting in the surviving company or companies, together with such new companies, of all of the assets and liabilities that were held by any of the amalgamating or merging companies immediately before the implementation of the agreement;

"amalgamated or merged company" means a company that either—

(a) was incorporated pursuant to an amalgamation or merger agreement; or

(b) was an amalgamating or merging company and continued in existence after the implementation of the amalgamation or merger agreement,

and holds any part of the assets and liabilities that were held by any of the amalgamating or merging companies immediately before the implementation of the agreement;

"amalgamating or merging company" means a company that is a party to an amalgamation or merger agreement;

"annual general meeting" means the meeting of a public company required by section 61(7);

"audit" has the meaning set out in the Auditing Profession Act;

"Auditing Profession Act" means the Auditing Profession Act, 2005 (Act No. 26 of 2005)**;**

"auditor" has the meaning set out in the Auditing Professions Act;

"Banks Act" means the Banks Act, 1993 (Act No.124 of 1993);

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

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

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

(c) dispose or direct the disposition of the company's securities, or any part of a distribution in respect of the securities,

but does not include any interest held by a person in a unit trust or collective investment scheme in terms of the Collective Investment Schemes Act, 2002 (Act No. 45 of 2002);

"board" means the board of directors of a company;

"business days" has the meaning determined in accordance with section 5(3);

"Cabinet" means the body of the national executive described in section 91 of the Constitution;

"central securities depository" has the meaning set out in section 1 of the Securities Services Act, 2004 (Act No. 36 of 2004);

"close corporation" means a juristic person incorporated under the Close Corporations Act, 1984 (Act No. 69 of 1984);

"Commission" means the Companies and Intellectual Property Commission established by section 185;

"Commissioner" means the person appointed to or acting in the office of that name, as contemplated in section 189;

"Companies Tribunal" means the Companies Tribunal established in terms of section 193;

"companies register" means the register required to be established by the Commission in terms of section 187(4);

"company" means a juristic person incorporated in terms of this Act, or a juristic person that, immediately before the effective date—

(a) was registered in terms of the—

(i) Companies Act, 1973 (Act No. 61 of 1973), other than as an external company as defined in that Act; or

(ii) Close Corporations Act, 1984 (Act No. 69 of 1984), if it has subsequently been converted in terms of Schedule 2;

(b) was in existence and recognised as an 'existing company' in terms of the Companies Act, 1973 (Act No. 61 of 1973); or

(c) was deregistered in terms of the Companies Act, 1973 (Act No. 61 of 1973), and has subsequently been re-registered in terms of this Act;

"Competition Act", means the Competition Act, 1998 (Act No. 89 of 1998);

"consideration" means anything of value given and accepted in exchange for any property, service, act, omission or forbearance or any other thing of value, including—

(a) any money, property, negotiable instrument, securities, investment credit facility, token or ticket;

(b) any labour, barter or similar exchange of one thing for another; or

(c) any other thing, undertaking, promise, agreement or assurance, irrespective of its apparent or intrinsic value, or whether it is transferred directly or indirectly;

"Constitution" means the Constitution of the Republic of South Africa, 1996;

"convertible securities" means any securities of a company that may, by their terms, be converted into other securities of the company, including—

(a) any non-voting securities issued by a company and which will become voting securities—

(i) on the happening of a designated event; or

(ii) if the holder of those securities so elects at some time after acquiring them; and

(b) options to acquire securities to be issued by the company, irrespective of whether or not those securities may be voting securities, or non-voting securities contemplated in paragraph *(a)*;

"co-operative" means a juristic person as defined in the Co-operatives Act, 2005 (Act No. 14 of 2005);

"Council" means the Financial Reporting Standards Council established by section 203;

"director" means a member of the board of a company, as contemplated in section 66, or an alternate director of a company and includes any person occupying the position of a director or alternate director, by whatever name designated;

"distribution" means a direct or indirect—

(a) transfer by a company of money or other property of the company, other than its own shares, to or for the benefit of one more holders of any of the shares of that company or of another company within the same group of companies, whether—

(i) in the form of a dividend;

(ii) as a payment in lieu of a capitalisation share, as contemplated in section 47;

(iii) is consideration for the acquisition—

(aa) by the company of any of its shares, as contemplated in section 48; or

(bb) by any company within the same group of companies, of any shares of a company within that group of companies; or

(iv) otherwise in respect of any of the shares of that company or of another company within the same group of companies, subject to section 164(19);

(b) incurrence of a debt or other obligation by a company for the benefit of one or more holders of any of the shares of that company or of another company within the same group of companies; or

(c) forgiveness or waiver by a company of a debt or other obligation owed to the company by one more holders of any of the shares of that company or of another company within the same group of companies,

but does not include any such action taken upon the final liquidation of the company;

"effective date", with reference to any particular provision of this Act, means the date on which that provision came into operation in terms of section 225;

"electronic communication" has the meaning set out in section 1 of the Electronic Communications and Transactions Act;

"Electronic Communications and Transactions Act" means the Electronic Communications and Transactions Act, 2002 (Act No. 25 of 2002);

"employee share scheme" has the meaning set out in section 95(1)*(c)*;

"exchange" when used as a noun, has the meaning set out in section 1 of the Securities Services Act, 2004 (Act No. 36 of 2004);

"exercise", when used in relation to voting rights, includes voting by proxy, nominee, trustee or other person in a similar capacity;

"ex officio director" means a person who holds office as a director of a particular company solely as a consequence of that person holding some other office, title, designation or similar status specified in the company's Memorandum of Incorporation;

"external company" means a foreign company that is carrying on business, or non-profit activities, as the case may be, within the Republic, subject to section 23(2);

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

"financial reporting standards", with respect to any particular company's financial statements, means the standards applicable to that company, as prescribed in terms of section 29(4) and (5);

"financial statement" includes—

(a) annual financial statements and provisional annual financial statements;

(b) interim or preliminary reports;

(c) group and consolidated financial statements in the case of a group of companies; and

(d) financial information in a circular, prospectus or provisional announcement of results, that an actual or prospective creditor or holder of the company's securities, or the Commission, Panel or other regulatory authority, may reasonably be expected to rely on;

"foreign company" means an entity incorporated outside the Republic, irrespective of whether it is—

(a) a profit, or non-profit, entity; or

(b) carrying on business or non-profit activities, as the case may be, within the Republic;

"general voting rights" means voting rights that can be exercised generally at a general meeting of a company;

"group of companies" means two or more companies that share a holding company or subsidiary relationship;

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

"Human Rights Commission" means the South African Human Rights Commission established in terms of Chapter 9 of the Constitution;

"incorporator", when used—

(a) with respect to a company incorporated in terms of this Act, means a person who incorporated that company, as contemplated in section 13; or

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

"individual" means a natural person;

"inspector" means a person appointed as such in terms of section 209;

"investigator" means a person appointed as such in terms of section 209;

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

"juristic person" includes—

(a) a foreign company; and

(b) a trust, irrespective of whether or not it was established within or outside the Republic;

"knowing", **"knowingly"** or **"knows"**, when used with respect to a person, and in relation to a particular matter, means that the person either—

(a) had actual knowledge of that matter;

(b) was in a position in which the person reasonably ought to have—

(i) had actual knowledge;

(ii) investigated the matter to an extent that would have provided the person with actual knowledge; or

(iii) taken other measures which, if taken, would reasonably be expected to have provided the person with actual knowledge of the matter;

"listed securities" has the meaning set out in section 1 of the Securities Services Act, 2004 (Act No. 36 of 2004);

"Master" means the person holding the office of that name in terms of the Supreme Court Act, 1959 (Act No. 59 of 1959);

"material", when used as an adjective, means significant in the circumstances of a particular matter, to a degree that is—

(a) of consequence in determining the matter; or

(b) might reasonably affect a person's judgement or decision-making in the matter;

"member", when used in reference to a non-profit company, means a person who holds membership in, and specified rights in respect of, that non-profit company, as contemplated in item 4 of Schedule 1;

"Memorandum of Incorporation" means the document, as amended from time to time—

(a) that sets out rights, duties and responsibilities of shareholders, directors and others within and in relation to a company, and other matters as contemplated in section 15; and

(b) by which—

(i) the company was incorporated in terms of this Act, as contemplated in section 13; or

(ii) a pre-existing company was structured and governed before the later of—

(aa) the effective date; or

(bb) the date it was converted to a company in terms of Schedule 2;

"Minister" means the member of the Cabinet responsible for companies;

"nominee" has the meaning set out in section 1 of the Securities Services Act, 2004 (Act No. 36 of 2004);

"non-profit company" means a company—

(a) incorporated for a public benefit or other object as required by item 1(1) of Schedule 1; and

(b) the income and property of which are not distributable to its incorporators, members, directors, officers or persons related to any of them except to the extent permitted by item 1(3) of Schedule 1;

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

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

"ordinary resolution" means a resolution adopted—

(a) at a shareholders meeting, with the support of more than 50% of the voting rights exercised on the resolution, or a higher percentage as contemplated in section 65(8); or

(b) by holders of a company's securities acting other than at a meeting, as contemplated in section 60;

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

"Panel" means the Takeover Regulation Panel, established by section 196;

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

"person" includes a juristic person;

"personal financial interest", when used with respect to any person—

(a) means a direct material interest of that person, of a financial, monetary or economic nature, or to which a monetary value may be attributed; but

(b) does not include any interest held by a person in a unit trust or collective investment scheme in terms of the Collective Investment Schemes Act, 2002 (Act No. 45 of 2002), unless that person has direct control over the investment decisions of that fund or investment;

"personal liability company" means a company whose Memorandum of Incorporation states that the company is a personal liability company, as contemplated in section 8(2)*(c)*;

"pre-existing company" means a company contemplated in paragraph *(a)*, *(b)* or *(c)* of the definition of 'company' in this section;

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

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

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

"prescribed officer" means the holder of an office, within a company, that has been designated by the Minister in terms of section 66(11);

"present at a meeting" means to be present in person, or able to participate in the meeting by electronic communication, or to be represented by a proxy who is present in person or able to participate in the meeting by electronic communication;

"private company" means a profit company that—

(a) is not a company or a personal liability state-owned company; and
(b) satisfies the criteria set out in section 8(2)*(b)*;
"profit company" means a company incorporated for the purpose of financial gain for its shareholders;
"public company" means a profit company that is not a state-owned company, a private company or a personal liability company;
"public regulation" means any national, provincial or local government legislation or subordinate legislation, or any licence, tariff, directive or similar authorisation issued by a regulatory authority or pursuant to any statutory authority;
"records", when used with respect to any information pertaining to a company, means any information contemplated in section 24(1);
"record date" means the date established under section 59 on which a company determines the identity of its shareholders and their shareholdings for the purposes of this Act;
"registered auditor" has the meaning set out in the Auditing Profession Act;
"registered external company" means an external company that has registered its office as required by section 23, and has been assigned a registration number in terms of that section;
"registered office" means the office of a company, or of an external company, that is registered as required by section 23;
"registered trade union" means a trade union registered in terms of section 96 of the Labour Relations Act, 1995 (Act No. 66 of 1995);
"registration certificate", when used with respect to a—
(a) company incorporated on or after the effective date, means the certificate, or amended certificate, issued by the Commission as evidence of the incorporation and registration of that company;
(b) pre-existing company registered in terms of—
(i) the Companies Act, 1973 (Act No. 61 of 1973), means the certificate of incorporation or registration issued to it in terms of that Act;
(ii) the Close Corporations Act, 1984 (Act No. 69 of 1984), and converted in terms of Schedule 2 to this Act, means the certificate of incorporation issued to the company in terms of that Schedule, read with section 14; or
(iii) any other law, means any document issued to the company in terms of that law as evidence of the company's incorporation; or
(c) registered external company, means the certificate of registration issued to it in terms of this Act or the Companies Act, 1973 (Act No. 61 of 1973);
"registry" means a depository of documents required to be kept by the Commission in terms of section 187(4);
"regulated person or entity" means a person that has been granted authority to conduct business by a regulatory authority;
"regulation" means a regulation made under this Act;
"regulatory authority" means an entity established in terms of national or provincial legislation responsible for regulating an industry, or sector of an industry;
"related", when used in respect of two persons, means persons who are connected to one another in any manner contemplated in section 2(1)*(a)* to *(c)*;
"relationship" includes the connection subsisting between any two or more persons who are related or inter-related, as determined in accordance with section 2;
"rules" and **"rules of a company"** means any rules made by a company as contemplated in section 15(3) to (5);
"securities" has the meaning set out in section 1 of the Securities Services Act, 2004 (Act No. 36 of 2004), and includes shares held in a private company;
"share" means one of the units into which the proprietary interest in a profit company is divided;
"shareholder", subject to section 57(1), means the holder of a share issued by a company and who is entered as such in the certificated or uncertificated securities register, as the case may be;

"shareholders meeting", with respect to any particular matter concerning a company, means a meeting of those holders of that company's issued securities who are entitled to exercise voting rights in relation to that matter;
"solvency and liquidity test" means the test set out in section 4(1);
"special resolution" means a resolution adopted—
(a) at a shareholders meeting, with the support of at least 75% of the voting rights exercised on the resolution, or a lower percentage as contemplated in section 65(10); or
(b) by holders of a company's securities acting other than at a meeting, as contemplated in section 60;
"state-owned company" means an enterprise that is registered in terms of this Act as a company, and either—
(a) falls within the meaning of ''state-owned enterprise'' in terms of the Public Finance Management Act, 1999 (Act No. 1 of 1999); or
(b) is owned by a municipality, as contemplated in the Local Government: Municipal Systems Act, 2000 (Act No. 32 of 2000), and is otherwise similar to an enterprise referred to in paragraph *(a)*;
"subsidiary" has the meaning determined in accordance with section 3;
"Takeover Regulations" means the regulations made by the Minister in terms of sections 120 and 223;
"this Act" includes the Schedules and regulations;
"unalterable provision" means a provision of this Act that does not expressly contemplate that its effect on any particular company may be negated, restricted, limited, qualified, extended or otherwise altered in substance or effect by a company's Memorandum of Incorporation or rules;
"uncertificated securities" means any securities defined as such in section 29 of the Securities Services Act, 2004 (Act No. 36 of 2004);
"uncertificated securities register" means the record of uncertificated securities administered and maintained by a participant or central securities depository, as determined in accordance with the rules of a central securities depository, and which forms part of the relevant company's securities register established and maintained in terms of Part E of Chapter 2;
"voting power", with respect to any matter to be decided by a company, means the voting rights that may be exercised in connection with that matter by a particular person, as a percentage of all such voting rights;
"voting rights", with respect to any matter to be decided by a company, means—
(a) the rights of any holder of the company's securities to vote in connection with that matter, in the case of a profit company; or
(b) the rights of a member to vote in connection with the matter, in the case of a non-profit company;
"voting securities", with respect to any particular matter, means securities that—
(a) carry voting rights with respect to that matter; or
(b) are presently convertible to securities that carry voting rights with respect to that matter; and
"wholly-owned subsidiary" has the meaning determined in accordance with section 3(1)*(b)*.

Related and inter-related persons, and control

2. (1) For all purposes of this Act—
(a) an individual is related to another individual if they—
(i) are married, or live together in a relationship similar to a marriage; or
(ii) are separated by no more than two degrees of natural or adopted consanguinity or affinity;
(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); and
(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, as determined in accordance with subsection (2);
(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, as determined in accordance with subsection (2).

(2) For the purpose of subsection (1), a person controls a juristic person, or its business, if—

(a) in the case of a juristic person that is a company—

(i) that juristic person is a subsidiary of that first person, as determined in accordance with section 3(1)*(a)*; or

(ii) that first person together with any related or inter-related person, is—

(aa) directly or indirectly able to exercise or control the exercise of a majority of the voting rights associated with securities of that company, whether pursuant to a shareholder agreement or otherwise; or

(bb) has the right to appoint or elect, or control the appointment or election of, directors of that company who control a majority of the votes at a meeting of the board;

(b) in the case of a juristic person that is a close corporation, that first person owns the majority of the members' interest, or controls directly, or has the right to control, the majority of members' votes in the close corporation;

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

(d) that first person has the ability to materially influence the policy of the juristic person in a manner comparable to a person who, in ordinary commercial practice, would be able to exercise an element of control referred to in paragraph *(a)*, *(b)* or *(c)*.

(3) With respect to any particular matter arising in terms of this Act, a court, the Companies Tribunal or the Panel may exempt any person from the application of a provision of this Act that would apply to that person because of a relationship contemplated in subsection (1) if the person can show that, in respect of that particular matter, there is sufficient evidence to conclude that the person acts independently of any related or inter-related person.

Subsidiary relationships

3. (1) A company is—

(a) a subsidiary of another juristic person if that juristic person, one or more other subsidiaries of that juristic person, or one or more nominees of that juristic person or any of its subsidiaries, alone or in any combination—

(i) is or are directly or indirectly able to exercise, or control the exercise of, a majority of the general voting rights associated with issued securities of that company, whether pursuant to a shareholder agreement or otherwise; or

(ii) has or have the right to appoint or elect, or control the appointment or election of, directors of that company who control a majority of the votes at a meeting of the board; or

(b) a wholly-owned subsidiary of another juristic person if all of the general voting rights associated with issued securities of the company are held or controlled, alone or in any combination, by persons contemplated in paragraph *(a)*.

(2) For the purpose of determining whether a person controls all or a majority of the general voting rights associated with issued securities of a company—

(a) voting rights that are exercisable only in certain circumstances are to be taken into account only—

(i) when those circumstances have arisen, and for so long as they continue; or

(ii) when those circumstances are under the control of the person holding the voting rights;

(b) voting rights that are exercisable only on the instructions or with the consent or concurrence of another person are to be treated as being held by a nominee for that other person; and

(c) voting rights held by—

(i) a person as nominee for another person are to be treated as held by that other person; or

(ii) a person in a fiduciary capacity are to be treated as held by the beneficiary of those voting rights.

(3) For the purposes of subsection (2), 'hold', or any derivative of it, refers to the registered or direct or indirect beneficial holder of securities conferring a right to vote.

Solvency and liquidity test

4. (1) For any purpose of this Act, a company satisfies the solvency and liquidity test at a particular time if, considering all reasonably foreseeable financial circumstances of the company at that time—

(a) the 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 ordinary 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 paragraph *(a)* of the definition of 'distribution' in section 1, 12 months following that distribution.

(2) For the purposes contemplated in subsection (1)—

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

(i) accounting records that satisfy the requirements of section 28; and

(ii) financial statements that satisfy the requirements of section 29;

(b) subject to paragraph *(c)*, the board or any other person applying the solvency and liquidity test to a company—

(i) must consider a fair valuation of the company's assets and liabilities, including any reasonably foreseeable contingent assets and liabilities, irrespective of whether or not arising as a result of the proposed distribution, or otherwise; and

(ii) may consider any other valuation of the company's assets and liabilities that is reasonable in the circumstances; and

(c) unless the Memorandum of Incorporation of the company provides otherwise, a person applying the test in respect of a distribution contemplated in paragraph *(a)* of the definition of 'distribution' in section 1 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 upon liquidation are superior to the preferential rights upon liquidation of those receiving the distribution.

General interpretation of Act

5. (1) This Act must be interpreted and applied in a manner that gives effect to the purposes set out in section 7.

(2) To the extent appropriate, a court interpreting or applying this Act may consider foreign company law.

(3) When, in this Act, a particular number of 'business days' is provided for between the happening of one event and another, the number of days must be calculated by—

(a) excluding the day on which the first such event occurs;

(b) including the day on or by which the second event is to occur; and

(c) excluding any public holiday, Saturday or Sunday that falls on or between the days contemplated in paragraphs *(a)* and *(b)*, respectively.

(4) If there is an inconsistency between any provision of this Act and a provision of any other national legislation—

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

(b) to the extent that it is impossible to apply or comply with one of the inconsistent provisions without contravening the second—

(i) any applicable provisions of the—

(aa) Auditing Profession Act;

(bb) Labour Relations Act, 1995 (Act No. 66 of 1995);

(cc) Promotion of Access to Information Act, 2000 (Act No. 2 of 2000);

(dd) Promotion of Administrative Justice Act, 2000 (Act No. 3 of 2000);

(ee) Public Finance Management Act, 1999 (Act No. 1 of 1999);

(ff) Securities Services Act, 2004 (Act No. 36 of 2004); or

(gg) Banks Act,

prevail in the case of an inconsistency involving any of them, except to the extent provided otherwise in section 49(4); or

(ii) the provisions of this Act prevail in any other case, except to the extent provided otherwise in subsection (5) or section 118(4).

(5) If there is a conflict between a provision of Chapter 8 and a provision of the Public Service Act, 1994 (Proclamation No.103 of 1994), the provisions of that Act prevail.

Anti-avoidance, exemptions and substantial compliance

6. (1) A court, on application by the Commission or Panel, may declare any agreement, transaction, arrangement, resolution or provision of a company's Memorandum of Incorporation or rules—

(a) to be primarily or substantially intended to defeat or reduce the effect of a prohibition or requirement established by or in terms of an unalterable provision of this Act; and

(b) void to the extent that it defeats or reduces the effect of a prohibition or requirement established by or in terms of an unalterable provision of this Act.

(2) A person may apply to the Companies Tribunal for an administrative order exempting an agreement, transaction, arrangement, resolution or provision of a company's Memorandum of Incorporation or rules from any prohibition or requirement established by or in terms of an unalterable provision of this Act, other than a provision that falls within the jurisdiction of the Panel.

(3) The Companies Tribunal may make an administrative order contemplated in subsection (2) if it is satisfied that—

(a) the agreement, transaction, arrangement, resolution or provision serves a reasonable purpose other than to defeat or reduce the effect of that prohibition or requirement; and

(b) it is reasonable and justifiable to grant the exemption, having regard to the purposes of this Act and all relevant factors, including—

(i) the purpose and policy served by the relevant prohibition or requirement; and

(ii) the extent to which the agreement, transaction, arrangement, resolution or provision infringes or would infringe the relevant prohibition or requirement.

(4) The producer of a prospectus, notice, disclosure or document that is required, in terms of this Act, to be published, produced or provided to a potential investor, a company's creditor or potential creditor, a holder of a company's securities, a member of a non-profit company, an employee of a company or a representative of any employees of a company, must publish, produce, or provide that prospectus, notice, disclosure or document—

(a) in the prescribed form, if any, for that prospectus, notice, disclosure or document, or;

(b) in plain language, if no form has been prescribed for that prospectus, notice, disclosure or document.

(5) For the purposes of this Act, a prospectus, notice, disclosure or document is in plain language if it is reasonable to conclude that a person of the class of persons for whom the prospectus, notice, disclosure or document is intended, with average literacy skills and minimal experience in dealing with company law matters, could be expected to understand the content, significance and import of the prospectus, notice, disclosure or document without undue effort, having regard to—

(a) the context, comprehensiveness and consistency of the prospectus, notice, disclosure or document;

(b) the organisation, form and style of the prospectus, notice, disclosure or document;

(c) the vocabulary, usage and sentence structure of the prospectus, notice, disclosure or document; and

(d) the use of any illustrations, examples, headings or other aids to reading and understanding in the prospectus, notice, disclosure or document.

(6) The Commission may publish guidelines for methods of assessing whether a prospectus, notice, disclosure or document satisfies the requirements of subsection (4)*(b)*.

(7) An unaltered electronically or mechanically generated reproduction of any document, other than a share certificate, may be substituted for the original for any purpose for which the original could be used in terms of this Act.

(8) If a form of document, record, statement or notice is prescribed in terms of this Act for any purpose—

(a) it is sufficient if the person required to prepare or complete such a document, record, statement or notice does so in a form that satisfies all of the substantive requirements of the prescribed form; and

(b) any deviation from the design or content of the prescribed form does not invalidate the action taken by the person preparing or completing that document, record, statement or notice, unless the deviation—

(i) negatively and materially affects the substance of the document, record, statement or notice; or

(ii) is such that it would reasonably mislead a person reading the document, record, statement or notice.

(9) If a manner of delivery of a document, record, statement or notice is prescribed in terms of this Act for any purpose—

(a) it is sufficient if the person required to deliver such a document, record, statement or notice does so in a manner that satisfies all of the substantive requirements as prescribed; and

(b) any deviation from the prescribed manner does not invalidate the action taken by the person delivering that document, record, statement or notice, unless the deviation—

(i) materially reduces the probability that the intended recipient will receive the document, record, statement or notice; or

(ii) is such as would reasonably mislead a person to whom the document, record, statement or notice is, or is to be, delivered.

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

(11) If, in terms of this Act, a document, record or statement, other than a notice contemplated in subsection (10), is required—

(a) to be retained, it is sufficient if an electronic original or reproduction of that document is retained as provided for in section 15 of the Electronic Communications and Transactions Act; or

(b) to be published, provided or delivered, it is sufficient if—

(i) an electronic original or reproduction of that document, record or statement is published, provided or delivered by electronic communication in a manner and form such that the document, record or statement

can conveniently be printed by the recipient within a reasonable time and at a reasonable cost; or

(ii) a notice of the availability of that document, record or statement, summarising its content and satisfying any prescribed requirements, is delivered to each intended recipient of the document, record or statement, together with instructions for receiving the complete document, record or statement.

(12) If a provision of this Act requires a document to be signed or initialled—

(a) by or on behalf of a person, that signing or initialling may be effected in any manner provided for in the Electronic Communications and Transactions Act; or

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

(i) all of those persons sign a single original of the document, in person or as contemplated in paragraph *(a)*; or

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

(13) The Commission may—

(a) establish a system, using any means of electronic communication, to facilitate the automated—

(i) reservation of names in terms of Part A of Chapter 2 or in terms of any other legislation listed in Schedule 4;

(ii) incorporation and registration of companies or close corporations; or

(iii) filing of any information contemplated by this Act or by any legislation listed in Schedule 4; or

(b) accredit an established system that—

(i) is capable of facilitating any activity contemplated in paragraph *(a)*; and

(ii) satisfies any prescribed requirements.

(14) The Minister may—

(a) make regulations relating to the standards of operation, accessibility, technical requirements, service quality, and fees for the use of any system contemplated in subsection 13; and

(b) declare any system established or accredited by the Commission to be an acceptable mechanism for the filing of any particular document, in lieu of any other requirements set out in legislation relating to the filing of that document.

Part B

Purpose and application

Purposes of Act

7. The purposes of this Act are to—

(a) promote compliance with the Bill of Rights as provided for in the Constitution, in the application of company law;

(b) promote the development of the South African economy by—

(i) encouraging entrepreneurship and enterprise efficiency;

(ii) creating flexibility and simplicity in the formation and maintenance of companies; and

(iii) encouraging transparency and high standards of corporate governance as appropriate, given the significant role of enterprises within the social and economic life of the nation;

(c) promote innovation and investment in the South African markets;

(d) reaffirm the concept of the company as a means of achieving economic and social benefits;

(e) continue to provide for the creation and use of companies, in a manner that enhances the economic welfare of South Africa as a partner within the global economy;

(f) promote the development of companies within all sectors of the economy, and encourage active participation in economic organisation, management and productivity;

(g) create optimum conditions for the aggregation of capital for productive purposes, and for the investment of that capital in enterprises and the spreading of economic risk;

(h) provide for the formation, operation and accountability of non-profit companies in a manner designed to promote, support and enhance the capacity of such companies to perform their functions;

(i) balance the rights and obligations of shareholders and directors within companies;

(j) encourage the efficient and responsible management of companies;

(k) provide for the efficient rescue and recovery of financially distressed companies, in a manner that balances the rights and interests of all relevant stakeholders; and

(l) provide a predictable and effective environment for the efficient regulation of companies.

Categories of companies

8. (1) Two types of companies may be formed and incorporated under this Act, namely profit companies and non-profit companies.

(2) A profit company is—

(a) a state-owned company; or

(b) a private company if—

(i) it is not a state-owned company; and

(ii) its Memorandum of Incorporation—

(aa) prohibits it from offering any of its securities to the public; and

(bb) restricts the transferability of its securities;

(c) a personal liability company if—

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

(ii) its Memorandum of Incorporation states that it is a personal liability company; or

(d) a public company, in any other case.

(3) No association of persons formed after 31 December 1939 for the purpose of carrying on any business that has for its object the acquisition of gain by the association or its individual members is or may be a company or other form of body corporate unless it—

(a) is registered as a company under this Act;

(b) is formed pursuant to another law; or

(c) was formed pursuant to Letters Patent or Royal Charter before 31 May 1962.

Modified application with respect to state-owned companies

9. (1) Subject to section 5(4) and (5), any provision of this Act that applies to a public company applies also to a state-owned company, except to the extent that the Minister has granted an exemption in terms of subsection (3).

(2) The member of the Cabinet responsible for—

(a) state-owned companies may request the Minister to grant a total, partial or conditional exemption from one or more provisions of this Act, applicable to all state-owned companies, any class of state-owned companies, or to one or more particular state-owned company; or

(b) local government matters may request the Minister to grant a total, partial or conditional exemption from one or more provisions of this Act, applicable to all state-owned companies owned by a municipality, any class of such enterprises, or to one or more particular such enterprises,

on the grounds that those provisions overlap or duplicate an applicable regulatory scheme established in terms of any other national legislation.

(3) The Minister, by notice in the *Gazette* after receiving the advice of the Commission, may grant an exemption contemplated in subsection (2)—

(a) only to the extent that the relevant alternative regulatory scheme ensures the achievement of the purposes of this Act at least as well as the provisions of this Act; and

(b) subject to any limits or conditions necessary to ensure the achievement of the purposes of this Act.

Modified application with respect to non-profit companies

10. (1) Every provision of this Act applies to a non-profit company, subject to the provisions, limitations, alterations or extensions set out in this section, and in Schedule 1.

(2) The following provisions of this Act do not apply to a non-profit company:

(a) Part D of Chapter 2—Capitalisation of profit companies.

(b) Part E of Chapter 2—Securities registration and transfer.

(c) Parts B and D of Chapter 3—Company secretaries, and audit committees, except to the extent contemplated in section 34(2).

(d) Chapter 4—Public offerings of company securities.

(e) Chapter 5—Takeovers, offers and fundamental transactions.

(f) Sections 146*(d)*, and 152(3)*(c)*—Rights of shareholders to approve a business rescue plan, except to the extent that the non-profit company is itself a shareholder of a profit company engaged in business rescue proceedings.

(g) Section 164—Dissenting shareholders' appraisal rights, except to the extent that the non-profit company is itself a shareholder of a profit company.

(3) Sections 58 to 65, read with the changes required by the context—

(a) apply to a non-profit company only if the company has voting members; and

(b) when applied to a non-profit company, are subject to the provisions of item 4 of Schedule 1.

(4) With respect to a non-profit company that has voting members, a reference in this Act to ''a shareholder'', ''the holders of a company's securities'', ''holders of issued securities of that company'' or ''a holder of voting rights entitled to be voted'' is a reference to the voting members of the non-profit company.

CHAPTER 2

FORMATION, ADMINISTRATION AND DISSOLUTION OF COMPANIES

Part A

Reservation and registration of company names

Criteria for names of companies

11. (1) Subject to subsections (2) and (3), a company name—

(a) may comprise words in any language, irrespective of whether or not the words are commonly used or contrived for the purpose, together with—

(i) any letters, numbers or punctuation marks;

(ii) any of the following symbols: +, &, #, , %, =;

(iii) any other symbol permitted by the regulations made in terms of subsection (4); or

(iv) round brackets used in pairs to isolate any other part of the name,

alone or in any combination; or

(b) in the case of a profit company, may be the registration number of the company together with the relevant expressions required by subsection (3).

(2) The name of a company must—

(a) not be the same as, or confusingly similar to—

(i) the name of another company, registered external company, close corporation or co-operative unless the company forms part of a group of companies using similar names;

(ii) a name registered for the use of a person as a business name in terms of the Business Names Act, 1960 (Act No. 27 of 1960);

(iii) a registered trade mark belonging to a person other than the company, or a mark in respect of which an application has been filed in the Republic for registration as a trade mark or a well-known trade mark as contemplated in section 35 of the Trade Marks Act, 1993 (Act No. 194 of 1993); or

(iv) a mark, word or expression the use of which is restricted or protected in terms of the Merchandise Marks Act, 1941 (Act No. 17 of 1941), except to the extent permitted by or in terms of that Act;

(b) not falsely imply or suggest, or be such as would reasonably mislead a person to believe incorrectly, that the company—

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

(ii) is an organ of state or a court, or is operated, sponsored, supported or endorsed by the State or by any organ of state or a court;

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

(iv) is owned, operated, sponsored, supported or endorsed by, or enjoys the patronage of, any—

(aa) foreign state, head of state, head of government, government or administration or any department of such a government or administration; or

(bb) international organisation; and

(c) not include any word, expression or symbol that, in isolation or in context within the rest of the name, may reasonably be considered to constitute—

(i) propaganda for war;

(ii) incitement of imminent violence; or

(iii) advocacy of hatred based on race, ethnicity, gender or religion, or incitement to cause harm.

(3) In addition to complying with the requirements of subsections (1) and (2)—

(a) if the name of a profit company is the company's registration number, as contemplated in subsection (1)*(b)*, that number must be immediately followed by the expression ''(South Africa)'';

(b) if the company's Memorandum of Incorporation includes any provision contemplated in section 15(2)*(b)* or *(c)*, the name must be immediately followed by the expression ''(RF)''; and

(c) a company name, irrespective of its form or language, must end with one of the following expressions, as appropriate for the category of the particular company:

(i) The word ''Incorporated'' or its abbreviation ''Inc.'', in the case of a personal liability company.

(ii) The expression ''Proprietary Limited'' or its abbreviation, ''(Pty) Ltd.'', in the case of a private company.

(iii) The word ''Limited'' or its abbreviation, ''Ltd.'', in the case of a public company.

(iv) The expression ''SOC Ltd.'' in the case of a state-owned company.

(v) The expression ''NPC'', in the case of a non-profit company.

(4) The Minister may prescribe additional commonly recognised symbols for use in company names as contemplated in subsection (1)*(a)*(iii).

Reservation of name and defensive names

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

(2) The Commission must reserve each name as applied for in the name of the applicant, unless the name as applied for is—

(a) the registered name of another company, close corporation or co-operative;

(b) the name of a registered external company; or

(c) already reserved in terms of this section.

(3) If, upon reserving a name in terms of subsection (2), there are reasonable grounds for considering that the name may be inconsistent with the requirements of—

(a) section 11(2)*(a)* or *(b)*—

(i) the Commission, by written notice, may require the applicant to serve a copy of the application and name reservation on any particular person, or class of persons, named in the notice, on the grounds that the person or persons may have an interest in the use of the name that has been reserved for the applicant; and

(ii) any person to whom a notice is required to be given in terms of subparagraph (i) may apply to the Companies Tribunal for a determination and order in terms of section 160; or

(b) section 11(2)*(c)*—

(i) the Commission may refer the application and name reservation to the South African Human Rights Commission; and

(ii) the South African Human Rights Commission may apply to the Companies Tribunal for a determination and order in terms of section 160.

(4) A name reservation continues for a period of six months from the date of the application, and may be extended by the Commission for good cause shown, on application by the person for whom the name is reserved together with the prescribed fee, for a period of 60 business days at a time.

(5) A person for whom a name has been reserved in terms of subsection (2) may transfer that reservation to another person by filing a signed notice of the transfer together with the prescribed fee.

(6) If the Commission reasonably believes that an applicant in terms of subsection (1), a person to whom a reserved name is to be transferred, or a person for whom a name is reserved, may be attempting to abuse the name reservation system for the purpose of selling access to names, or trading in or marketing names, the Commission may issue a notice to that person—

(a) requiring the person to show cause why that name should be reserved or continue to be reserved, or why the reservation should be transferred;

(b) refusing to extend a name reservation upon its expiry;

(c) refusing to transfer a reserved name; or

(d) cancelling a name reservation.

(7) If, as a result of a pattern of conduct by a person, or two or more persons who are related or inter-related, the Commission has reasonable grounds to believe that the person or persons have abused the name reservation system by—

(a) selling access to names, or trading in or marketing reserved names; or

(b) repeatedly attempting to reserve names for the purpose of selling access to names, or trading in or marketing reserved names,

the Commission may apply to a court for an order prohibiting the person or persons from applying to reserve any names in terms of this section for a period that the court considers just and reasonable in the circumstances.

(8) In considering whether a person has abused, or may be attempting to abuse, the name reservation system as contemplated in subsection (6) or (7), the Commission may consider any relevant conduct by that person or any related or inter-related person, including—

(a) the reservation of more than one name in a single application or a series of applications;

(b) a pattern of repetitious applications to reserve a particular name or a number of substantially similar names, or to extend the reservation of a particular name;

(c) a failure to show good cause for a reservation period to be extended; or

(d) a pattern of unusually frequent transfers of reserved names without apparent legitimate cause having regard to the nature of the person's profession or business.

(9) Any person may on application on the prescribed form and on payment of the prescribed fee apply to the Commission to—

(a) register any name as a defensive name for a period of two years; or

(b) renew, for a period of two years, the registration of a name as a defensive name,

in respect of which he or she has furnished proof, to the satisfaction of the Commission, that he or she has a direct and material interest.

Part B

Incorporation and legal status of companies

Right to incorporate company

13. (1) One or more persons may incorporate a profit company, or three or more persons may incorporate a non-profit company, by—

(a) completing, and each signing in person or by proxy, a Memorandum of Incorporation—

(i) in the prescribed form; or

(ii) in a form unique to the company; and

(b) filing a Notice of Incorporation, in accordance with subsection (2).

(2) The Notice of Incorporation of a company must be—

(a) filed together with the prescribed fee; and

(b) accompanied by a copy of the Memorandum of Incorporation, subject to any declaration contemplated in section 6(14)*(b)*.

(3) If a company's Memorandum of Incorporation includes any provision contemplated in section 15(2)*(b)* or *(c)*, the Notice of Incorporation filed by the company must include a prominent statement drawing attention to each such provision, and its location in the Memorandum of Incorporation.

(4) The Commission—

(a) may reject a Notice of Incorporation if the notice, or any thing required to be filed with it, is incomplete, or improperly completed in any respect, subject to section 6(8); and

(b) must reject a Notice of Incorporation if—

(i) the initial directors of the company, as set out in the Notice, are fewer than required by or in terms of section 66(2); or

(ii) the Commission reasonably believes that any of the initial directors of the company, as set out in the Notice, are disqualified in terms of section 69(8), and the remaining directors are fewer than required by or in terms of section 66(2).

Registration of company

14. (1) As soon as practicable after accepting a filed Notice of Incorporation in terms of section 13, the Commission must—

(a) assign to the company a unique registration number; and

(b) subject to subsection (2)—

(i) enter the prescribed information concerning the company in the companies register;

(ii) endorse the Notice of Incorporation, and, if applicable, the copy of the Memorandum of Incorporation filed with it, in the prescribed manner; and

(iii) issue and deliver to the company a registration certificate in the prescribed manner and form, dated as of the later of—

(aa) the date on, and time at, which the Commission issued the certificate; or

(bb) the date, if any, stated by the incorporators in the Notice of Incorporation.

(2) If the name of a company, as entered on the Notice of Incorporation—

(a) fails to satisfy the requirements of section 11(3), the Commission, in taking the steps required by subsection (1)*(b)*, may alter the name by inserting or substituting the appropriate expressions as required by section 11(3); or

(b) is the same as the name of another company, close corporation or co-operative, or is reserved in terms of section 12 for a person other than one of the incorporators, the Commission—

(i) must take the steps set out in subsection (1)*(b)*, using the company's registration number, followed by ''Inc.'', ''(Pty) Ltd'', ''Ltd.'', ''SOC'', or ''NPC'', as appropriate, as the interim name of the company in the companies register and on the registration certificate;

(ii) must invite the company to file an amended Notice of Incorporation using a satisfactory name; and

(iii) when the company files such an amended Notice of Incorporation, must—

(aa) enter the company's amended name in the companies register; and

(bb) issue and deliver to the company an amended registration certificate showing the amended name of the company.

(3) If, upon registering a company in terms of subsection (2), there are reasonable grounds for considering that the company's name may be inconsistent with the requirements of—

(a) section 11(2)*(a)* or *(b)*—

(i) the Commission, by written notice, may require the applicant to serve a copy of the application and name reservation on any particular person, or class of persons, named in the notice, on the grounds that the person or persons may have an interest in the use of the reserved name by the applicant; and

(ii) any person contemplated in subparagraph (i) may apply to the Companies Tribunal for a determination and order in terms of section 160; or

(b) section 11(2)*(c)*—

(i) the Commission may refer the application and name reservation to the South African Human Rights Commission; and

(ii) the South African Human Rights Commission may apply to the Companies Tribunal for a determination and order in terms of section 160.

(4) A registration certificate issued in terms of subsection (1) is conclusive evidence that—

(a) all the requirements for the incorporation of the company have been complied with; and

(b) the company is incorporated under this Act as from the date, and the time, if any, stated in the certificate.

Memorandum of Incorporation, shareholder agreements and rules of company

15. (1) Each provision of a company's Memorandum of Incorporation—

(a) must be consistent with this Act; and

(b) is void to the extent that it contravenes, or is inconsistent with, this Act.

(2) The Memorandum of Incorporation of any company may—

(a) include any provision—

(i) dealing with a matter that this Act does not address; or

(ii) altering the effect of any alterable provision of this Act;

(b) contain any special conditions applicable to the company, and any requirement for the amendment of any such condition in addition to the requirements set out in section 16; or

(c) prohibit the amendment of any particular provision of the Memorandum of Incorporation.

(3) Except to the extent that a company's Memorandum of Incorporation provides otherwise, the board of the company may make, amend or repeal any necessary or incidental rules relating to the governance of the company in respect of matters that are not addressed in this Act or the Memorandum of Incorporation, by—

(a) publishing a copy of those rules, in any manner required or permitted by the Memorandum of Incorporation, or the rules of the company; and

(b) filing a copy of those rules.

(4) A rule contemplated in subsection (3)—

(a) must be consistent with this Act and the company's Memorandum of Incorporation, and any such rule that is inconsistent with this Act or the company's Memorandum of Incorporation is void to the extent of the inconsistency;

(b) takes effect on a date that is the later of—

(i) 20 business days after the rule is published in terms of subsection (3)*(a)*; or

(ii) the date, if any, specified in the rule; and

(c) is binding—

(i) on an interim basis from the time it takes effect until it is put to a vote at the next general shareholders meeting of the company; and

(ii) on a permanent basis only if it has been ratified by an ordinary resolution at the meeting contemplated in subparagraph (i).

(5) If a rule that has been published in terms of subsection (3) is not subsequently ratified as contemplated in subsection (4)*(c)*, the company's board may not make a substantially similar rule within the ensuing 12 months, unless it has been approved in advance by ordinary resolution at a shareholders meeting.

(6) A company's Memorandum of Incorporation, and any rules of the company, are binding—

(a) between the company and each shareholder;

(b) between or among the shareholders of the company; and

(c) between the company and—

(i) each director or prescribed officer of the company; or

(ii) any other person serving the company as a member of the audit committee or as a member of a committee of the board,

in the exercise of their respective functions within the company.

(7) The shareholders of a company may enter into any agreement with one another concerning any matter relating to the company, but any such agreement must be consistent with this Act and the company's Memorandum of Incorporation, and any provision of such an agreement that is inconsistent with this Act or the company's Memorandum of Incorporation is void to the extent of the inconsistency.

Amending Memorandum of Incorporation

16. (1) A company's Memorandum of Incorporation may be amended—

(a) in compliance with a court order in the manner contemplated in subsection (4);

(b) in the manner contemplated in section 36(3) and (4); or

(c) at any other time if a special resolution to amend it—

(i) is proposed by—

(aa) the board of the company; or

(bb) shareholders entitled to exercise at least 10% of the voting rights that may be exercised on such a resolution; and

(ii) is adopted at a shareholders meeting, or in accordance with section 60, subject to subsection (3).

(2) A company's Memorandum of Incorporation may provide different requirements than those set out in subsection (1)*(c)*(i) with respect to proposals for amendments.

(3) Despite subsection (1)*(c)*(ii), if a non-profit company has no voting members—

(a) the board of that company may amend its Memorandum of Incorporation in the manner contemplated in subsection (1)*(c)*(i)*(aa)*; and

(b) the requirements of subsection (1)*(c)*(ii) do not apply to the company.

(4) An amendment to a company's Memorandum of Incorporation required by any court order—

(a) must be effected by a resolution of the company's board; and

(b) does not require a special resolution as contemplated in subsection (1)*(c)*(ii).

(5) An amendment contemplated in subsection (1)*(c)* may take the form of—

(a) a new Memorandum of Incorporation in substitution for the existing Memorandum; or

(b) one or more alterations to the existing Memorandum of Incorporation by—

(i) changing the name of the company;

(ii) deleting, altering or replacing any of its provisions;

(iii) inserting any new provisions into the Memorandum of Incorporation; or

(iv) making any combination of alterations contemplated in this paragraph.

(6) If a profit company amends its Memorandum of Incorporation in such a manner that it no longer meets the criteria for its particular category of profit company, the company must also amend its name at the same time by altering the ending expression as appropriate to reflect the category of profit company into which it now falls.

(7) Within the prescribed time after amending its Memorandum of Incorporation, a company must file a Notice of Amendment together with the prescribed fee, and—

(a) the provisions of section 13(3) and (4)*(a)* and section 14, each read with the changes required by the context, apply to the filing of the Notice of Amendment; and

(b) if the amendment to a company's Memorandum of Incorporation—

(i) has substituted a new Memorandum, as contemplated in subsection (5)*(a)*, the provisions of section 13 (2)*(b)*, read with the changes required by the context, apply to the filing of the Notice of Amendment; or

(ii) has altered the existing Memorandum, as contemplated in subsection (5)*(b)*—

(aa) the company must include a copy of the amendment with the Notice of Amendment; and

(bb) the Commission may require the company to file a full copy of its amended Memorandum of Incorporation within a reasonable time.

(8) If a company's amendment to its Memorandum of Incorporation includes a change of the company's name—

(a) the provisions of section 14(2) and (3), read with the changes required by the context, apply afresh to the company; and

(b) if the amended name of the company—

(i) is reserved in terms of section 12 for that company, the Commission must—

(aa) issue to the company an amended registration certificate; and

(bb) alter the name of the company on the companies register; or

(ii) is not reserved in terms of section 12 for that company, the Commission must take the steps set out in subparagraph (i), unless the name is—

(aa) the registered name of another company, registered external company, close corporation or co-operative; or

(bb) reserved in terms of section 12 for another person.

(9) An amendment to a company's Memorandum of Incorporation takes effect from the later of—

(a) the date on, and time at, which the Commission accepts the filing of the Notice of Amendment; or

(b) the date, if any, set out in the Notice of Amendment.

Alterations, translations and consolidations of Memorandum of Incorporation

17. (1) The board of a company, or an individual authorised by the board, may alter the company's rules, or its Memorandum of Incorporation, in any manner necessary to correct a patent error in spelling, punctuation, reference, grammar or similar defect on the face of the document, by—

(a) publishing a notice of the alteration, in any manner required or permitted by the Memorandum of Incorporation or the rules of the company; and

(b) filing a notice of the alteration.

(2) The Commission, or a director or shareholder of a company, may apply to the Companies Tribunal for an administrative order setting aside the notice of an alteration published in terms of subsection (1), only on the grounds that the alteration exceeds the authority to correct a patent error or defect, as contemplated in that subsection.

(3) At any time, a company that has filed its Memorandum of Incorporation may file one or more translations of it, in any official language or languages of the Republic.

(4) A translation of a company's Memorandum of Incorporation must be accompanied by a sworn statement by the person who made the translation, stating that it is a true, accurate and complete translation of the Memorandum of Incorporation.

(5) At any time after a company has filed its Memorandum of Incorporation, and subsequently filed one or more alterations or amendments to it—

(a) the company may file a consolidated revision of its Memorandum of Incorporation, as so altered or amended; or

(b) the Commission may require the company to file a consolidated revision of its Memorandum of Incorporation, as so altered or amended.

(6) A consolidated revision of a company's Memorandum of Incorporation must be accompanied by—

(a) a sworn statement by a director of the company; or

(b) a statement by an attorney or notary public,

stating that the consolidated revision is a true, accurate and complete representation of the company's Memorandum of Incorporation, as altered and amended up to the date of the statement.

Authenticity of versions of memorandum of incorporation

18. (1) The Memorandum of Incorporation of a company, as altered or amended, prevails in any case of a conflict between it and—

(a) a translation filed in terms of section 17(3); or

(b) a consolidated revision filed in terms of section 17(5), unless the consolidated revision has subsequently been ratified by a special resolution at a general shareholders meeting of the company.

(2) The latest version of a company's Memorandum of Incorporation that has been endorsed by the Commission in terms of this Part prevails in the case of any conflict between it and any other purported version of the company's Memorandum of Incorporation.

Legal status of companies

19. (1) From the date and time that the incorporation of a company is registered, as stated in its registration certificate, the company—

(a) is a juristic person, which exists continuously until its name is removed from the companies register in accordance with this Act;

(b) has all of the legal powers and capacity of an individual, except to the extent that—

(i) a juristic person is incapable of exercising any such power, or having any such capacity; or

(ii) the company's Memorandum of Incorporation provides otherwise;

(c) is constituted in accordance with—

(i) the unalterable provisions of this Act;

(ii) the alterable provisions of this Act, subject to any negation, restriction, limitation, qualification, extension or other alteration that is contemplated in an alterable provision, and has been noted in the company's Memorandum of Incorporation; and

(iii) any further provisions of the company's Memorandum of Incorporation.

(2) A person is not, solely by reason of being an incorporator, shareholder or director

of a company, liable for any liabilities or obligations of the company, except to the extent that this Act or the company's Memorandum of Incorporation provides otherwise.

(3) If a company is a personal liability company the directors and past directors are jointly and severally liable, together with the company, for any debts and liabilities of the company as are or were contracted during their respective periods of office.

(4) Subject to subsection (5), a person must not be regarded as having received notice or knowledge of the contents of any document relating to a company merely because the document—

(a) has been filed; or

(b) is accessible for inspection at an office of the company.

(5) A person must be regarded as having received notice and knowledge of—

(a) any provision of a company's Memorandum of Incorporation contemplated in section 15(2)*(b)* if the company's Notice of Incorporation or a Notice of Amendment has drawn attention to the provision, as contemplated in section 13(3); or

(b) the effect of subsection (3) on a personal liability company.

(6) If a company has amended its Memorandum of Incorporation, the Memorandum of Incorporation as previously adopted by the company has no force or effect with respect to any right, cause of action or matter occurring or arising after the date on which the amendment took effect.

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

Validity of company actions

20. (1) If a company's Memorandum of Incorporation limits, restricts or qualifies the purposes, powers or activities of that company, as contemplated in section 19(1)*(b)*(ii)—

(a) no action of the company is void by reason only that—

(ii) the action was prohibited by that limitation, restriction or qualification; or

(ii) as a consequence of that limitation, restriction or qualification, the directors had no authority to authorise the action by the company; and

(b) in any legal proceeding, other than proceedings between—

(i) the company and its shareholders, directors or prescribed officers; or

(ii) the shareholders and directors or prescribed officers of the company,

no person may rely on such limitation, restriction or qualification to assert that an action contemplated in paragraph *(a)* is void.

(2) If a company's Memorandum of Incorporation limits, restricts or qualifies the purposes, powers or activities of that company, or limits the authority of the directors to perform an act on behalf of the company, the shareholders, by special resolution, may ratify any action by the company or the directors that is inconsistent with any such limit, restriction or qualification, subject to subsection (3).

(3) An action contemplated in subsection (2) may not be ratified if it is in contravention of this Act.

(4) One or more shareholders, directors or prescribed officers of a company, or a trade union representing employees of the company, may take proceedings to restrain the company from doing anything inconsistent with this Act.

(5) One or more shareholders, directors or prescribed officers of a company may take proceedings to restrain the company or the directors from doing anything inconsistent with any limitation, restriction or qualification contemplated in subsection (2), but any such proceedings are without prejudice to any rights to damages of a third party who—

(a) obtained those rights in good faith; and

(b) did not have actual knowledge of the limit, restriction or qualification.

(6) Each shareholder of a company has a claim for damages against any person who fraudulently or due to gross negligence causes the company to do anything inconsistent with—

(a) this Act; or

(b) a limitation, restriction or qualification contemplated in this section, unless that action has been ratified by the shareholders in terms of subsection (2).

(7) A person dealing with a company in good faith, other than a director, prescribed officer or shareholder of the company, is entitled to presume that the company, in making any decision in the exercise of its powers, has complied with all of the formal and procedural requirements in terms of this Act, its Memorandum of Incorporation and any rules of the company unless, in the circumstances, the person knew or reasonably ought to have known of any failure by the company to comply with any such requirement.

(8) Subsection (7) must be construed concurrently with, and not in substitution for, any relevant common law principle relating to the presumed validity of the actions of a company in the exercise of its powers.

Pre-incorporation contracts

21. (1) A person may enter into a written agreement in the name of, or purport to act in the name of, or on behalf of, an entity that is contemplated to be incorporated in terms of this Act, but does not yet exist at the time.

(2) A person who does anything contemplated in subsection (1) is jointly and severally liable with any other such person for liabilities created as provided for in the pre-incorporation contract while so acting, if—

(a) the contemplated entity is not subsequently incorporated; or

(b) after being incorporated, the company rejects any part of such an agreement or action.

(3) If, after its incorporation, a company enters into an agreement on the same terms as, or in substitution for, an agreement contemplated in subsection (1), the liability of a person under subsection (2) in respect of the substituted agreement is discharged.

(4) Within three months after the date on which a company was incorporated the board of that company may completely, partially or conditionally ratify or reject any pre-incorporation contract or other action purported to have been made or done in its name or on its behalf, as contemplated in subsection (1).

(5) If, within three months after the date on which a company was incorporated, the board has neither ratified nor rejected a particular pre-incorporation contract, or other action purported to have been made or done in the name of the company, or on its behalf, as contemplated in subsection (1), the company will be regarded to have ratified that agreement or action.

(6) To the extent that a pre-incorporation contract or action has been ratified or regarded to have been ratified in terms of subsection (5)—

(a) the agreement is as enforceable against the company as if the company had been a party to the agreement when it was made; and

(b) the liability of a person under subsection (2) in respect of the ratified agreement or action is discharged.

(7) If a company rejects an agreement or action contemplated in subsection (1), a person who bears any liability in terms of subsection (2) for that rejected agreement or action may assert a claim against the company for any benefit it has received, or is entitled to receive, in terms of the agreement or action.

Reckless trading prohibited

22. (1) A company must not—

(a) carry on its business recklessly, with gross negligence, with intent to defraud any person or for any fraudulent purpose; or

(b) trade under insolvent circumstances.

(2) If the Commission has reasonable grounds to believe that a company is engaging in conduct prohibited by subsection (1), the Commission may issue a notice to the company to show cause why the company should be permitted to continue carrying on its business, or to trade, as the case may be.

(3) If a company to whom a notice has been issued in terms of subsection (2) fails within 20 business days to satisfy the Commission that it is not engaging in conduct prohibited by subsection (1), the Commission may issue a compliance notice to the company requiring it to cease carrying on its business or trading, as the case may be.

Part C

Transparency, accountability and integrity of companies

Registration of external companies and registered office

23. (1) An external company must register with the Commission within 20 business days after it first begins to conduct business, or non-profit activities, as the case may be, within the Republic—

(a) as an external non-profit company if, within the jurisdiction in which it was incorporated, it meets legislative or definitional requirements that are comparable to the legislative or definitional requirements of a non-profit company incorporated under this Act; or

(b) as an external profit company, if, within the jurisdiction in which it was incorporated, it meets legislative or definitional requirements that are comparable to the legislative or definitional requirements of a profit company incorporated under this Act.

(2) For the purposes of subsection (1), and the definition of ''external company'' as set out in section 1, a foreign company is not to be regarded as ''conducting business, or non-profit activities, as the case may be, within the Republic'', unless that foreign company is engaged in, or has engaged in, one or more of the following activities within the Republic:

(a) Holding a meeting or meetings of the shareholders or board of the foreign company, or otherwise conducting the internal affairs of the company;

(b) establishing or maintaining any bank or other financial accounts;

(c) establishing or maintaining offices or agencies for the transfer, exchange or registration of the foreign company's own securities;

(d) creating or acquiring any debts, mortgages or security interests in any property;

(e) securing or collecting any debt, or enforcing any mortgage or security interest.

(f) acquiring any interest in any property; and

(g) entering into contracts of employment.

(3) Each company or external company must—

(a) continuously maintain at least one office in the Republic; and

(b) register the address of its office, or its principal office if it has more than one office—

(i) initially in the case of—

(aa) a company, by providing the required information on its Notice of Incorporation; or

(bb) an external company, by providing the required information when filing its registration in terms of subsection (1); and

(ii) subsequently, by filing a notice of change of registered office, together with the prescribed fee.

(4) A change contemplated in subsection (2)*(b)*(ii) takes effect as from the later of—

(a) the date, if any, stated in the notice; or

(b) five business days after the date on which the notice was filed.

(5) The Commission must—

(a) assign a unique registration number to each external company that has registered in accordance with subsection (1);

(b) maintain a register of external companies;

(c) enter the prescribed information concerning each external company in the register; and

(d) in the case of an external company whose name is a foreign registration number but does not indicate the name of the foreign jurisdiction in which it was incorporated, append to its name on the registry the name of that jurisdiction in a manner comparable to that required for a company under section 11(3)*(a)*.

(6) If an external company has failed to register in terms of subsection (1) within 12 months after commencing its activities within the Republic, the Commission may issue a compliance notice to that external company requiring it to—

(a) register as required by subsection (1) within 20 business days after receiving the notice; or

(b) if it fails to register within the time allowed in paragraph *(a)*, to cease carrying on its business or activities within the Republic.

Form and standards for company records

24. (1) Any documents, accounts, books, writing, records or other information that a company is required to keep in terms of this Act or any other public regulation must be kept—

(a) in written form, or other form or manner that allows that information to be converted into written form within a reasonable time; and

(b) for a period of seven years, or any longer period of time specified in any other applicable public regulation, subject to subsection (2).

(2) If a company has existed for a shorter time than contemplated in subsection (1)*(b)*, the company is required to retain records for that shorter time.

(3) Every company must maintain—

(a) a copy of its Memorandum of Incorporation, and any amendments or alterations to it, and any rules of the company made in terms of section 15(3) to (5);

(b) a record of its directors, including—

(i) details of any person who has served as a director of the company, for a period of seven years after the person ceases to serve as a director; and

(ii) the information required by or in terms of subsection (5);

(c) copies of all—

(i) reports presented at an annual general meeting of the company, for a period of seven years after the date of any such meeting;

(ii) annual financial statements required by this Act, for seven years after the date on which each such particular statements were issued; and

(iii) accounting records required by this Act, for the current financial year and for the previous seven completed financial years of the company;

(d) notice and minutes of all shareholders meetings, including—

(i) all resolutions adopted by them, for seven years after the date each such resolution was adopted; and

(ii) any document that was made available by the company to the holders of securities in relation to each such resolution;

(e) copies of any written communications sent generally by the company to all

holders of any class of the company's securities, for a period of seven years after the date on which each such communication was issued; and

(f) minutes of all meetings and resolutions of directors, or directors' committees, or the audit committee, if any, for a period of seven years after the date—

(i) of each such meeting; or

(ii) on which each such resolution was adopted.

(4) In addition to the requirements of subsection (3), every profit company must maintain—

(a) a securities register or its equivalent, as required by section 50; and

(b) the records required in terms of section 85, if that section applies to the company.

(5) A company's record of directors must include, in respect of each director, that person's—

(a) full name, and any former names;

(b) identity number or, if the person does not have an identity number, the person's date of birth;

(c) nationality and passport number, if the person is not a South African;

(d) occupation;

(e) date of their most recent election or appointment as director of the company;

(f) name and registration number of every other company or foreign company of which the person is a director, and in the case of a foreign company, the nationality of that company; and

(g) any other prescribed information.

(6) To protect personal privacy, the Minister, by notice in the *Gazette*, may exempt from the application of subsection (5)*(a)* categories of names as formerly used by any person—

(a) before attaining majority, or by persons who have been adopted, married, divorced or widowed; or

(b) in other circumstances prescribed by the Minister.

Location of company records

25. (1) The records referred to in section 24 must be accessible at or from the company's registered office or another location, or other locations, within the Republic.

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

(a) are not kept at or made accessible from the company's registered office, as contemplated in subsection (1); or

(b) are moved from one location to another.

Access to company records

26. (1) A person who holds or has a beneficial interest in any securities issued by a company—

(a) has a right to inspect and copy the information contained in the records of the company—

(i) mentioned in section 24(3)*(a)*, *(b)*, *(c)*(i) and (ii), *(d)* and *(e)*; or

(ii) contemplated in section 24(4)*(a)* or *(b)*;

(b) has a right to any other information to the extent granted by the Memorandum of Incorporation, as contemplated in subsection (2); and

(c) may exercise the rights set out in paragraph *(a)* or *(b)*—

(i) by direct request made to the company in the prescribed manner, either in person or through an attorney or other personal representative designated in writing; or

(ii) in accordance with the Promotion of Access to Information Act, 2000 (Act No. 2 of 2000).

(2) In addition to the information rights set out in subsection (1)*(a)*, the Memorandum of Incorporation of a company may establish additional information rights of any person, with respect to any information pertaining to the company, but no such right may negate or diminish any mandatory protection of any record, as set out in Part 3 of the Promotion of Access to Information Act, 2000 (Act No. 2 of 2000).

(3) The register of members and register of directors of a company, must, during business hours for reasonable periods be open to inspection by any member, free of charge and by any other person, upon payment for each inspection of an amount not more than R100,00.

(4) The rights of access to information set out in this section are in addition to, and not in substitution for, any rights a person may have to access information in terms of—

(a) section 32 of the Constitution;

(b) the Promotion of Access to Information Act, 2000 (Act No. 2 of 2000); or

(c) any other public regulation.

(5) The Minister may make regulations respecting the exercise of the rights set out in this section.

(6) It is an offence for a company to—

(a) fail to accommodate any reasonable request for access, or to unreasonably refuse access, to any record that a person has a right to inspect or copy in terms of this section; or

(b) to otherwise impede, interfere with, or attempt to frustrate, the reasonable exercise by any person of the rights set out in this section.

Financial year of company

27. (1) A company must have a financial year, ending on a date set out in the company's Notice of Incorporation, subject to any change made in terms of subsection (4).

(2) The first financial year of a company—

(a) begins on the date that the incorporation of the company is registered, as stated in its registration certificate; and

(b) ends on the date set out in the Notice of Incorporation, which may not be more than 15 months after the date contemplated in paragraph *(a)*.

(3) The second and each subsequent financial year of a company—

(a) begins when the preceding financial year ends; and

(b) ends on the first anniversary of the date contemplated in paragraph *(a)*, unless the financial year end has been changed as contemplated in subsection (4).

(4) The board of a company may change its financial year end at any time, by filing a notice of that change, but—

(a) it may not do so more than once during any financial year;

(b) the newly established financial year end must be later than the date on which the notice is filed; and

(c) the date as changed may not result in a financial year ending more than 15 months after the end of the preceding financial year.

(5) Despite subsection (2)*(b)* or (3), the financial year of a company that has changed the date contemplated in subsection (1) ends on the date as changed.

(6) If, in a particular year, the financial year of a company ends on a Saturday, Sunday or public holiday, that financial year will be regarded to have ended on the next following business day.

(7) The financial year of the company is its annual accounting period.

Accounting records

28. (1) A company must keep accurate and complete accounting records in one of the official languages of the Republic—

(a) as necessary to enable the company to satisfy its obligations in terms of this Act or any other law with respect to the preparation of financial statements; and

(b) including any prescribed accounting records, which must be kept in the prescribed manner and form.

(2) A company's accounting records must be kept at, or be accessible from, the registered office of the company.

(3) It is an offence for—

(a) a company—

(i) with an intention to deceive or mislead any person—

(aa) to fail to keep accurate or complete accounting records;

(bb) to keep records other than in the prescribed manner and form, if any; or

(ii) to falsify any of its accounting records, or permit any person to do so; or

(b) any person to falsify a company's accounting records.

(4) For greater certainty, the Commission may issue a compliance notice, as contemplated in section 171, to a company in respect of any failure by the company to comply with the requirements of this section, irrespective whether that failure constitutes an offence in terms of subsection (3).

Financial statements

29. (1) If a company provides any financial statements, including any annual financial statements, to any person for any reason, those statements 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 business 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 the statements apply; and

(e) bear, on the first page of the statements, a prominent notice indicating—

(i) whether the statements—

(aa) have been audited in compliance with any applicable requirements of this Act;

(bb) if not audited, have been independently reviewed in compliance with any applicable requirements of this Act; or

(cc) have not been audited or independently reviewed; and

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

(2) Any financial statements prepared by a company, including any annual financial statements of a company as contemplated in section 30, must not be—

(a) false or misleading in any material respect; or

(b) incomplete in any material particular, subject only to subsection (3).

(3) A company may provide any person with a summary of any particular financial statements, but—

(a) any such summary must comply with any prescribed requirements; and

(b) the first page of the summary must bear a prominent notice—

(i) stating that it is a summary of particular financial statements prepared by the company, and setting out the date of those statements;

(ii) stating whether the financial statements that it summarises have been audited, independently reviewed, or are unaudited, as contemplated in subsection (1)*(e)*;

(iii) stating the name, and professional designation, if any, of the individual who prepared, or supervised the preparation of, the financial statements that it summarises; and

(iv) setting out the steps required to obtain a copy of the financial statements that it summarises.

(4) Subject to subsection (5), the Minister, after consulting the Council, may make regulations prescribing—

(a) financial reporting standards contemplated in this Part; or
(b) form and content requirements for summaries contemplated in subsection (3).

(5) Any regulations contemplated in subsection (4)—
(a) must 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 or its successor body; and
(c) may establish different standards applicable to—
(i) profit and non-profit companies; and
(ii) different categories of profit companies.

(6) Subject to section 214(2), a person is guilty of an offence if the person is a party to the preparation, approval, dissemination or publication of—
(a) any financial statements, including any annual financial statements contemplated in section 30, knowing that those statements—
(i) do not comply with the requirements of subsection (1); or
(ii) are materially false or misleading, as contemplated in subsection (2); or
(b) a summary of any financial statements, knowing that—
(i) the statements that it summarises do not comply with the requirements of subsection (1), or are materially false or misleading, as contemplated in subsection (2); or
(ii) the summary does not comply with the requirements of subsection (3), or is materially false or misleading.

Annual financial statements

30. (1) Each year, a company must prepare annual financial statements within six months after the end of its financial year, or such shorter period as may be appropriate to provide the required notice of an annual general meeting in terms of section 61(7).

(2) The annual financial statements must—
(a) be 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 made in terms of subsection (7) 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; or
(cc) the nature and extent of its activities; or
(ii) be either—
(aa) audited voluntarily at the option of the company; or
(bb) independently reviewed in a manner that satisfies the regulations made in terms of subsection (7) unless exempted if it is a private company and—
(AA) one person holds, or has all of the beneficial interest in, all of the securities issued by the company; or
(BB) every person who is a holder of, or has a beneficial interest in, any securities issued by the company is also a director of the company unless the company has only one director, and that director is a person contemplated in section 69(12).

(3) The annual financial statements of a company must—
(a) include an auditor's report, if the statements are audited;
(b) include a report by the directors with respect to the state of affairs, the business and profit or loss of the company, or of the group of companies, if the company is part of a group, including—
(i) any matter material for the shareholders to appreciate the company's state of affairs; and
(ii) any prescribed information;
(c) be approved by the board and signed by an authorised director; and

(d) be presented to the first shareholders meeting after the statements have been approved by the board.

(4) The annual financial statements of each company that is required in terms of this Act to have its annual financial statements audited, must include particulars showing—

(a) the remuneration, as defined in subsection (6), and benefits received by each director, or individual holding any prescribed office in the company;

(b) the amount of—

(i) any pensions paid by the company to or receivable by current or past directors or individuals who hold or have held any prescribed office in the company;

(ii) any amount paid or payable by the company to a pension scheme with respect to current or past directors or individuals who hold or have held any prescribed office in the company;

(c) the amount of any compensation paid in respect of loss of office to current or past directors or individuals who hold or have held any prescribed office in the company;

(d) the number and class of any securities issued to a director or person holding any prescribed office in the company, or to any person related to any of them, and the consideration received by the company for those securities; and

(e) details of service contracts of current directors and individuals who hold any prescribed office in the company.

(5) The information to be disclosed under subsection (4) must satisfy the prescribed standards, and must show the amount of any remuneration or benefits paid to or receivable by persons in respect of—

(a) services rendered as directors or prescribed officers of the company; or

(b) services rendered while being directors or prescribed officers of the company—

(i) as directors or prescribed officers of any other company within the same group of companies; or

(ii) otherwise in connection with the carrying on of the affairs of the company or any other company within the same group of companies.

(6) For the purposes of subsections (4) and (5), 'remuneration' includes—

(a) fees paid to directors for services rendered by them to or on behalf of the company, including any amount paid to a person in respect of the person's accepting the office of director;

(b) salary, bonuses and performance-related payments;

(c) expense allowances, to the extent that the director is not required to account for the allowance;

(d) contributions paid under any pension scheme not otherwise required to be disclosed in terms of subsection (4)*(b)*;

(e) the value of any option or right given directly or indirectly to a director, past director or future director, or person related to any of them, as contemplated in section 42;

(f) financial assistance to a director, past director or future director, or person related to any of them, for the subscription of shares, as contemplated in section 44; and

(g) with respect to any loan or other financial assistance by the company to a director, past director or future director, or a person related to any of them, or any loan made by a third party to any such person, as contemplated in section 45, if the company is a guarantor of that loan, the value of—

(i) any interest deferred, waived or forgiven; or

(ii) the difference in value between—

(aa) the interest that would reasonably be charged in comparable circumstances at fair market rates in an arm's length transaction; and

(bb) the interest actually charged to the borrower, if less.

(7) The Minister may make regulations, including different requirements for different categories of companies, prescribing—

(a) the categories of any private companies that are required to have their respective annual financial statements audited, as contemplated in subsection (2)*(b)*(i); and

(b) the manner, form and procedures for the conduct of an independent review other than an audit, as contemplated in subsection (2)*(b)*(ii)*(bb)*, as well as the professional qualifications, if any, of persons who may conduct such reviews.

Access to financial statements or related information

31. (1) In addition to the rights set out in section 26, a person who holds or has a beneficial interest in any securities issued by a company, is entitled—

(a) without demand to receive a notice of the publication of any annual financial statements of the company required by this Act, setting out the steps required to obtain a copy of those statements; and

(b) on demand to receive without charge one copy of any annual financial statements of the company required by this Act.

(2) If a judgment creditor of a company has been informed, by a person whose duty it is to execute the judgment, that there appears to be insufficient disposable property to satisfy that judgment, the judgement creditor is entitled within five business days after making a demand, to receive without charge, one copy of the most recent annual financial statements of the company.

(3) Trade unions must, through the Commission and under conditions as determined by the Commission, be given access to company financial statements for purposes of initiating a business rescue process.

Use of company name and registration number

32. (1) A company or external company must—

(a) provide its full registered name or registration number to any person on demand; and

(b) not misstate its name or registration number in a manner likely to mislead or deceive any person.

(2) If the Commission has issued to a company a registration certificate with an interim name, as contemplated in section 14(2)*(b)*, the company must use its interim name, until its name has been amended.

(3) A person must not—

(a) use the name or registration number of a company in a manner likely to convey an impression that the person is acting or communicating on behalf of that company, unless the company has authorised that person to do so; or

(b) use a form of name for any purpose if, in the circumstances, the use of that form of name is likely to convey a false impression that the name is the name of a company.

(4) Every company must have its name and registration number mentioned in legible characters in all notices and other official publications of the company, including such notices and publications in electronic format as contemplated in the Electronic Communications and Transactions Act, 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.

(5) Contravention of subsection (1), (2), (3) or (4) is an offence.

(6) A company, or incorporator, shareholder or director of a company, or a person acting with the authority or on behalf of the company, must not, by any act or omission, misrepresent to any person, in any way or to any degree, the true legal status of the company.

(7) Despite section 19(2), if a person contravenes subsection (6), a court, on application by any person affected by that failure, may impose personal liability on any shareholder, director or incorporator of the company for any liability or obligation of the company, to the extent that the court determines to be just and equitable in the circumstances.

Annual return

33. (1) Every company must file an annual return 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, including in that return—

(a) a copy of its annual financial statements, if it is required to have such statements audited in terms of section 30(2)*(a)*; and

(b) any other prescribed information.

(2) Every external company must file an annual return in the prescribed form with the prescribed fee, and within the prescribed period after the anniversary of the date on which it was registered in terms of section 23(1).

(3) Each year, in its annual return filed in terms of subsection (1), every company must designate a director, employee or other person who is responsible for the company's compliance with the requirements of this Part, and Chapter 3, if it applies to the company.

Additional accountability requirements for certain companies

34. (1) In addition to complying with the requirements of this Part, a public company or state-owned company must also comply with the extended accountability requirements set out in Chapter 3.

(2) A private company, personal liability company or non-profit company is not required to comply with the extended accountability requirements set out in Chapter 3, except to the extent that the company's Memorandum of Incorporation provides otherwise.

Part D

Capitalisation of profit companies

Legal nature of company shares and requirement to have shareholders

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

(2) A share does not have a nominal or par value, subject to item 6 of Schedule 5.

(3) A company may not issue shares to itself.

(4) An authorised share of a company has no rights associated with it until it has been issued.

(5) Shares of a company that have been issued and subsequently—

(a) acquired by that company, as contemplated in section 48; or

(b) surrendered to that company in the exercise of appraisal rights in terms of section 164,

have the same status as shares that have been authorised but not issued.

(6) Despite the repeal of the Companies Act, 1973 (Act No. 61 of 1973), a share issued by a pre-existing company, and held by a shareholder immediately before the effective date, continues to have all of the rights associated with it immediately before the effective date, irrespective of whether those rights existed in terms of the company's Memorandum of Incorporation, or in terms of that Act, subject only to—

(a) amendments to that company's Memorandum of Incorporation after the effective date;

(b) the operation of subsection (5); and

(c) the regulations contemplated in item 6(3) of Schedule 5.

Authorisation for shares

36. (1) A company's Memorandum of Incorporation—

(a) must set out the classes of shares, and the number of shares of each class, that the company is authorised to issue;

(b) must set out, with respect to each class of shares—

(i) a distinguishing designation for that class; and

(ii) the preferences, rights, limitations and other terms associated with that class, subject to paragraph *(d)*;

(c) may authorise a stated number of unclassified shares, which are subject to classification by the board of the company in accordance with subsection (3)*(c)*; and

(d) may set out a class of shares—

(i) without specifying the associated preferences, rights, limitations or other terms of that class;

(ii) for which the board of the company must determine the associated preferences, rights, limitations or other terms; and

(iii) which must not be issued until the board of the company has determined the associated preferences, rights, limitations or other terms, as contemplated in subparagraph (ii).

(2) The authorisation 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 a company's Memorandum of Incorporation, may be changed only by—

(a) an amendment of the Memorandum of Incorporation by special resolution of the shareholders; or

(b) the board of the company, in the manner contemplated in subsection (3), except to the extent that the Memorandum of Incorporation provides otherwise.

(3) Except to the extent that a company's Memorandum of Incorporation provides otherwise, the company's board may—

(a) increase or decrease the number of authorised shares of any class of shares;

(b) reclassify any classified shares that have been authorised but not issued;

(c) classify any unclassified shares that have been authorised as contemplated in subsection (1)*(c)*, but are not issued; or

(d) determine the preferences, rights, limitations or other terms of shares in a class contemplated in subsection (1)*(d)*.

(4) If the board of a company acts pursuant to its authority contemplated in subsection (3), the company must file a Notice of Amendment of its Memorandum of Incorporation, setting out the changes effected by the board.

Preferences, rights, limitations and other share terms

37. (1) All of the shares of any particular class authorised by a company have preferences, rights, limitations and other terms that are identical to those of other shares of the same class, except to the extent that the company's Memorandum of Incorporation provides otherwise.

(2) Each issued share of a company, regardless of its class, has associated with it one general voting right, except to the extent provided otherwise by—

(a) this Act; or

(b) the preferences, rights, limitations and other terms determined by or in terms of the company's Memorandum of Incorporation in accordance with section 36.

(3) Despite anything to the contrary in a company's Memorandum of Incorporation—

(a) every share issued by that company has associated with it an irrevocable right of the shareholder to vote on any proposal to amend the preferences, rights, limitations and other terms associated with that share; and

(b) if that company has established only one class of shares—

(i) those shares have a right to be voted on every matter that may be decided by shareholders of the company; and

(ii) the holders of that class of shares are entitled to receive the net assets of the company upon its liquidation.

(4) If a company's Memorandum of Incorporation has established more than one class of shares the Memorandum of Incorporation, in setting out the preferences, rights, limitations and other terms of those classes of shares, must provide that—

(a) for each particular matter that may be submitted for a decision to shareholders of the company, at least one class of the company's shares has voting rights that may be exercised on that matter; and

(b) the holders of at least one class of the company's shares, irrespective of whether it is the same as any class contemplated in paragraph *(a)*, are entitled to receive the net assets of the company upon its liquidation.

(5) Subject to any other law, a company's Memorandum of Incorporation may establish, for any particular class of shares, preferences, rights, limitations or other terms that—

(a) confer special, conditional or limited voting rights;

(b) provide for shares of that class to be redeemable, subject to the requirements of sections 46 and 48, or convertible, as specified in the Memorandum of Incorporation—

(i) at the option of the company, the shareholder, or another person at any time, or upon the occurrence of any specified contingency;

(ii) for cash, indebtedness, securities or other property;

(iii) at prices and in amounts specified, or determined in accordance with a formula; or

(iv) subject to any other terms set out in the company's Memorandum of Incorporation;

(c) entitle the shareholders to distributions calculated in any manner, including dividends that may be cumulative, non-cumulative, or partially cumulative, subject to the requirements of sections 46 and 47; or

(d) provide for shares of that class to have preference over any other class of shares with respect to distributions, or rights upon the final liquidation of the company.

(6) The Memorandum of Incorporation of a company may provide for preferences, rights, limitations or other terms of any class of shares of that company to vary in response to any objectively ascertainable external fact or facts.

(7) For the purpose of subsection (6)—

(a) ''external fact or facts'' includes the occurrence of any event, a variation in any fact, benchmark or other point of reference, a determination or action by the company, its board, or any other person, an agreement to which the company is a party, or any other document; and

(b) the manner in which a fact affects the preferences, rights, limitations or other terms of shares must be expressly determined by or in terms of the company's Memorandum of Incorporation, in accordance with section 36.

(8) If the Memorandum of Incorporation of a company has been amended to materially and adversely alter the preferences, rights, limitations or other terms of a class of shares, any holder of those shares is entitled to seek relief in terms of section 164 if that shareholder—

(a) notified the company in advance of the intention to oppose the resolution to amend the Memorandum of Incorporation; and

(b) was present at the meeting, and voted against that resolution.

Issuing shares

38. (1) The board of a company may resolve to issue shares of the company at any time, but only within the classes, and to the extent, that the shares have been authorised by or in terms of the company's Memorandum of Incorporation, in accordance with section 36.

(2) If a company issues shares—

(a) that have not been authorised in accordance with section 36; or

(b) in excess of the number of authorised shares of any particular class,

the issuance of those shares may be retroactively authorised in accordance with section 36.

(3) If a resolution seeking to retroactively authorise an issue of shares, as contemplated in subsection (2), is not adopted when it is put to a vote—

(a) the share issue is a nullity to the extent that it exceeds any authorisation;

(b) the company must return to any person the fair value of the consideration received by the company in respect of that share issue to the extent that it is nullified, together with interest in accordance with the Prescribed Rate of Interest Act, 1975 (Act No. 55 of 1975), from the date on which the

consideration for the shares was received by the company, until the date on which the company complies with this paragraph;

(c) any certificate evidencing a share so issued and nullified, and any entry in a securities register in respect of such an issue, is void; and

(d) a director of the company is liable to the extent set out in section 77(3)*(e)*(i) if the director—

(i) was present at a meeting when the board approved the issue of any unauthorised shares, or participated in the making of such a decision in terms of section 74; and

(ii) failed to vote against the issue of those shares, despite knowing that the shares had not been authorised in accordance with section 36.

Subscription of shares

39. (1) This section—

(a) does not apply to a public company or state-owned company, except to the extent that the company's Memorandum of Incorporation provides otherwise; and

(b) applies to a private company or personal liability company with respect to any issue of its shares, other than—

(i) shares issued—

(aa) in terms of options or conversion rights; or

(bb) as contemplated in section 40(5) to (7); or

(ii) capitalisation shares issued as contemplated in section 47.

(2) If a private company proposes to issue any shares, other than as contemplated in subsection (1)*(b)*, each shareholder of that private company has a right, before any other person who is not a shareholder of that company, to be offered and, within a reasonable time to subscribe for, a percentage of the shares to be issued equal to the voting power of that shareholder's general voting rights immediately before the offer was made.

(3) A private or personal liability company's Memorandum of Incorporation may limit, negate, restrict or place conditions upon the right set out in subsection (2), with respect to any or all classes of shares of that company.

(4) Except to the extent that a private or personal liability company's Memorandum of Incorporation provides otherwise—

(a) in exercising a right in terms of subsection (2), a shareholder may subscribe fewer shares than the shareholder would be entitled to subscribe under that subsection; and

(b) shares not subscribed by a shareholder within the reasonable time contemplated in subsection (2), may be offered to other persons to the extent permitted by the Memorandum of Incorporation.

Consideration for shares

40. (1) The board of a company may issue authorised shares only—

(a) for adequate consideration to the company, as determined by the board;

(b) in terms of conversion rights associated with previously issued securities of the company; or

(c) as a capitalisation share as contemplated in section 47.

(2) Before a company issues any particular shares, the board must determine the consideration for which, and the terms on which, those shares will be issued.

(3) A determination by the board of a company in terms of subsection (2) as to the adequacy of consideration for any shares may not be challenged on any basis other than in terms of section 76, read with section 77(2).

(4) Subject to subsections (5) to (7), when a company has received the consideration approved by its board for the issuance of any shares—

(a) those shares are fully paid; and

(b) the company must issue those shares and cause the name of the holder to be entered on the company's securities register in accordance with Part E of this Chapter.

(5) If the consideration for any shares that are issued or to be issued is in the form of an instrument that is not negotiable by the company at the time the shares are to be issued, or is in the form of an agreement for future services, future benefits or future payment by the subscribing party—

(a) the consideration for those shares is regarded as having been received by the company at any time only to the extent—

(i) that the instrument is negotiable by the company; or

(ii) that the subscribing party to the agreement has fulfilled its obligations in terms of the agreement; and

(b) upon receiving the instrument or entering into the agreement, the company must—

(i) issue the shares immediately; and

(ii) cause the issued shares 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.

(6) Except to the extent that a trust agreement contemplated in subsection (5)*(b)* provides otherwise—

(a) voting rights, and appraisal rights set out in section 164, associated with shares that have been issued but are held in trust may not be exercised;

(b) any pre-emptive rights associated with shares that have been issued but are held in trust may be exercised only to the extent that the instrument has become negotiable by the company or the subscribing party has fulfilled its obligations under the agreement;

(c) any distribution with respect to shares that have been issued but are held in trust—

(i) must be paid or credited by the company to the subscribing party to the extent that the instrument has become negotiable by the company or the subscribing party has fulfilled its obligations under the agreement; and

(ii) may be credited against the remaining value at that time of any services still to be performed by the subscribing party, any future payment remaining due, or the benefits still to be received by the company; and

(d) shares that have been issued but are held in trust—

(i) may not be transferred by or at the direction of the subscribing party unless the company has expressly consented to the transfer in advance;

(ii) may be transferred to the subscribing party on a quarterly basis, to the extent that the instrument has become negotiable by the company or the subscribing party has fulfilled its obligations under the agreement;

(iii) must be transferred to the subscribing party when the instrument has become negotiable by the company, or upon satisfaction of all of the subscribing party's obligations in terms of the agreement; and

(iv) to the extent that the instrument is dishonoured after becoming negotiable, or that the subscribing party has failed to fulfil its obligations under the agreement, must be returned to the company and cancelled, on demand by the company.

(7) A company may not make a demand contemplated in subsection (6)*(d)*(iv) unless—

(a) a negotiable instrument is dishonoured after becoming negotiable by the company; or

(b) in the case of an agreement, the subscribing party has failed to fulfil any obligation in terms of the agreement for a period of at least 40 business days after the date on which the obligation was due to be fulfilled.

Shareholder approval for issuing shares in certain cases

41. (1) Subject to subsection (2), an issue of shares or securities convertible into shares, or a grant of options contemplated in section 42, or a grant of any other rights

exercisable for securities, must be approved by a special resolution of the shareholders of a company, if the shares, securities, options or rights are issued to a—

(a) director, future director, prescribed officer, or future prescribed officer of the company;

(b) person related or inter-related to the company, or to a director or prescribed officer of the company; or

(c) nominee of a person contemplated in paragraph *(a)* or *(b)*.

(2) Subsection (1) does not apply if the issue of shares, securities or rights is—

(a) under an agreement underwriting the shares, securities or rights;

(b) in the exercise of a pre-emptive right to be offered and to subscribe shares, as contemplated in section 39;

(c) in proportion to existing holdings, and 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;

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

(e) pursuant to an offer to the public, as defined in section 95(1)*(h)*, read with section 96.

(3) An issue of shares, securities convertible into shares, or rights exercisable for shares in a transaction, or a series of integrated transactions, requires approval of the shareholders by special resolution if the voting power of the class of shares that are issued or issuable as a result of the transaction or series of integrated transactions will be equal to or exceed 30% of the voting power of all the shares of that class held by shareholders immediately before the transaction or series of transactions.

(4) In subsection (3)—

(a) for purposes of determining the voting power of shares issued and issuable as a result of a transaction or series of integrated transactions, the voting power of shares is the greater of—

(i) the voting power of the shares to be issued; or

(ii) the voting power of the shares that would be issued after giving effect to the conversion of convertible shares and other securities and the exercise of rights to be issued;

(b) a series of transactions is integrated if—

(i) consummation of one transaction is made contingent on consummation of one or more of the other transactions; or

(ii) the transactions are entered into within a 12-month period, and involve the same parties, or related persons; and—

(aa) they involve the acquisition or disposal of an interest in one particular company or asset; or

(bb) taken together, they lead to substantial involvement in a business activity that did not previously form part of the company's principal activity.

(5) A director of a company is liable to the extent set out in section 77(3)*(e)*(ii) if the director—

(a) was present at a meeting when the board approved the issue of any securities as contemplated in this section, or participated in the making of such a decision in terms of section 74; and

(b) failed to vote against the issue of those securities, despite knowing that the issue of those securities was inconsistent with this section.

(6) In this section, 'future director' or 'future prescribed officer' does not include a person who becomes a director or prescribed officer of the company more than six months after acquiring a particular option or right.

Options for subscription of securities

42. (1) A company may issue options for the allotment or subscription of authorised shares or other securities of the company.

(2) The board of a company must determine the consideration or other benefit for which, and the terms upon which—

(a) any options are issued; and

(b) the related shares or other securities are to be issued.

(3) A decision by the board that the company may issue—

(a) any options, constitutes also the decision of the board to issue any authorised shares or other securities for which the options may be exercised; or

(b) any securities convertible into shares of any class, constitutes also the decision of the board to issue the authorised shares into which the securities may be converted.

(4) A director of a company is liable to the extent set out in section 77(3)*(e)*(iii) if the director—

(a) was present at a meeting when the board approved the granting of an option or a right as contemplated in this section, or participated in the making of such a decision in terms of section 74; and

(b) failed to vote against the granting of the option or right, despite knowing that any shares—

(i) for which the options could be exercised; or

(ii) into which any securities could be converted,

had not been authorised in terms of section 36.

Securities other than shares

43. (1) In this section—

(a) ''debt instrument''—

(i) includes any securities other than the shares of a company, irrespective of whether or not issued in terms of a security document, such as a trust deed; but

(ii) does not include promissory notes and loans, whether constituting an encumbrance on the assets of the company or not; and

(b) ''security document'' includes any document by which a debt instrument is offered or proposed to be offered, embodying the terms and conditions of the debt instrument including, but not limited to, a trust deed or certificate.

(2) The board of a company—

(a) may authorise the company to issue a secured or unsecured debt instrument at any time, except to the extent provided by that the company's Memorandum of Incorporation; and

(b) must determine whether each such debt instrument is secured or unsecured.

(3) Except to the extent that a company's Memorandum of Incorporation provides otherwise, a debt instrument issued by the company may grant special privileges regarding—

(a) attending and voting at general meetings and the appointment of directors; or

(b) allotment of securities, redemption by the company, or substitution of the debt instrument for shares of the company, provided that the securities to be allotted or substituted in terms of any such privilege, are authorised by or in terms of the company's Memorandum of Incorporation in accordance with section 36.

(4) Every security document must clearly indicate, on its first page, whether the relevant debt instrument is secured or unsecured.

(5) A company may appoint any person, including a juristic person, as trustee for the holders of the company's debt instruments, if—

(a) the person—

(i) is not a director or prescribed officer of the company, or a person related or inter-related to the company, a director or a prescribed officer; and

(ii) does not have any interest in, or relationship with, the company that might conflict with the duties of a trustee; and

(b) the board is satisfied that the person has the requisite knowledge and experience to carry out the duties of a trustee.

(6) Any new trustee appointed for the purpose of this section must—

(a) satisfy the requirements of subsection (5)*(a)*; and

(b) be approved by the holders of at least 75% by value of debt instruments present at a meeting called for that purpose.

(7) Any provision contained in a trust deed for securing any debt instruments, or in any agreement with the holders of any debt instruments secured by a trust deed, is void to the extent that it would exempt a trustee from, or indemnify a trustee against, liability for breach of trust, or failure to exercise the degree of care and diligence required of the prudent and careful person, having regard to the provisions of the trust deed respecting the powers, authorities or discretions of the trustee.

(8) Subsection (7) does not invalidate—

(a) any release validly given in respect of anything done or omitted to be done by a trustee before the giving of the release; or

(b) any provision of a debt instrument—

(i) enabling a release to be given with the consent of the majority of not less than three fourths in value of the holders of debt instruments present and voting at a meeting called for the purpose; and

(ii) with respect to a specific act or omission, or of the trustee dying or ceasing to act.

Financial assistance for subscription of securities

44. (1) In this section, ''financial assistance'' does not include lending money in the ordinary course of business by a company whose primary business is the lending of money.

(2) To the extent that the Memorandum of Incorporation of a company provides otherwise, 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 subsections (3) and (4).

(3) Despite any provision of a company's Memorandum of Incorporation to the contrary, the board may not authorise any financial assistance contemplated in subsection (2), 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 within the previous two years, which approved such assistance either for the specific recipient, or generally for a category of potential recipients, and the specific recipient falls within that category; and

(b) the board is satisfied that—

(i) immediately after providing the financial assistance, the company would satisfy the solvency and liquidity test; and

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

(4) In addition to satisfying the requirements of subsection (3), the board must ensure that any conditions or restrictions respecting the granting of financial assistance set out in the company's Memorandum of Incorporation have been satisfied.

(5) A decision by the board of a company to provide financial assistance contemplated in subsection (2), or an agreement with respect to the provision of any such assistance, is void to the extent that the provision of that assistance would be inconsistent with—

(a) this section; or

(b) a prohibition, condition or requirement contemplated in subsection (4).

(6) If a resolution or an agreement has been declared void in terms of subsection (5) read with section 218(1), a director of a company is liable to the extent set out in section 77(3)*(e)*(iv) 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 subsection (4).

Loans or other financial assistance to directors

45. (1) In this section, ''financial assistance''—

(a) includes lending money, guaranteeing a loan or other obligation, and securing any debt or obligation; but

(b) does not include—

(i) lending money in the ordinary course of business by a company whose primary business is the lending of money;

(ii) an accountable advance to meet—

(aa) legal expenses in relation to a matter concerning the company; or

(bb) anticipated expenses to be incurred by the person on behalf of the company; or

(iii) an amount to defray the person's expenses for removal at the company's request.

(2) Except to the extent that the Memorandum of Incorporation of a company provides otherwise, the board may authorise the company to provide direct or indirect financial assistance to a director or prescribed officer of the company or of a related or inter-related company, or to a related or inter-related company or corporation, or to a member of a related or inter-related corporation, or to a person related to any such company, corporation, director, prescribed officer or member, subject to subsections (3) and (4).

(3) Despite any provision of a company's Memorandum of Incorporation to the contrary, the board may not authorise any financial assistance contemplated in subsection (2), 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 within the previous two years, which approved such assistance either for the specific recipient, or generally for a category of potential recipients, and the specific recipient falls within that category; and

(b) the board is satisfied that immediately after providing the financial assistance, the company would satisfy the solvency and liquidity test.

(4) In addition to satisfying the requirements of subsection (3), the board must ensure that any conditions or restrictions respecting the granting of financial assistance set out in the company's Memorandum of Incorporation have been satisfied.

(5) If the board of a company adopts a resolution to do anything contemplated in subsection (2), the company must provide written notice of that resolution to all shareholders, unless every shareholder is also a director of the company, and to any trade union representing its employees—

(a) within 10 business days after the board adopts the resolution, if the total value of all loans, debts, obligations or assistance contemplated in that resolution, together with any previous such resolution during the financial year, exceeds one-tenth of 1% of the company's net worth at the time of the resolution; or

(b) within 30 business days after the end of the financial year, in any other case.

(6) A resolution by the board of a company to provide financial assistance contemplated in subsection (2), or an agreement with respect to the provision of any such assistance, is void to the extent that the provision of that assistance would be inconsistent with—

(a) this section; or

(b) a prohibition, condition or requirement contemplated in subsection (4).

(7) If a resolution or an agreement has been declared void in terms of subsection (6) read with section 218(1), a director of a company is liable to the extent set out in section 77(3)*(e)*(v) 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 subsection (4).

Distributions must be authorised by board

46. (1) A company must not make any proposed distribution unless—

(a) the distribution—

(i) is pursuant to an existing legal obligation of the company, or a court order; or

(ii) the board of the company, by resolution, has authorised the distribution;

(b) it reasonably appears that the company will satisfy the solvency and liquidity test immediately after completing the proposed distribution; and

(c) the board of the company, by resolution, has acknowledged that it has applied the solvency and liquidity test, as set out in section 4, and reasonably concluded that the company will satisfy the solvency and liquidity test immediately after completing the proposed distribution.

(2) When the board of a company has adopted a resolution contemplated in subsection (1)*(c)*, the relevant distribution must be fully carried out, subject only to subsection (3).

(3) If the distribution contemplated in a particular board resolution, court order or existing legal obligation has not been completed within 120 business days after the board made the acknowledgement required by subsection (1)*(c)*, or after a fresh acknowledgement being made in terms of this subsection, as the case may be—

(a) the board must reconsider the solvency and liquidity test with respect to the remaining distribution to be made pursuant to the original resolution, order or obligation; and

(b) despite any law, order or agreement to the contrary, the company must not proceed with or continue with any such distribution unless the board adopts a further resolution as contemplated in subsection (1)*(c)*.

(4) If a distribution takes the form of the incurrence of a debt or other obligation by the company, as contemplated in paragraph *(b)* of the definition of 'distribution' set out in section 1, the requirements of this section—

(a) apply at the time that the board resolves that the company may incur that debt or obligation; and

(b) do not apply to any subsequent action of the company in satisfaction of that debt or obligation, except to the extent that the resolution, or the terms and conditions of the debt or obligation, provide otherwise.

(5) If, after considering the solvency and liquidity test as required by this section, it appears to the company that the section prohibits its immediate compliance with a court order contemplated in subsection (1)*(a)*(i)—

(a) the company may apply to a court for an order varying the original order; and

(b) the court may make an order that—

(i) is just and equitable, having regard to the financial circumstances of the company; and

(ii) ensures that the person to whom the company is required to make a payment in terms of the original order is paid at the earliest possible date compatible with the company satisfying its other financial obligations as they fall due and payable.

(6) A director of a company is liable to the extent set out in section 77(3)*(e)*(vi) if the director—

(a) was present at the meeting when the board approved a distribution as contemplated in this section, or participated in the making of such a decision in terms of section 74; and

(b) failed to vote against the distribution, despite knowing that the distribution was contrary to this section.

Capitalisation shares

47. (1) Except to the extent that a company's Memorandum of Incorporation provides otherwise—

(a) the board of that company, by resolution, may approve the issuing of any authorised shares of the company, as capitalisation shares, on a pro rata basis to the shareholders of one or more classes of shares;

(b) shares of one class may be issued as a capitalisation share in respect of shares of another class; and

(c) subject to subsection (2), when resolving to award a capitalisation share, the board may at the same time resolve to permit any shareholder entitled to receive such an award to elect instead to receive a cash payment, at a value determined by the board.

(2) The board of a company may not resolve to offer a cash payment in lieu of awarding a capitalisation share, as contemplated in subsection (1)*(c)*, unless the board—

(a) has considered the solvency and liquidity test, as required by section 46, on the assumption that every such shareholder would elect to receive cash; and

(b) is satisfied that the company would satisfy the solvency and liquidity test immediately upon the completion of the distribution.

Company or subsidiary acquiring company's shares

48. (1) The making of a demand, tendering of shares and payment by a company to a shareholder in terms of a shareholder's appraisal rights set out in section 164 do not constitute an acquisition of its shares by the company within the meaning of this section.

(2) Subject to subsection (3)—

(a) a company may acquire its own shares, if the decision to do so satisfies the requirements of section 46; and

(b) any subsidiary of a company may acquire shares of that company, but—

(i) not more than 10%, in aggregate, of the number of issued shares of any class of shares of a company may be held by, or for the benefit of, all of the subsidiaries of that company, taken together; and

(ii) no voting rights attached to those shares may be exercised while the shares are held by the subsidiary, and it remains a subsidiary of the company whose shares it holds.

(3) Despite any provision of any law, agreement, order or the Memorandum of Incorporation of a company, the company may not acquire its own shares, and a subsidiary of a company may not acquire shares of that company, if, as a result of that acquisition, there would no longer be any shares of the company in issue other than—

(a) shares held by one or more subsidiaries of the company; or

(b) convertible or redeemable shares.

(4) An agreement with a company providing for the acquisition by the company of shares issued by it is enforceable against the company, subject to subsections (2) and (3).

(5) If a company alleges that, as a result of the operation of subsection (2) or (3), it is unable to fulfil its obligations in terms of an agreement contemplated in subsection (4)—

(a) the company must apply to a court for an order in terms of paragraph *(c)*;

(b) the company has the burden of proving that fulfilment of its obligations would put it in breach of subsections (2) or (3); and

(c) if the court is satisfied that the company is prevented from fulfilling its obligations pursuant to the agreement, the court may make an order that—

(i) is just and equitable, having regard to the financial circumstances of the company; and

(ii) ensures that the person to whom the company is required to make a payment in terms of the agreement is paid at the earliest possible date

compatible with the company satisfying its other financial obligations as they fall due and payable.

(6) If a company acquires any shares contrary to section 46, or this section, the company may, not more than two years after the acquisition, apply to a court for an order reversing the acquisition, and the court may order—

(a) the person from whom the shares were acquired to return the amount paid by the company; and

(b) the company to issue to that person an equivalent number of shares of the same class as those acquired.

(7) A director of a company is liable to the extent set out in section 77(3)*(e)*(vii) if the director—

(a) was present at the meeting when the board approved an acquisition of shares contemplated in this section, or participated in the making of such a decision in terms of section 74; and

(b) failed to vote against the acquisition of shares, despite knowing that the acquisition was contrary to this section or section 46.

Part E

Securities registration and transfer

Securities to be evidenced by certificates or uncertificated

49. (1) In this Part, **"certificated"** means evidenced by a certificate, as contemplated in subsection (2)*(a)*.

(2) Any securities issued by a company must be either—

(a) evidenced by certificates; or

(b) uncertificated, in which case the company must not issue certificates evidencing or purporting to evidence title to those securities, subject to subsection (6).

(3) Except to the extent that this Act expressly provides otherwise,—

(a) the rights and obligations of security holders are not different solely on the basis of their respective securities being certificated or uncertificated; and

(b) any provision of this Act applies with respect to any uncertificated securities in the same manner as it applies to certificated securities.

(4) Sections 52 to 55—

(a) apply only to uncertificated securities; and

(b) prevail in the case of a conflict between any provision of those sections and any other provision of this Act, any other law, the common law, the company's Memorandum of Incorporation or any agreement.

(5) Any certificated securities may cease to be evidenced by certificates, and thereafter be uncertificated, in which case any provision of this Act contemplated in subsection (4) applies to those securities from the date on which they ceased to be evidenced by certificates.

(6) In the manner set out in section 54, any uncertificated securities may be withdrawn from the uncertificated securities register, and certificates issued evidencing those securities, in which case from the date on which they became certificated—

(a) sections 52 to 55 cease to apply to those securities; and

(b) for greater certainty, transfer of ownership in those securities cannot be effected by a participant or central securities depository while they remain in certificated form.

(7) The Minister may make regulations regarding matters that are supplementary and ancillary to the provisions of this Part.

Securities register and numbering

50. (1) Every company must—

(a) establish or cause to be established a register of its issued securities in the prescribed form; and

(b) maintain its securities register in accordance with the prescribed standards.

(2) As soon as practicable after issuing any securities a company must enter or cause to be entered in its securities register, in respect of every class of securities that it has issued—

(a) the total number of those securities that are held in uncertificated form; and

(b) with respect to certificated securities—

(i) the names and addresses of the persons to whom the securities were issued;

(ii) the number of securities issued to each of them;

(iii) the number of, and prescribed circumstances relating to, any securities—

(aa) that have been placed in trust as contemplated in section 40(6)*(d)*; or

(bb) whose transfer has been restricted;

(iv) in the case of securities contemplated in section 43—

(aa) the number of those securities issued and outstanding; or

(bb) the names and addresses of the registered owner of the security and any holders of a beneficial interest in the security; and

(v) any other prescribed information.

(3) If a company has issued uncertificated securities, or has issued securities that have ceased to be certificated, as contemplated in section 49(5), a record must be administered and maintained by a participant or central securities depository in the prescribed form, as the company's uncertificated securities register, which—

(a) forms part of that company's securities register; and

(b) must contain, with respect to all securities contemplated in this subsection, any details—

(i) referred to in subsection (2)*(b)*, read with the changes required by the context; or

(ii) determined by the rules of the central securities depository.

(4) A securities register, or an uncertificated securities register, maintained in accordance with this Act is sufficient proof of the facts recorded in it, in the absence of evidence to the contrary.

(5) Unless all the shares of a company rank equally for all purposes, the company's shares, or each class of shares, and any other securities, must be distinguished by an appropriate numbering system.

Registration and transfer of certificated securities

51. (1) A certificate evidencing any certificated securities of a company—

(a) must state on its face—

(i) the name of the issuing company;

(ii) the name of the person to whom the securities were issued;

(iii) the number and class of shares and the designation of the series, if any, evidenced by that certificate; and

(iv) any restriction on the transfer of the securities evidenced by that certificate,

subject to item 6(4) of Schedule 5;

(b) must be signed by two persons authorised by the company's board; and

(c) is proof that the named security holder owns the securities, in the absence of evidence to the contrary.

(2) A signature contemplated in subsection (1)*(b)* may be affixed to or placed on the certificate by autographic, mechanical or electronic means.

(3) A certificate remains valid despite the subsequent departure from office of any person who signed it.

(4) If, as contemplated in section 50(5), all of a company's shares rank equally for all purposes, and are therefore not distinguished by a numbering system—

(a) each certificate issued in respect of those shares must be distinguished by a numbering system; and

(b) if the share has been transferred, the certificate must be endorsed with a reference number or similar device that will enable each preceding holder of the share in succession to be identified.

(5) Subject to subsection (6), a company must enter in its securities register every transfer of any certificated securities, including in the entry—

(a) the name and address of the transferee;

(b) the description of the securities, or interest transferred;

(c) the date of the transfer; and

(d) the value of any consideration still to be received by the company on each share or interest, in the case of a transfer of securities contemplated in section 40(5) and (6).

(6) A company may make an entry contemplated in subsection (5) only if the transfer—

(a) is evidenced by a proper instrument of transfer that has been delivered to the company; or

(b) was effected by operation of law.

Registration of uncertificated securities

52. (1) At the request of a company, and on payment of the prescribed fee, if any, a participant or central securities depository, as determined in accordance with the rules of the central securities depository, must furnish that company with all details of that company's uncertificated securities reflected in the uncertificated securities register.

(2) A person who wishes to inspect an uncertificated securities register may do so only—

(a) through the relevant company in terms of section 26; and

(b) in accordance with the rules of the central securities depository.

(3) Within five business days after the date of a request for inspection, a company must produce a record of the uncertificated securities register, which record must reflect at least the details referred to in section 50(3)*(b)* at the close of business on the day on which the request for inspection was made.

(4) A participant or central securities depository, determined in accordance with the rules of the central securities depository—

(a) must provide a regular statement at prescribed intervals to each person for whom any uncertificated securities are held in an uncertificated securities register, setting out the number and identity of the uncertificated securities held on that person's behalf;

(b) must not impose a charge for a statement on the person entitled to the statement; and

(c) may impose a charge or service fee for such a statement on the relevant company in accordance with the regulations.

(5) The regulations contemplated in section 49(7) may provide for a charge or service fee for statements contemplated in subsection (4)*(c)*.

Transfer of uncertificated securities

53. (1) The transfer of uncertificated securities in an uncertificated securities register may be effected only—

(a) by a participant or central securities depository;

(b) on receipt of—

(i) an instruction to transfer sent and properly authenticated in terms of the rules of a central securities depository; or

(ii) an order of a court; and

(c) in accordance with this section and the rules of the central securities depository.

(2) Transfer of ownership in any uncertificated securities must be effected by—

(a) debiting the account in the uncertificated securities register from which the transfer is effected; and

(b) crediting the account in the uncertificated securities register to which the transfer is effected,

in accordance with the rules of a central securities depository.

(3) The requirements of section 51(5), read with the changes required by the context, apply with respect to a transfer of uncertificated securities.

(4) A transfer of ownership in accordance with this section occurs despite any fraud, illegality or insolvency that may—

(a) affect the relevant uncertificated securities; or

(b) have resulted in the transfer being effected,

but a transferee who was a party to or had knowledge of the fraud or illegality, or had knowledge of the insolvency, as the case may be, may not rely on this subsection.

(5) A court may not order the name of a transferee contemplated in this section to be removed from a uncertificated securities register, unless that person was a party to or had knowledge of a fraud or illegality as contemplated in subsection (4).

(6) Nothing in this section prejudices any power of a participant or central securities depository, as the case may be, to effect a transfer to a person to whom the right to any uncertificated securities of a company has been transmitted by operation of law.

Substitution of certificated or uncertificated securities

54. (1) A person who wishes to withdraw all or part of the uncertificated securities held by that person in an uncertificated securities register, and obtain a certificate in respect of those withdrawn securities, may so notify the relevant participant or central securities depository, as determined in accordance with the rules of the central securities depository, which must within five business days—

(a) notify the relevant company to provide the requested certificate; and

(b) remove the details of the uncertificated securities from the uncertificated securities register.

(2) After receiving a notice in terms of subsection (1)*(a)* from a participant or central securities depository, as the case may be, a company must—

(a) immediately enter the relevant person's name and details of that person's holding of securities in the company's securities register and indicate on the register that the securities so withdrawn are no longer held in uncertificated form; and

(b) within 10 business days, or 20 business days in the case of a holder of securities who is not resident within the Republic—

(i) prepare and deliver to the relevant person a certificate in respect of the securities; and

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

(3) A company may charge a holder of its securities a reasonable fee to cover the actual costs of issuing a certificate, as contemplated in this section.

Liability relating to uncertificated securities

55. (1) A person who takes any unlawful action in consequence of which any of the following events occur in a securities register or uncertificated securities register, namely—

(a) the name of any person remains in, is entered in, or is removed or omitted;

(b) the number of uncertificated securities is increased, reduced, or remains unaltered; or

(c) the description of any uncertificated securities is changed,

is liable to any person who has suffered any direct loss or damage arising out of that action.

(2) A person who gives an instruction to transfer uncertificated securities must—

(a) warrant the legality and correctness of that instruction; and

(b) indemnify the company and the participant or central securities depository required to effect the transfer in accordance with the rules of the central securities depository, against any claim and against any direct loss or damage suffered by them arising out of such a transfer by virtue of an instruction referred to in this subsection.

(3) A participant or central securities depository who may effect the transfer of uncertificated securities in accordance with the rules of a central securities depository must indemnify—

(a) a company against any claim made upon it and against any direct loss or damage suffered by it arising out of a transfer of any uncertificated securities; and

(b) any other person against any direct loss or damage arising out of a transfer of any uncertificated securities,

if that transfer was effected by the participant or central securities depository without instruction, or in accordance with an instruction that was not sent and properly authenticated in terms of the rules of a central securities depository, or in a manner inconsistent with an instruction that was sent and properly authenticated in terms of the rules of a central securities depository.

Beneficial interest in securities

56. (1) Except to the extent that a company's Memorandum of Incorporation provides otherwise, the company's issued securities may be held by, and registered in the name of, one person for the beneficial interest of another person.

(2) A person is regarded to have a beneficial interest in a security of a public company if the security is held *nomine officii* by another person on that first person's behalf, or if that first person—

(a) is married in community of property to a person who has a beneficial interest in that security;

(b) is the parent of a minor child who has a beneficial interest in that security;

(c) acts in terms of an agreement with another person who has a beneficial interest in that security, and the agreement is in respect of the co-operation between them for the acquisition, disposal or any other matter relating to a beneficial interest in that security;

(d) is the holding company of a company that has a beneficial interest in that security;

(e) is entitled to exercise or control the exercise of the majority of the voting rights at general meetings of a juristic person that has a beneficial interest in that security; or

(f) gives directions or instructions to a juristic person that has a beneficial interest in that security, and its directors or the trustees are accustomed to act in accordance with that person's directions or instructions.

(3) If a security of a public company is registered in the name of a person who is not the holder of the beneficial interest in all of the securities in the same company held by that person, that registered holder of security must disclose—

(a) the identity of the person on whose behalf that security is held; and

(b) the number and class of securities held for each such person with a beneficial interest.

(4) The information required in terms of subsection (3) must—

(a) be disclosed in writing to the company within five business days after the end of every month; and

(b) otherwise be provided on payment of a prescribed fee charged by the registered holder of securities.

(5) A company that knows or has reasonable cause to believe that any of its securities are held by one person for the beneficial interest of another, by notice in writing, may require either of those persons to—

(a) confirm or deny that fact;

(b) provide particulars of the extent of the beneficial interest held during the three years preceding the date of the notice; and

(c) disclose the identity of each person with a beneficial interest in the securities held by that person.

(6) The information required in terms of subsection (5) must be provided not later than 10 business days after receipt of the notice.

(7) A company that falls within the meaning of **"regulated company"** as set out in section 117(1)*(i)* must—

(a) establish and maintain a register of the disclosures made in terms of this section; and

(b) publish in its annual financial statements, if it is required to have such statements audited in terms of section 30(2), a list of the persons who hold beneficial interests equal to or in excess of 5% of the total number of securities of that class issued by the company, together with the extent of those beneficial interests.

Part F

Governance of companies

Interpretation and restricted application of Part

57. (1) In this Part, **"shareholder"** means a person who is entitled to exercise any voting rights in relation to a company, irrespective of the form, title or nature of the securities to which those voting rights are attached.

(2) If a profit company, other than a state-owned company, has only one shareholder—

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

(b) sections 59 to 65 do not apply to the governance of that company.

(3) If a profit company, other than a state-owned company, has only one director—

(a) that director may exercise any power or perform any function of the board at any time, without notice or compliance with any other internal formalities, except to the extent that the company's Memorandum of Incorporation provides otherwise; and

(b) sections 71(3) to (7), 73 and 74 do not apply to the governance of that company.

(4) If every shareholder of a particular company, other than a state-owned company, is also a director of that company—

(a) any matter that is required to be referred by the board to the shareholders for decision may be decided by the shareholders at any time after being referred by the board, without notice or compliance with any other internal formalities, except to the extent that the Memorandum of Incorporation provides otherwise, provided that—

(i) every such person was present at the board meeting when the matter was referred to them in their capacity as shareholders;

(ii) sufficient persons are present in their capacity as shareholders to satisfy the quorum requirements set out in section 64; and

(iii) a resolution adopted by those persons in their capacity as shareholders has at least the support that would have been required for it to be adopted as an ordinary or special resolution, as the case may be, at a properly constituted shareholder's meeting; and

(b) when acting in their capacity as shareholders, those persons are not subject to the provisions of section 73 to 78 relating to the duties, obligations, liabilities and indemnification of directors.

(5) The board of a company that holds any securities of a second company may authorise any person to act as its representative at any shareholders meeting of that second company.

(6) A person authorised to act as a company's representative, as contemplated in subsection (5), may exercise the same powers as the authorising company could have exercised if it were an individual holder of securities.

Shareholder right to be represented by proxy

58. (1) At any time, a shareholder of a company may appoint any individual, including an individual who is not a shareholder of that company, as a proxy to—

(a) participate in, and speak and vote at, a shareholders meeting on behalf of the shareholder; or

(b) give or withhold written consent on behalf of the shareholder to a decision contemplated in section 60,

provided that the shareholder may appoint more than one proxy to exercise voting rights attached to different shares held by the shareholder.

(2) A proxy appointment—

(a) must be in writing, dated and signed by the shareholder; and

(b) remains valid for—

(i) one year after the date on which it was signed; or

(ii) any longer or shorter period expressly set out in the appointment,

unless it is revoked in a manner contemplated in subsection (4)*(c)*, or expires earlier as contemplated in subsection (8)*(d)*.

(3) Except to the extent that the Memorandum of Incorporation of a company provides otherwise—

(a) a shareholder of that company may appoint two or more persons concurrently as proxies;

(b) a proxy may delegate the proxy's authority to act on behalf of the shareholder to another person, subject to any restriction set out in the instrument appointing the proxy; and

(c) a copy of the instrument appointing a proxy must be delivered to the company, or to any other person on behalf of the company, before the proxy exercises any rights of the shareholder at a shareholders meeting.

(4) Irrespective of the form of instrument used to appoint a proxy—

(a) the appointment is suspended at any time and to the extent that the shareholder chooses to act directly and in person in the exercise of any rights as a shareholder;

(b) the appointment is revocable unless the proxy appointment expressly states otherwise; and

(c) if the appointment is revocable, a shareholder may revoke the proxy appointment by—

(i) cancelling it in writing, or making a later inconsistent appointment of a proxy; and

(ii) delivering a copy of the revocation instrument to the proxy, and to the company.

(5) The revocation of a proxy appointment constitutes a complete and final cancellation of the proxy's authority to act on behalf of the shareholder as of the later of—

(a) the date stated in the revocation instrument, if any; or

(b) the date on which the revocation instrument was delivered as required in subsection (4)*(c)*(ii).

(6) If the instrument appointing a proxy or proxies has been delivered to a company, as long as that appointment remains in effect, any notice that is required by this Act or the company's Memorandum of Incorporation to be delivered by the company to the shareholder must be delivered by the company to—

(a) the shareholder; or

(b) the proxy or proxies, if the shareholder has—

(i) directed the company to do so, in writing; and

(ii) paid any reasonable fee charged by the company for doing so.

(7) A proxy is entitled to exercise, or abstain from exercising, any voting right of the shareholder without direction, except to the extent that the Memorandum of Incorporation, or the instrument appointing the proxy, provides otherwise.

(8) If a company issues an invitation to shareholders to appoint one or more persons named by the company as a proxy, or supplies a form of instrument for appointing a proxy—

(a) the invitation must be sent to every shareholder who is entitled to notice of the meeting at which the proxy is intended to be exercised;

(b) the invitation, or form of instrument supplied by the company for the purpose of appointing a proxy, must—

(i) bear a reasonably prominent summary of the rights established by this section;

(ii) contain adequate blank space, immediately preceding the name or names of any person or persons named in it, to enable a shareholder to write in the name and, if so desired, an alternative name of a proxy chosen by the shareholder; and

(iii) provide adequate space for the shareholder to indicate whether the appointed proxy is to vote in favour of or against any resolution or resolutions to be put at the meeting, or is to abstain from voting;

(c) the company must not require that the proxy appointment be made irrevocable; and

(d) the proxy appointment remains valid only until the end of the meeting at which it was intended to be used, subject to subsection (5).

(9) Subsection (8)*(b)* and *(d)* do not apply if the company merely supplies a generally available standard form of proxy appointment on request by a shareholder.

Record date for determining shareholder rights

59. (1) The board of a company may set a record date for the purpose of determining which shareholders are entitled to—

(a) receive notice of a shareholders meeting;

(b) participate in and vote at a shareholders meeting;

(c) decide any matter by written consent or electronic communication, as contemplated in section 60;

(d) exercise pre-emptive rights, as contemplated in section 39;

(e) receive a distribution; or

(f) be allotted or exercise other rights.

(2) A record date determined by the board in terms of subsection (1)—

(a) may not be—

(i) earlier than the date on which the record date is determined; or

(ii) more than 10 business days before the date on which the event or action, for which the record date is being set, is scheduled to occur; and

(b) must be published to the shareholders in a manner that satisfies any prescribed requirements.

(3) If the board does not determine a record date for any action or event, the record date is—

(a) in the case of a meeting, the latest date by which the company is required to give shareholders notice of that meeting; or

(b) the date of the action or event, in any other case,

unless the Memorandum of Incorporation or rules of the company provide otherwise.

Shareholders acting other than at meeting

60. (1) A resolution that could be voted on at a shareholders meeting may instead be—

(a) submitted for consideration to the shareholders entitled to exercise voting rights in relation to the resolution; and

(b) voted on in writing by shareholders entitled to exercise voting rights in relation to the resolution within 20 business days after the resolution was submitted to them.

(2) A resolution contemplated in subsection (1)—

(a) will have been adopted if it is supported by persons entitled to exercise sufficient voting rights for it to have been adopted as an ordinary or special resolution, as the case may be, at a properly constituted shareholders meeting; and

(b) if adopted, has the same effect as if it had been approved by voting at a meeting.

(3) An election of a director that could be conducted at a shareholders meeting may instead be conducted by written polling of all of the shareholders entitled to exercise voting rights in relation to the election of that director.

(4) Within 10 business days after adopting a resolution, or conducting an election of directors, in terms of this section, the company must deliver a statement describing the results of the vote, consent process, or election to every shareholder who was entitled to vote on or consent to the resolution, or vote in the election of the director, as the case may be.

(5) For greater certainty, any business of a company that is required by this Act or the company's Memorandum of Incorporation to be conducted at an annual general meeting of the company, may not be conducted in the manner contemplated in this section.

Shareholders meetings

61. (1) The board of a company, or any other person specified in the company's Memorandum of Incorporation or rules, may call a shareholders meeting at any time.

(2) Subject to section 60, a company must hold a shareholders meeting—

(a) at any time that the board is required by this Act or the Memorandum of Incorporation to refer a matter to shareholders for decision;

(b) whenever required in terms of section 70(3) to fill a vacancy on the board; and

(c) when otherwise required—

(i) in terms of subsection (3) or (7); or

(ii) by the company's Memorandum of Incorporation.

(3) Subject to subsection (5) and (6), the board of a company, or any other person specified in the company's Memorandum of Incorporation or rules, must call a shareholders meeting if one or more written and signed demands for such a meeting are delivered to the company, and—

(a) each such demand describes the specific purpose for which the meeting is proposed; and

(b) in aggregate, demands for substantially the same purpose are made and signed by the holders, as the earliest time specified in any of those demands, of at least 10% of the voting rights entitled to be exercised in relation to the matter proposed to be considered at the meeting.

(4) A company's Memorandum of Incorporation may specify a lower percentage in substitution for that set out in subsection (3)*(b)*.

(5) A company, or any shareholder of the company, may apply to a court for an order setting aside a demand made in terms of subsection (3) on the grounds that the demand is frivolous, calls for a meeting for no other purpose than to reconsider a matter that has already been decided by the shareholders, or is otherwise vexatious.

(6) At any time before the start of a shareholders meeting contemplated in subsection (3)—

(a) a shareholder who submitted a demand for that meeting may withdraw that demand; and

(b) the company must cancel the meeting if, as a result of one or more demands being withdrawn, the voting rights of any remaining shareholders continuing to demand the meeting, in aggregate, fall below the minimum percentage of voting rights required to call a meeting.

(7) A public company must convene an annual general meeting of its shareholders—

(a) initially, no more than 18 months after the company's date of incorporation; and

(b) thereafter, once in every calendar year, but no more than 15 months after the date of the previous annual general meeting, or within an extended time allowed by the Companies Tribunal, on good cause shown.

(8) A meeting convened in terms of subsection (7) must, at a minimum, provide for the following business to be transacted:

(a) Presentation of—
  (i) the directors' report;
  (ii) audited financial statements for the immediately preceding financial year; and
  (iii) an audit committee report;
(b) election of directors, to the extent required by this Act or the company's Memorandum of Incorporation;
(c) appointment of—
  (i) an auditor for the ensuing financial year; and
  (ii) an audit committee; and
(d) any matters raised by shareholders, with or without advance notice to the company.

(9) Except to the extent that the Memorandum of Incorporation of a company provides otherwise—

(a) the board of the company may determine the location for any shareholders meeting of the company; and
(b) a shareholders meeting of the company may be held in the Republic or in any foreign country.

(10) Every shareholders meeting of a public company must be reasonably accessible within the Republic for electronic participation by shareholders in the manner contemplated in section 63(2), irrespective of whether the meeting is held in the Republic or elsewhere.

(11) If a company is unable to convene a meeting as required in terms of this section because it has no directors, or because all of its directors are incapacitated—

(a) any other person authorised by the company's Memorandum of Incorporation may convene the meeting; or
(b) if no person has been authorised as contemplated in paragraph *(a)*, the Companies Tribunal, on a request by any shareholder, may issue an administrative order for a shareholders meeting to be convened on a date, and subject to any terms, that the Tribunal considers appropriate in the circumstances.

(12) If a company fails to convene a meeting for any reason other than as contemplated in subsection (11)—

(a) at a time required in accordance with its Memorandum of Incorporation;
(b) when required by shareholders in terms of subsection (3); or
(c) within the time required by subsection (7),

a shareholder may apply to a court for an order requiring the company to convene a meeting on a date, and subject to any terms, that the court considers appropriate in the circumstances.

(13) The company must compensate a shareholder who applies to the Companies Tribunal in terms of subsection (11), or to a court in terms of subsection (12), respectively, for the costs of those proceedings.

(14) Any failure to hold a meeting as required by this section does not affect the existence of a company, or the validity of any action by the company.

Notice of meetings

62. (1) The company must deliver a notice of each shareholders meeting in the prescribed manner and form to all of the shareholders of the company as of the record date for the meeting, at least—

(a) 15 business days before the meeting is to begin, in the case of a public company or a non-profit company that has voting members; or
(b) 10 business days before the meeting is to begin, in any other case.

(2) A company's Memorandum of Incorporation may provide for longer minimum notice periods than required by subsection (1).

(3) A notice of a shareholders meeting must be in writing, and must include—

(a) the date, time and place for the meeting, and the record date for the meeting;

(b) the general purpose of the meeting, and any specific purpose contemplated in section 61(3)*(a)*, if applicable;

(c) a copy of any proposed resolution of which the company has received notice, and which is to be considered at the meeting, and a notice of the percentage of voting rights that will be required for that resolution to be adopted;

(d) in the case of an annual general meeting of a company—

(i) a summarised form of the financial statements to be presented; and

(ii) directions for obtaining a copy of the complete annual financial statements for the preceding financial year; and

(e) a reasonably prominent statement that—

(i) a shareholder entitled to attend and vote at the meeting is entitled to appoint a proxy to attend, participate in and vote at the meeting in the place of the shareholder, or two or more proxies if the Memorandum of Incorporation of the company so permits;

(ii) a proxy need not also be a shareholder of the company; and

(iii) section 63(1) requires that meeting participants provide satisfactory identification.

(4) If a company fails to give the required notice of a shareholders meeting, or if there was a material defect in the giving of the notice, the meeting may proceed, subject to subsection (5), if all of the persons who are entitled to exercise voting rights in respect of each item on the agenda of the meeting—

(a) acknowledge actual receipt of the notice;

(b) are present at the meeting;

(c) waive notice of the meeting; or

(d) in the case of a material defect in the manner and form of giving notice, ratify the defective notice.

(5) If a material defect in the form or manner of giving notice of a meeting relates only to one or more particular matters on the agenda for the meeting—

(a) any such matter may be severed from the agenda, and the notice remains valid with respect to any remaining matters on the agenda; and

(b) the meeting may proceed to consider a severed matter, if the defective notice in respect of that matter has been ratified in terms of subsection (4)*(d)*.

(6) An immaterial defect in the form or manner of giving notice of a shareholders meeting, or an accidental or inadvertent failure in the delivery of the notice to any particular shareholder to whom it was addressed, does not invalidate any action taken at the meeting.

(7) A shareholder who is present at a meeting—

(a) is regarded to have received or waived notice of the meeting;

(b) has a right to—

(i) allege a material defect in the form of notice for a particular item on the agenda for the meeting; and

(ii) participate in the determination whether to waive the requirements for notice, or ratify a defective notice; and

(c) except to the extent set out in paragraph *(b)*,

is regarded to have waived any right based on an actual or alleged material defect in the notice of the meeting.

Conduct of meetings

63. (1) Before any person may attend or participate in a shareholders meeting—

(a) that person must present reasonably satisfactory identification; and

(b) the person presiding at the meeting must be reasonably satisfied that the right of that person to participate and vote, either as a shareholder, or as a proxy for a shareholder, has been reasonably verified.

(2) Unless prohibited by its Memorandum of Incorporation, a company may provide for—

(a) a shareholders meeting to be conducted entirely by electronic communication; or

(b) one or more shareholders, or proxies for shareholders, to participate by electronic communication in all or part of a shareholders meeting that is being held in person, so long as the electronic communication employed ordinarily enables all persons participating in that meeting to communicate concurrently with each other without an intermediary, and to participate reasonably effectively in the meeting.

(3) If a company provides for participation in a meeting by electronic communication, as contemplated in subsection (2)—

(a) the notice of that meeting must inform shareholders of the availability of that form of participation, and provide any necessary information to enable shareholders or their proxies to access the available medium or means of electronic communication; and

(b) 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.

(4) Any person present and entitled to exercise voting rights must on a show of hands have only one vote, irrespective of the number of shares he or she holds or represents.

(5) On a poll at any meeting of a company, any member including his or her proxy, must be entitled to exercise all the voting rights attached to the shares held or represented by that person.

Meeting quorum and adjournment

64. (1) Subject to subsections (2) to (8)—

(a) a shareholders meeting may not begin until 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 in respect of at least one matter to be decided at the meeting; and

(b) a matter to be decided 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 the matter is called on the agenda.

(2) A company's Memorandum of Incorporation may specify a lower or higher percentage in place of the 25% required in either or both of subsection (1)*(a)* or *(b)*.

(3) Despite the percentage figures set out in subsection (1), or in any applicable provisions of a company's Memorandum of Incorporation, if a company has more than two shareholders, a meeting may not begin, or a matter begin to be debated, unless—

(a) at least three shareholders are present at the meeting; and

(b) the requirements of subsection (1) or the Memorandum of Incorporation, if different, are satisfied.

(4) If, within one hour after the appointed time for a meeting to begin, the requirements of subsections (1), or (3) if applicable,

(a) for that meeting to begin have not been satisfied, the meeting is postponed without motion, vote or further notice, for one week;

(b) for consideration of a particular matter to begin have not been satisfied—

(i) if there is other business on the agenda of the meeting, consideration of that matter may be postponed to a later time in the meeting without motion or vote; or

(ii) if there is no other business on the agenda of the meeting, the meeting is adjourned for one week, without motion or vote.

(5) The person intended to preside at a meeting that cannot begin due to the operation of subsection (1)*(a)*, or (3) if applicable, may extend the one-hour limit allowed in subsection (4) for a reasonable period on the grounds that—

(a) exceptional circumstances affecting weather, transportation or electronic communication have generally impeded or are generally impeding the ability of shareholders to be present at the meeting; or

(b) one or more particular shareholders, having been delayed, have communicated an intention to attend the meeting, and those shareholders, together with others in attendance, would satisfy the requirements of subsection (1), or (3) if applicable.

(6) A company's Memorandum of Incorporation or rules may specify a different time in substitution for—

(a) the period of one hour contemplated in subsections (4) and (5), respectively; or

(b) the period of one week contemplated in subsection (4).

(7) A company is not required to give further notice of a meeting that is postponed or adjourned in terms of subsection (4), unless the location for the meeting is different from—

(a) the location of the postponed or adjourned meeting; or

(b) a location announced at the time of adjournment, in the case of an adjourned meeting.

(8) If, at the time appointed in terms of this section for a postponed meeting to begin, or for an adjourned meeting to resume, the requirements of subsection (1), or (3) if applicable, have not been satisfied, the members of the company present in person or by proxy will be deemed to constitute a quorum.

(9) Unless the company's Memorandum of Incorporation or rules provide otherwise, after a quorum has been established for a meeting, or for a matter to be considered at a meeting, the meeting may continue, or the matter may be considered, so long as at least one shareholder with voting rights entitled to be exercised at the meeting, or on that matter, is present at the meeting.

(10) A shareholders meeting, or the consideration of any matter being debated at the meeting, may be adjourned from time to time without further notice, subject to subsection (11), on a motion supported by persons entitled to exercise, in aggregate, a majority of the voting rights—

(a) held by all of the persons who are present at the meeting at the time; and

(b) that are entitled to be exercised on at least one matter remaining on the agenda of the meeting, or on the matter under debate, as the case may be.

(11) An adjournment of a meeting, or of consideration of a matter being debated at the meeting, in terms of subsection (10)—

(a) may be either—

(i) to a fixed time and place; or

(ii) until further notice, as agreed at the meeting; and

(b) requires that a further notice be given to shareholders only if the meeting determined that the adjournment was ''until further notice'', as contemplated in paragraph *(a)*(ii).

(12) Subject to subsection (13), a meeting may not be adjourned beyond the earlier of—

(a) the date that is 120 business days after the record date determined in accordance with section 59; or

(b) the date that is 60 business days after the date on which the adjournment occurred.

(13) A company's Memorandum of Incorporation may provide for different maximum periods of adjournment of meetings than those set out in subsection (12), or for unlimited adjournment of meetings.

Shareholder resolutions

65. (1) Every resolution of shareholders is either an ordinary resolution or a special resolution.

(2) The board may propose any resolution to be considered by shareholders, and may determine whether that resolution will be considered at a meeting, or by vote or written consent in terms of section 60.

(3) Any two shareholders of a company—

(a) may propose a resolution concerning any matter in respect of which they are each entitled to exercise voting rights; and

(b) when proposing a resolution, may require that the resolution be submitted to shareholders for consideration—

(i) at a meeting demanded in terms of section 61(3);

(ii) at the next shareholders meeting; or

(iii) by written vote in terms of section 60.

(4) A proposed resolution is not subject to the requirements of section 6(4), but must be—

(a) expressed with sufficient clarity and specificity; and

(b) accompanied by sufficient information or explanatory material to enable a shareholder who is entitled to vote on the resolution to determine whether to participate in the meeting and to seek to influence the outcome of the vote on the resolution.

(5) At any time before the start of the meeting at which a resolution will be considered, a shareholder or director who believes that the form of the resolution does not satisfy the requirements of subsection (4) may seek leave to apply to a court for an order—

(a) restraining the company from putting the proposed resolution to a vote until the requirements of subsection (4) are satisfied; and

(b) requiring the company, or the shareholders who proposed the resolution, as the case may be, to—

(i) take appropriate steps to alter the resolution so that it satisfies the requirements of subsection (4); and

(ii) compensate the applicant for costs of the proceedings, if successful.

(6) Once a resolution has been approved, it may not be challenged or impugned by any person in any forum on the grounds that it did not satisfy subsection (4).

(7) For an ordinary resolution to be approved by shareholders, it must be supported by more than 50% of the voting rights exercised on the resolution.

(8) Except for an ordinary resolution for the removal of a director under section 71, a company's Memorandum of Incorporation may require—

(a) a higher percentage of voting rights to approve an ordinary resolution; or

(b) one or more higher percentages of voting rights to approve ordinary resolutions concerning one or more particular matters, respectively,

provided that 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.

(9) For a special resolution to be approved by shareholders, it must be supported by at least 75% of the voting rights exercised on the resolution.

(10) A company's Memorandum of Incorporation may permit—

(a) a lower percentage of voting rights to approve any special resolution; or

(b) one or more lower percentages of voting rights to approve special resolutions concerning one or more particular matters, respectively,

provided that 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.

(11) A special resolution is required to—

(a) amend the company's Memorandum of Incorporation to the extent required by section 16(1)*(c)*;

(b) approve the voluntary winding-up of the company, as contemplated in section 80(1); or

(c) approve any proposed fundamental transaction, to the extent required by Part A of Chapter 5.

(12) A company's Memorandum of Incorporation may require a special resolution to approve any other matter not contemplated in subsection (11).

Board, directors and prescribed officers

66. (1) The business and affairs of a company must be managed by or under the direction of its board, which has the authority to exercise all of the powers and perform any of the functions of the company, except to the extent that this Act or the company's Memorandum of Incorporation provides otherwise.

(2) The board of a company must comprise—

(a) in the case of a private company, or a personal liability company, at least one director; or

(b) in the case of a public company, or a non-profit company, at least three directors.

(3) A company's Memorandum of Incorporation may specify a higher number in substitution for the minimum number of directors required by subsection (2).

(4) A company's Memorandum of Incorporation—

(a) may provide for—

(i) the direct appointment and removal of one or more directors by any person who is named in, or determined in terms of, the Memorandum of Incorporation;

(ii) a person to be an *ex officio* director of the company as a consequence of that person holding some other office, title, designation or similar status, subject to subsection (5)*(a)*; or

(iii) the appointment or election of one or more persons as alternate directors of the company; and

(b) in the case of a profit company other than a state-owned company, must provide for the election by shareholders of at least 50% of the directors, and 50% of any alternate directors.

(5) A person contemplated in subsection (4)*(a)*(ii)—

(a) may not serve or continue to serve as an *ex officio* director of a company, despite holding the relevant office, title, designation or similar status, if that person is or becomes ineligible or disqualified in terms of section 69; and

(b) who holds office or acts in the capacity of an *ex officio* director of a company has all the—

(i) powers and functions of any other director of the company, except to the extent that the company's Memorandum of Incorporation restricts the powers, functions or duties of an *ex officio* director; and

(ii) duties, and is subject to all of the liabilities, of any other director of the company.

(6) The election or appointment of a person as a director is a nullity if, at the time of the election or appointment, that person is ineligible or disqualified in terms of section 69.

(7) A person becomes a director of a company when that person—

(a) has been appointed or elected in accordance with this Part, or holds an office, title, designation or similar status entitling that person to be an *ex officio* director of the company, subject to subsection (5)*(a)*; and

(b) has delivered to the company a written consent to serve as its director.

(8) Except to the extent that the Memorandum of Incorporation of a company provides otherwise, the company may pay remuneration to its directors for their service as directors, subject to subsection (9).

(9) Remuneration contemplated in subsection (8) may be paid only in accordance with a special resolution approved by the shareholders within the previous two years.

(10) The Minister may make regulations designating any specific function or functions within a company to constitute a prescribed office for the purposes of this Act.

(11) Any failure by a company at any time to have the minimum number of directors required by this Act or the company's Memorandum of Incorporation, does not limit or

negate the authority of the board, or invalidate anything done by the board or the company.

First director or directors

67. (1) Each incorporator of a company is a first director of the company, and serves until sufficient other directors to satisfy the minimum requirements of this Act, or the company's Memorandum of Incorporation, have been—

(a) first appointed, as contemplated in section 66(4)*(a)*(i); or

(b) first elected in accordance with section 68 or the company's Memorandum of Incorporation.

(2) If the number of incorporators of a company, together with any *ex officio* directors, or directors to be appointed as contemplated in section 66(4)*(a)*(i), is fewer than the minimum number of directors required for that company in terms of this Act or the company's Memorandum of Incorporation, the board must call a shareholders meeting within 40 business days after incorporation of the company for the purpose of electing sufficient directors to fill all vacancies on the board at the time of the election.

Election of directors

68. (1) Subject to subsection (3), each director of a company, other than the first directors or a director contemplated in section 66(4)*(a)*(i) or (ii), must be elected by the persons entitled to exercise voting rights in such an election, to serve for an indefinite term, or for a term as set out in the Memorandum of Incorporation.

(2) Unless the company's Memorandum of Incorporation provides otherwise, in any election of directors—

(a) the election is to be conducted as a series of votes, each of which is on the candidacy of a single individual to fill a single vacancy, with the series of votes continuing until all vacancies on the board at that time have been filled; and

(b) in each vote to fill a vacancy—

(i) each voting right entitled to be exercised may be exercised once; and

(ii) the vacancy is filled only if a majority of the voting rights exercised support the candidate.

(3) Unless the Memorandum of Incorporation of a company provides otherwise, the board may appoint a person who satisfies the requirements for election as a director to fill any vacancy and serve as a director of the company on a temporary basis until the vacancy has been filled by election in terms of subsection (2), and during that period any person so appointed has all of the powers, functions and duties, and is subject to all of the liabilities, of any other director of the company.

Ineligibility and disqualification of persons to be director or prescribed officer

69. (1) In this section, ''director'' includes an alternate director, and—

(a) a prescribed officer; or

(b) a person who is a member of a committee of a board of a company, or of the audit committee of a company,

irrespective of whether or not the person is also a member of the company's board.

(2) A person who is ineligible or disqualified, as set out in this section, must not—

(a) be appointed or elected as a director of a company, or consent to being appointed or elected as a director; or

(b) act as a director of a company.

(3) A company must not knowingly permit an ineligible or disqualified person to serve or act as a director.

(4) A person who becomes ineligible or disqualified while serving as a director of a company ceases to be a director immediately, subject to section 70(2).

(5) A person who has been placed under probation by a court in terms of section 162,

or in terms of section 47 of the Close Corporations Act, 1984 (Act No. 69 of 1984), must not serve as a director except to the extent permitted by the order of probation.

(6) In addition to the provisions of this section, the Memorandum of Incorporation of a company may impose—

(a) additional grounds of ineligibility or disqualification of directors; or

(b) minimum qualifications to be met by directors of that company.

(7) A person is ineligible to be a director of a company if the person—

(a) is a juristic person;

(b) is an unemancipated minor, or is under a similar legal disability; or

(c) does not satisfy any qualification set out in the company's Memorandum of Incorporation.

(8) A person is disqualified to be a director of a company if—

(a) a court has prohibited that person to be a director, or declared the person to be delinquent in terms of section 162, or in terms of section 47 of the Close Corporations Act, 1984 (Act No. 69 of 1984); or

(b) subject to subsections (9) to (12), the person—

(i) is an unrehabilitated insolvent;

(ii) is prohibited in terms of any public regulation to be a director of the company;

(iii) has been removed from an office of trust, on the grounds of misconduct involving dishonesty; or

(iv) has been convicted, in the Republic or elsewhere, and imprisoned without the option of a fine, or fined more than the prescribed amount, for theft, fraud, forgery, perjury or an offence—

(aa) involving fraud, misrepresentation or dishonesty;

(bb) in connection with the promotion, formation or management of a company, or in connection with any act contemplated in subsection (2) or (5); or

(cc) under this Act, the Insolvency Act, 1936 (Act No. 24 of 1936), the Close Corporations Act, 1984, the Competition Act, the Financial Intelligence Centre Act, 2001 (Act No. 38 of 2001), the Securities Services Act, 2004 (Act No. 36 of 2004), or Chapter 2 of the Prevention and Combating of Corruption Activities Act, 2004 (Act No. 12 of 2004).

(9) A disqualification in terms of subsection (8)*(b)*(iii) or (iv) ends at the later of—

(a) five years after the date of removal from office, or the completion of the sentence imposed for the relevant offence, as the case may be; or

(b) at the end of one or more extensions, as determined by a court from time to time, on application by the Commission in terms of subsection (10).

(10) At any time before the expiry of a person's disqualification in terms of subsection (8)*(b)*(iii) or (iv)—

(a) the Commission may apply to a court for an extension contemplated in subsection (9)*(b)*; and

(b) the court may extend the disqualification for no more than five years at a time, if the court is satisfied that an extension is necessary to protect the public, having regard to the conduct of the disqualified person up to the time of the application.

(11) A court may exempt a person from the application of any provision of subsection (8)*(b)*.

(12) Despite being disqualified in terms of subsection (8)*(b)*(iii) or (iv), a person may act as a director of a private company if all of the shares of that company are held by that disqualified person alone, or by—

(a) that disqualified person; and

(b) persons related to that disqualified person, and each such person has consented in writing to that person being a director of the company.

(13) The Commission must establish and maintain in the prescribed manner a public register of persons who are disqualified from serving as a director, or who are subject to an order of probation as a director, in terms of an order of a court pursuant to this Act or any other law.

Vacancies on board

70. (1) Subject to subsection (2), a person ceases to be a director, and a vacancy arises on the board of a company—

(a) when the person's term of office as director expires, in the case of a company whose Memorandum of Incorporation provides for fixed terms, as contemplated in section 68(1); or

(b) in any case, if the person—

(i) resigns or dies;

(ii) in the case of an *ex officio* director, ceases to hold the office, title, designation or similar status that entitled the person to be an *ex officio* director;

(iii) becomes incapacitated to the extent that the person is unable to perform the functions of a director, and is unlikely to regain that capacity within a reasonable time, subject to section 71(3);

(iv) is declared delinquent by a court, or placed on probation under conditions that are inconsistent with continuing to be a director of the company, in terms of section 162;

(v) becomes ineligible or disqualified in terms of section 69, subject to section 71(3); or

(vi) is removed—

(aa) by resolution of the shareholders in terms of section 71(1);

(bb) by resolution of the board in terms of section 71(3); or

(cc) by order of the court in terms of section 71(5) or (6).

(2) If, in terms of section 71(3), the board of a company has removed a director, a vacancy on the board does not arise until the later of—

(a) the expiry of the time for filing an application for review in terms of section 71(5); or

(b) the granting of an order by the court on such an application,

but the director is suspended from office during that time.

(3) If a vacancy arises on the board, other than as a result of an *ex officio* director ceasing to hold that office, it must be filled by—

(a) a new appointment, if the director was appointed as contemplated in section 66(4)*(a)*(i); or

(b) subject to subsection (4), by a new election conducted—

(i) at the next annual general meeting of the company, if the company is required to hold such a meeting; or

(ii) in any other case, within six months after the vacancy arose—

(aa) at a shareholders meeting called for the purpose of electing the director; or

(bb) by a poll of the persons entitled to exercise voting rights in an election of the director, as contemplated in section 60(3).

(4) If, as a result of a vacancy arising on the board of a company there are no remaining directors of a company, any holder of voting rights entitled to be exercised in the election of a director may convene a meeting for the purpose of such an election.

(5) A person contemplated in subsection (4) may apply to a court for relief, and the court may grant a supervisory order relating to a meeting convened in terms of that paragraph if the court is satisfied that such an order is required to prevent the oppression, or preserve the rights, of any shareholder.

(6) Every company must file a notice within 10 business days after a person becomes or ceases to be a director of the company.

Removal of directors

71. (1) Despite anything to the contrary in a company's Memorandum of Incorporation or rules, or any agreement between a company and a 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, subject to subsection (2).

(2) Before the shareholders of a company may consider a resolution contemplated in subsection (1)—

(a) the director concerned must be given notice of the meeting and the resolution, at least equivalent to that which a shareholder is entitled to receive, irrespective of whether or not the director is a shareholder of the company; and

(b) the director must be afforded a reasonable opportunity to make a presentation, in person or through a representative, to the meeting, before the resolution is put to a vote.

(3) If a company has more than two directors, and a shareholder or director has alleged that a director of the company—

(a) has become—

(i) ineligible or disqualified in terms of section 69, other than on the grounds contemplated in section 69(8)*(a)*; or

(ii) incapacitated to the extent that the director is unable to perform the functions of a director, and is unlikely to regain that capacity within a reasonable time; or

(b) has neglected, or been derelict in the performance of, the functions of director,

the board, other than the director concerned, must determine the matter by resolution, and may remove a director whom it has determined to be ineligible or disqualified, incapacitated, or negligent or derelict, as the case may be.

(4) Before the board of a company may consider a resolution contemplated in subsection (3), the director concerned must be given—

(a) notice of the meeting, including a copy of the proposed resolution and a statement setting out reasons for the resolution, with sufficient specificity to reasonably permit the director to prepare and present a response; and

(b) a reasonable opportunity to make a presentation, in person or through a representative, to the meeting before the resolution is put to a vote.

(5) If, in terms of subsection (3), the board of a company has determined that a director is ineligible or disqualified, incapacitated, or has been negligent or derelict, as the case may be, the director concerned, or a person who appointed that director as contemplated in section 66(4)*(a)*(i), if applicable, may apply within 20 business days to a court to review the determination of the board.

(6) If, in terms of subsection (3), the board of a company has determined that a director is not ineligible or disqualified, incapacitated, or has not been negligent or derelict, as the case may be—

(a) any director who voted otherwise on the resolution, or any holder of voting rights entitled to be exercised in the election of that director, may apply to a court to review the determination of the board; and

(b) the court, on application in terms of paragraph *(a)*, may—

(i) confirm the determination of the board; or

(ii) remove the director from office, if the court is satisfied that the director is ineligible or disqualified, incapacitated, or has been negligent or derelict.

(7) An applicant in terms of subsection (6) must compensate the company, and any other party, for costs incurred in relation to the application, unless the court reverses the decision of the board.

(8) If a company has fewer than three directors—

(a) subsection (3) does not apply to the company;

(b) in any circumstances contemplated in subsection (3), any director or shareholder of the company may apply to the Companies Tribunal, to make a determination contemplated in that subsection; and

(c) subsections (4), (5) and (6), each read with the changes required by the context, apply to the determination of the matter by the Companies Tribunal.

(9) Nothing in this section deprives a person removed from office as a director in terms of this section of any right that person may have at common law or otherwise to apply to a court for damages or other compensation for—

(a) loss of office as a director; or

(b) loss of any other office as a consequence of being removed as a director.

(10) This section is in addition to the right of a person, in terms of section 162, to apply to a court for an order declaring a director delinquent, or placing a director on probation.

Board committees

72. (1) Except to the extent that the Memorandum of Incorporation of a company provides otherwise, the board of a company may—

(a) appoint any number of committees of directors; and

(b) delegate to any committee any of the authority of the board.

(2) Except to the extent that the Memorandum of Incorporation of a company, or a resolution establishing a committee, provides otherwise, the committee—

(a) may include persons who are not directors of the company, but—

(i) any such person must not be ineligible or disqualified to be a director in terms of section 69; and

(ii) no such person has a vote on a matter to be decided by the committee;

(b) may consult with or receive advice from any person; and

(c) has the full authority of the board in respect of a matter referred to it.

(3) The creation of a committee, delegation of any power to a committee, or action taken by a committee, does not alone satisfy or constitute compliance by a director with the required duty of a director to the company, as set out in section 76.

(4) The Minister may by regulation prescribe that a company or a category of companies must have a social and ethics committee, if it is desirable in the public interest, having regard to—

(a) its annual turnover;

(b) the size of its workforce; or

(c) the nature and extent of its activities.

Board meetings

73. (1) A director authorised by the board of a company—

(a) may call a meeting of the board at any time; and

(b) must call such a meeting if required to do so by at least—

(i) 25% of the directors, in the case of a board that has at least 12 members; or

(ii) two directors, in any other case.

(2) A company's Memorandum of Incorporation may specify a higher or lower percentage or number in substitution for those set out in subsection (1)*(b)*.

(3) Except to the extent that this Act or a company's Memorandum of Incorporation provides otherwise—

(a) a meeting of the board may be conducted by electronic communication; or

(b) one or more directors may participate in a meeting by electronic communication,

so long as the electronic communication facility employed ordinarily enables all persons participating in that meeting to communicate concurrently with each other without an intermediary, and to participate effectively in the meeting.

(4) The board of a company may determine the form and time for giving notice of its meetings, but—

(a) such a determination must comply with any requirements set out in the Memorandum of Incorporation, or rules, of the company; and

(b) no meeting of a board may be convened without notice to all of the directors, subject to subsection (5).

(5) Except to the extent that the company's Memorandum of Incorporation provides otherwise—

(a) if all of the directors of the company—

(i) acknowledge actual receipt of the notice;

(ii) are present at a meeting; or

(iii) waive notice of the meeting,

the meeting may proceed even if the company failed to give the required notice of that meeting, or there was a defect in the giving of the notice;

(b) a majority of the directors must be present at a meeting before a vote may be called at a meeting of the directors;

(c) each director has one vote on a matter before the board;

(d) a majority of the votes cast on a resolution is sufficient to approve that resolution; and

(e) in the case of a tied vote—

(i) the chair may cast a deciding vote, if the chair did not initially have or cast a vote; or

(ii) the matter being voted on fails, in any other case.

(6) A company must keep minutes of the meetings of the board, and any of its committees, and include in the minutes—

(a) any declaration given by notice or made by a director as required by section 75; and

(b) every resolution adopted by the board.

(7) Resolutions adopted by the board—

(a) must be dated and sequentially numbered; and

(b) are effective as of the date of the resolution, unless the resolution states otherwise.

(8) Any minutes of a meeting, or a resolution, signed by the chair of the meeting, or by the chair of the next meeting of the board, is evidence of the proceedings of that meeting, or adoption of that resolution, as the case may be.

Directors acting other than at meeting

74. (1) Except to the extent that the Memorandum of Incorporation of a company provides otherwise, a decision that could be voted on at a meeting of the board of that company may instead be adopted by written consent of a majority of the directors, given in person, or by electronic communication, provided that each director has received notice of the matter to be decided.

(2) A decision made in the manner contemplated in this section is of the same effect as if it had been approved by voting at a meeting.

Director's personal financial interests

75. (1) In this section, **"director"** includes an alternate director, and—

(a) a prescribed officer; or

(b) a person who is a member of a committee of a board of a company, or of the audit committee of a company,

irrespective of whether or not the person is also a member of the company's board.

(2) This section does not apply—

(a) to a director of a company—

(i) in respect of a decision that may generally affect—

(aa) all of the directors of the company in their capacity as directors; or

(bb) a class of persons, despite the fact that the director is one member of that class of persons, unless the only members of the class are the director or persons related or inter-related to the director; or

(ii) in respect of a proposal to remove that director from office as contemplated in section 71; or

(b) to a company or its director, if one person—

(i) holds all of the beneficial interests of all of the issued securities of the company; and

(ii) is the only director of that company.

(3) If a person is the only director of a company, but does not hold all of the beneficial interests of all of the issued securities of the company, that person may not—

(a) approve or enter into any agreement in which the person or a related person has a personal financial interest; or

(b) as a director, determine any other matter in which the person or a related person has a personal financial interest,

unless the agreement or determination is approved by an ordinary resolution of the shareholders after the director has disclosed the nature and extent of that interest to the shareholders.

(4) At any time, a director may disclose any personal financial interest in advance, by delivering to the board, or shareholders in the case of a company contemplated in subsection (3), a notice in writing setting out the nature and extent of that interest, to be used generally for the purposes of this section until changed or withdrawn by further written notice from that director.

(5) If a director of a company, other than a company contemplated in subsection (2)*(b)* or (3), has a personal financial interest in respect of a matter to be considered at a meeting of the board, or knows that a related person has a personal financial interest in the matter, the director—

(a) must disclose the interest and its general nature before the matter is considered at the meeting;

(b) must disclose to the meeting any material information relating to the matter, and known to the director;

(c) may disclose any observations or pertinent insights relating to the matter if requested to do so by the other directors;

(d) if present at the meeting, must leave the meeting immediately after making any disclosure contemplated in paragraph *(b)* or *(c)*;

(e) must not take part in the consideration of the matter, except to the extent contemplated in paragraphs *(b)* and *(c)*;

(f) while absent from the meeting in terms of this subsection—

(i) is to be regarded as being present at the meeting for the purpose of determining whether sufficient directors are present to constitute the meeting; and

(ii) is not to be regarded as being present at the meeting for the purpose of determining whether a resolution has sufficient support to be adopted; and

(g) must not execute any document on behalf of the company in relation to the matter unless specifically requested or directed to do so by the board.

(6) If a director of a company acquires a personal financial interest in an agreement or other matter in which the company has a material interest, or knows that a related person has acquired a personal financial interest in the matter, after the agreement or other matter has been approved by the company, the director must promptly disclose to the board, or to the shareholders in the case of a company contemplated in subsection (3), the nature and extent of that interest, and the material circumstances relating to the director or related person's acquisition of that interest.

(7) A decision by the board, or a transaction or agreement approved by the board, or by a company as contemplated in subsection (3), is valid despite any personal financial interest of a director or person related to the director, if it—

(a) was approved in the manner contemplated in this section; or

(b) has been ratified by an ordinary resolution of the shareholders.

(8) A court, on application by any interested person, may declare valid a transaction or agreement that had been approved by the board, or shareholders as the case may be, despite the failure of the director to satisfy the requirements of this section.

Standards of directors conduct

76. (1) In this section, **"director"** includes an alternate director, and—

(a) a prescribed officer; or

(b) a person who is a member of a committee of a board of a company, or of the audit committee of a company,

irrespective of whether or not the person is also a member of the company's board.

(2) A director of a company must—

(a) not use the position of director, or any information obtained while acting in the capacity of a director—

(i) to gain an advantage for the director, or for another person other than the company or a wholly-owned subsidiary of the company; or

(ii) to knowingly cause harm to the company or a subsidiary of the company; and

(b) communicate to the board at the earliest practicable opportunity any information that comes to the director's attention, unless the director—

(i) reasonably believes that the information is—

(aa) immaterial to the company; or

(bb) generally available to the public, or known to the other directors; or

(ii) is bound not to disclose that information by a legal or ethical obligation of confidentiality.

(3) Subject to subsections (4) and (5), a director of a company, when acting in that capacity, must exercise the powers and perform the functions of director—

(a) in good faith and for a proper purpose;

(b) in the best interests of the company; and

(c) with the degree of care, skill and diligence that may reasonably be expected of a person—

(i) carrying out the same functions in relation to the company as those carried out by that director; and

(ii) having the general knowledge, skill and experience of that director.

(4) In respect of any particular matter arising in the exercise of the powers or the performance of the functions of director, a particular director of a company—

(a) will have satisfied the obligations of subsection (3)*(b)* and *(c)* if—

(i) the director has taken reasonably diligent steps to become informed about the matter;

(ii) either—

(aa) the director had no material personal financial interest in the subject matter of the decision, and had no reasonable basis to know that any related person had a personal financial interest in the matter; or

(bb) the director complied with the requirements of section 75 with respect to any interest contemplated in subparagraph *(aa)*; and

(iii) the director made a decision, or supported the decision of a committee or the board, with regard to that matter, and the director had a rational basis for believing, and did believe, that the decision was in the best interests of the company; and

(b) is entitled to rely on—

(i) the performance by any of the persons—

(aa) referred to in subsection (5); or

(bb) to whom the board may reasonably have delegated, formally or informally by course of conduct, the authority or duty to perform one or more of the board's functions that are delegable under applicable law; and

(ii) any information, opinions, recommendations, reports or statements, including financial statements and other financial data, prepared or presented by any of the persons specified in subsection (5).

(5) To the extent contemplated in subsection (4)*(b)*, a director is entitled to rely on—

(a) one or more employees of the company whom the director reasonably believes to be reliable and competent in the functions performed or the information, opinions, reports or statements provided;

(b) legal counsel, accountants, or other professional persons retained by the company, the board or a committee as to matters involving skills or expertise that the director reasonably believes are matters—

(i) within the particular person's professional or expert competence; or

(ii) as to which the particular person merits confidence; or

(c) a committee of the board of which the director is not a member, unless the director has reason to believe that the actions of the committee do not merit confidence.

Liability of directors and prescribed officers

77. (1) In this section, ''director'' includes an alternate director, and—

(a) a prescribed officer; or

(b) a person who is a member of a committee of a board of a company, or of the audit committee of a company,

irrespective of whether or not the person is also a member of the company's board.

(2) A director of a company may be held liable—

(a) in accordance with the principles of the common law relating to breach of a fiduciary duty, for any loss, damages or costs sustained by the company as a consequence of any breach by the director of a duty contemplated in section 75, 76(2) or 76(3)*(a)* or *(b)*; or

(b) in accordance with the principles of the common law relating to delict for any loss, damages or costs sustained by the company as a consequence of any breach by the director of—

(i) a duty contemplated in section 76(3)*(c)*;

(ii) any provision of this Act not otherwise mentioned in this section; or

(iii) any provision of the company's Memorandum of Incorporation.

(3) A director of a company is liable for any loss, damages or costs sustained by the company as a direct or indirect consequence of the director having—

(a) acted in the name of the company, signed anything on behalf of the company, or purported to bind the company or authorise the taking of any action by or on behalf of the company, despite knowing that the director lacked the authority to do so;

(b) acquiesced in the carrying on of the company's business despite knowing that it was being conducted in a manner prohibited by section 22(1);

(c) been a party to an act or omission by the company despite knowing that the act or omission was calculated to defraud a creditor, employee or shareholder of the company, or had another fraudulent purpose;

(d) signed, consented to, or authorised, the publication of—

(i) any financial statements that were false or misleading in a material respect; or

(ii) a prospectus, or a written statement contemplated in section 101, that contained—

(aa) an 'untrue statement' as defined and described in section 95; or

(bb) a statement to the effect that a person had consented to be a director of the company, when no such consent had been given,

despite knowing that the statement was false, misleading or untrue, as the case may be, but the provisions of section 104(3), read with the changes required by the context, apply to limit the liability of a director in terms of this paragraph; or

(e) been present at a meeting, or participated in the making of a decision in terms of section 74, and failed to vote against—

(i) the issuing of any unauthorised shares, despite knowing that those shares had not been authorised in accordance with section 36;

(ii) the issuing of any authorised securities, despite knowing that the issue of those securities was inconsistent with section 41;

(iii) the granting of options to any person contemplated in section 42(4), despite knowing that any shares—

(aa) for which the options could be exercised; or

(bb) into which any securities could be converted,

had not been authorised in terms of section 36;

(iv) the provision of financial assistance to any person contemplated in section 44 for the acquisition of securities of the company, despite knowing that the provision of financial assistance was inconsistent with section 44 or the company's Memorandum of Incorporation, to the extent that the resolution or agreement has been declared void in terms of section 44(5), read with section 218(1);

(v) the provision of financial assistance to a director for a purpose contemplated in section 45, despite knowing that the provision of financial assistance was inconsistent with that section or the company's Memorandum of Incorporation, to the extent that the resolution or agreement has been declared void in terms of section 45(6), read with section 218(1);

(vi) a resolution approving a distribution, despite knowing that the distribution was contrary to section 46, subject to subsection (4);

(vii) the acquisition by the company of any of its shares, or the shares of its holding company, despite knowing that the acquisition was contrary to section 46 or 48; or

(viii) an allotment by the company, despite knowing that the allotment was contrary to any provision of Chapter 4, to the extent that the allotment or an acceptance is declared void under section 109(1) read with section 218(1).

(4) The liability of a director in terms of subsection (3)*(e)*(vi) as a consequence of the director having failed to vote against a distribution in contravention of section 46—

(a) arises only if—

(i) immediately after making all of the distribution contemplated in a resolution in terms of section 46, the company does not satisfy the solvency and liquidity test; and

(ii) it was unreasonable at the time of the decision to conclude that the company would satisfy the solvency and liquidity test after making the relevant distribution; and

(b) does not exceed, in aggregate, the difference between—

(i) the amount by which the value of the distribution exceeded the amount that could have been distributed without causing the company to fail to satisfy the solvency and liquidity test; and

(ii) the amount, if any, recovered by the company from persons to whom the distribution was made.

(5) If the board of a company has made a decision in a manner that contravened this Act, as contemplated in subsection (3)*(e)*—

(a) the company, or any director who has been or may be held liable in terms of subsection (3)*(e)*, may apply to a court for an order setting aside the decision of the board; and

(b) the court may make—

(i) an order setting aside the decision in whole or in part, absolutely or conditionally; and

(ii) any further order that is just and equitable in the circumstances, including an order—

(aa) to rectify the decision, reverse any transaction, or restore any consideration paid or benefit received by any person in terms of the decision of the board; and

(bb) requiring the company to indemnify any director who has been or may be held liable in terms of this section, including indemnification for the costs of the proceedings under this subsection.

(6) The liability of a person in terms of this section is joint and several with any other person who is or may be held liable for the same act.

(7) Proceedings to recover any loss, damages or costs for which a person is or may be held liable in terms of this section may not be commenced more than three years after the act or omission that gave rise to that liability.

(8) In addition to the liability set out elsewhere in this section, any person who would be so liable is jointly and severally liable with all other such persons—

(a) to pay the costs of all parties in the court in a proceeding contemplated in this section unless the proceedings are abandoned, or exculpate that person; and

(b) to restore to the company any amount improperly paid by the company as a consequence of the impugned act, and not recoverable in terms of this Act.

(9) In any proceedings against a director, other than for wilful misconduct or wilful breach of trust, the court may relieve the director, either wholly or partly, from any liability set out in this section, on any terms the court considers just if it appears to the court that—

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

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

(10) A director who has reason to apprehend that a claim may be made alleging that the director is liable, other than for wilful misconduct or wilful breach of trust, may apply to a court for relief, and the court may grant relief to the director on the same grounds as if the matter had come before the court in terms of subsection (9).

Indemnification and directors' insurance

78. (1) In this section, ''director'' includes a former director and an alternate director, and—

(a) a prescribed officer; or

(b) a person who is a member of a committee of a board of a company, or of the audit committee of a company,

irrespective of whether or not the person is also a member of the company's board.

(2) Subject to subsections (4) to (6), any provision of an agreement, the Memorandum of Incorporation or rules of a company, or a resolution adopted by a company, whether express or implied, is void to the extent that it directly or indirectly purports to—

(a) relieve a director of—

(i) a duty contemplated in section 75 or 76; or

(ii) liability contemplated in section 77; or

(b) negate, limit or restrict any legal consequences arising from an act or omission that constitutes wilful misconduct or wilful breach of trust on the part of the director.

(3) A company may not directly or indirectly pay any fine that may be imposed on the director of the company, or of a related company, who has been convicted of an offence in terms of any national legislation.

(4) Except to the extent that a company's Memorandum of Incorporation provides otherwise, the company—

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

(b) may directly or indirectly indemnify a director for expenses contemplated in paragraph *(a)*, irrespective of whether it has advanced those expenses, if the proceedings—

(i) are abandoned or exculpate the director; or

(ii) arise in respect of any liability for which the company may indemnify the director, in terms of subsections (5) and (6).

(5) Except to the extent that the Memorandum of Incorporation of a company provides otherwise, a company may indemnify a director in respect of any liability arising other than as contemplated in subsection (6).

(6) A company may not indemnify a director in respect of—

(a) any liability arising—

(i) in terms of section 77(3)*(a)*, *(b)* or *(c)*; or
(ii) from willful misconduct or willful breach of trust on the part of the director; or

(b) any fine contemplated in subsection (3).

(7) Except to the extent that the Memorandum of Incorporation of a company provides otherwise, a company may purchase insurance to protect—

(a) a director against any liability or expenses for which the company is permitted to indemnify a director in accordance with subsection (5); or

(b) the company against—

(i) any expenses—

(aa) that the company is permitted to advance in accordance with subsection (4)*(a)*; or

(bb) for which the company is permitted to indemnify a director in accordance with subsection (4)*(b)*; or

(ii) any liability for which the company is permitted to indemnify a director in accordance with subsection (5).

(8) A company is entitled to claim restitution from a director of the company or of a related company for any money paid directly or indirectly by the company to or on behalf of that director in any manner inconsistent with this section.

Part G

Winding-up of solvent companies and deregistering companies

Winding-up of solvent companies

79. (1) A solvent company may be dissolved by—

(a) voluntary winding-up initiated by the company as contemplated in section 80, and conducted either—

(i) by the company; or
(ii) by the company's creditors,

as determined by the resolution of the company; or

(b) winding-up and liquidation by court order, as contemplated in section 81.

(2) The procedures for winding-up and liquidation of a solvent company, whether voluntary or by court order, are governed by this Part and, to the extent applicable, by the laws referred to or contemplated in item 9 of Schedule 5.

(3) If, at any time after a company has adopted a resolution contemplated in section 80, or after an application has been made to a court as contemplated in section 81, it is determined that the company to be wound up is or may be insolvent, a court, on application by any interested person, may order that the company be wound up as an insolvent company in terms of the laws referred to or contemplated in item 9 of Schedule 5.

Voluntary winding-up of solvent company

80. (1) A solvent company may be wound up voluntarily if the company has adopted a special resolution to do so, which may provide for the winding-up to be by the company, or by its creditors.

(2) A resolution providing for the voluntary winding-up of a company must be filed, together with the prescribed notice and filing fee.

(3) If a resolution contemplated in this section provides for winding-up by the company, before the resolution and notice are filed the company must—

(a) arrange for security, satisfactory to the Master, for the payment of the company's debts within no more than 12 months after the start of the winding-up of the company; or

(b) obtain the consent of the Master to dispense with security, which the Master may do only if the company has submitted to the Master—

(i) a sworn statement by a director authorised by the board of the company, stating that the company has no debts; and

(ii) a certificate by the company's auditor, or if it does not have an auditor, a person who meets the requirements for appointment as an auditor, and appointed for the purpose, stating that to the best of the auditor's knowledge and belief and according to the financial records of the company, the company appears to have no debts.

(4) Any costs incurred in furnishing the security referred to in subsection (3) may be paid by the company.

(5) A liquidator appointed in a voluntary winding-up may exercise all powers given by this Act, or a law contemplated in item 9 of Schedule 5, to a liquidator in a winding-up by the court—

(a) without requiring specific order or sanction of the court; and

(b) subject to any directions given by—

(i) the shareholders of the company in a general meeting, in the case of a winding-up by the company; or

(ii) the creditors, in the case of a winding-up by creditors.

(6) A voluntary winding-up of a company begins when the resolution of the company has been filed in terms of subsection (2).

(7) When a resolution has been filed in terms of subsection (2), the Commission must promptly deliver a copy of it to the Master.

(8) Despite any provision to the contrary in a company's Memorandum of Incorporation—

(a) the company remains a juristic person and retains all of its powers as such while it is being wound up voluntarily; but

(b) from the beginning of the company's winding-up—

(i) it must stop carrying on its business except to the extent required for the beneficial winding-up of the company; and

(ii) all of the powers of the company's directors cease, except to the extent specifically authorised—

(aa) in the case of a winding-up by the company, by the liquidator or the shareholders in a general meeting; or

(bb) in the case of a winding-up by creditors, the liquidator or the creditors.

Winding-up of solvent companies by court order

81. (1) A court may order a solvent company to be wound up if—

(a) the company has—

(i) resolved, by special resolution, that it be wound up by the court; or

(ii) applied to the court to have its voluntary winding-up continued by the court;

(b) the practitioner of a company appointed during business rescue proceedings has applied for liquidation in terms of section 141(2)*(a)*, on the grounds that there is no reasonable prospect of the company being rescued; or

(c) one or more of the company's creditors have applied to the court for an order to wind up the company on the grounds that—

(i) the company's business rescue proceedings have ended in the manner contemplated in section 132(2)*(b)* or *(c)*(i) and it appears to the court that it is just and equitable in the circumstances for the company to be wound up; or

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

(d) the company, one or more directors or one or more shareholders have applied to the court for an order to wind up the company on the grounds that—

(i) the directors are deadlocked in the management of the company, and the shareholders are unable to break the deadlock, and—

(aa) irreparable injury to the company is resulting, or may result, from the deadlock; or

(bb) the company's business cannot be conducted to the advantage of shareholders generally, as a result of the deadlock;

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

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

(e) a shareholder has applied, with leave of the court, for an order to wind up the company on the grounds that—

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

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

(f) the Commission or Panel has applied to the court for an order to wind up the company on the grounds that—

(i) the company, its directors or prescribed officers or other persons in control of the company are acting or have acted in a manner that is fraudulent or otherwise illegal, the Commission or Panel, as the case may be, has issued a compliance notice in respect of that conduct, and the company has failed to comply with that compliance notice; and

(ii) within the previous five years, enforcement procedures in terms of this Act or the Close Corporations Act, 1984 (Act No. 69 or 1984), were taken against the company, its directors or 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.

(2) A shareholder may not apply to a court as contemplated in subsection (1)*(d)* or *(e)* unless the shareholder—

(a) has been a shareholder continuously for at least six months immediately before the date of the application; or

(b) became a shareholder as a result of—

(i) acquiring another shareholder; or

(ii) the distribution of the estate of a former shareholder,

and the present shareholder, and other or former shareholder, in aggregate, satisfied the requirements of paragraph *(a)*.

(3) A court may not make an order applied for in terms of subsection (1)*(e)* or *(f)* if, before the conclusion of the court proceedings—

(a) any of the directors have resigned, or have been removed in terms of section 71, and the court concludes that the remaining directors were not materially implicated in the conduct on which the application was based; or

(b) one or more shareholders have applied to the court for a declaration in terms of section 162 to declare delinquent the directors, if any, responsible for the alleged misconduct, and the court is satisfied that the removal of those directors would bring the misconduct to an end.

(4) A winding-up of a company by a court begins when—

(a) an application has been made to the court in terms of subsection (1)*(a)* or *(b)*; or

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

Dissolution of companies and removal from register

82. (1) When the affairs of a company have been completely wound up, and a court order of final liquidation has been made, the Master must promptly file a certificate to that effect, together with a copy of the court order.

(2) Upon receiving a certificate in terms of subsection (1), the Commission must—

(a) record the dissolution of the company in the prescribed manner; and

(b) remove the company's name from the companies register.

(3) In addition to the duty to deregister a company contemplated in subsection (2)*(b)*, the Commission may otherwise remove a company from the companies register only if—

(a) the company—
(i) has failed to file an annual return in terms of section 33 for two or more years in succession; and
(ii) on demand by the Commission, has failed to—
(aa) give satisfactory reasons for the failure to file the required annual returns; or
(bb) show satisfactory cause for the company to remain registered; or
(b) the Commission—
(i) has 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, it's continued existence; or
(ii) has received a request in the prescribed manner and form and has determined that the company—
(aa) has ceased to carry on business; and
(bb) has no assets or, because of the inadequacy of its assets, there is no reasonable probability of the company being liquidated.

(4) If the Commission deregisters a company as contemplated in subsection (3), any interested person may apply in the prescribed manner and form to the Commission, to reinstate the registration of the company.

Effect of removal of company from register

83. (1) A company is dissolved as of the date its name is removed from the companies register.

(2) The removal of a company's name from the companies register does not affect the liability of any former director or shareholder of the company or any other person in respect of any act or omission that took place before the company was removed from the register.

(3) Any liability contemplated in subsection (2) continues and may be enforced as if the company had not been removed from the register.

(4) At any time after a company has been dissolved—
(a) the liquidator of the company, or other person with an interest in the company, may apply to a court for an order declaring the dissolution to have been void, or any other order that is just and equitable in the circumstances; and
(b) if the court declares the dissolution to have been void, any proceedings may be taken against the company as might have been taken if the company had not been dissolved.

CHAPTER 3

ENHANCED ACCOUNTABILITY AND TRANSPARENCY

Part A

Application and general requirements of Chapter

Application of Chapter

84. (1) This Chapter applies to—
(a) every public company, subject to subsection (2) and section 94(1);
(b) every company that is a state-owned company—
(i) except to the extent that the company has been exempted from the application of this Chapter, in terms of section 9; and
(ii) subject to subsection (3); and
(c) a private company, a personal liability company or a non-profit company, only to the extent contemplated in section 34(2) or as otherwise required by this Act to have its financial statements audited.

(2) In the case of a public company whose securities are listed on an exchange, if there is a conflict between any provision of Part B, C or D of this Chapter, and any provision of the listing requirements of an exchange—

(a) the provisions of this Chapter and of the listing requirements apply concurrently, to the extent that it is possible to apply and comply with one of the inconsistent provisions without contravening the second; and

(b) to the extent that it is impossible to apply or comply with one of the inconsistent provisions without contravening the second, the provisions of this Act prevail.

(3) In the case of a state-owned company—

(a) if there is a conflict between a provision of this Chapter and a provision of the Public Audit Act, 2004 (Act No. 25 of 2004), the provisions of that Act prevail;

(b) despite the provisions of this Chapter to the contrary, the state-owned company is not required to appoint an auditor for any financial year in respect of which the Auditor-General has elected, in terms of the Public Audit Act, 2004 (Act No. 25 of 2004), to conduct an audit of that enterprise; and

(c) in any year in which the state-owned company is required by this Chapter to appoint an auditor, any requirement in terms of the Public Audit Act, 2004 (Act No. 25 of 2004), to have the appointment of the company's auditor approved by the Auditor-General applies to that company, in addition to the relevant provisions of this Chapter.

(4) Every company contemplated in subsection (1)*(a)* or *(b)* must appoint—

(a) a person to serve as company secretary, in the manner and for the purposes set out in Part B;

(b) a person to serve as auditor, in the manner and for the purposes set out in Part C; and

(c) an audit committee, in the manner and for the purposes set out in Part D.

(5) A person who is disqualified in terms of section 69(8) to serve as a director of any particular company may not be appointed or continue to serve that company in any capacity mentioned in subsection (4), irrespective of whether that appointment is made—

(a) as required by this Chapter; or

(b) voluntarily, as contemplated in section 34(2).

(6) If the board of a public company or state-owned company fails to make an appointment contemplated in subsection (4) in accordance with this Part—

(a) the Commission may issue a notice to that company to show cause why the Commission should not proceed to convene a shareholders meeting for the purpose of making that appointment; and

(b) if the company fails to respond to a notice contemplated in paragraph *(a)* or, in responding, fails to satisfy the Commission that the board will make the appointment, or convene a shareholders meeting to make the appointment, within an acceptable period, the Commission may—

(i) give notice to the holders of the company's securities of a general meeting, and convene such a meeting, to make that appointment; and

(ii) assess a pro-rata share of the cost of convening the general meeting to each director of the company who knowingly permitted the company to fail to make the appointment in accordance with this Part.

(7) A company that has been given notice contemplated in subsection (6)*(a)*, or a director who has been assessed any portion of the costs of a meeting, as contemplated in subsection (6)*(b)*, may apply to the Companies Tribunal to set aside the notice, or the assessment, in whole or in part.

Registration of company secretary and auditor

85. (1) Every company that makes an appointment contemplated in section 84(4), irrespective of whether the company does so as required by that section or voluntarily as contemplated in section 34(2), must—

(a) maintain a record of its company secretaries and auditors, including, in respect of each person appointed as company secretary or auditor of the company—
  (i) the name, including any former name, of each such person; and
  (ii) the date of every such appointment; and

(b) if a firm or juristic person is appointed—
  (i) the name, registration number and registered office address of that firm or juristic person; and
  (ii) the name of any individual contemplated in section 90(3), if that section is applicable; and

(c) any changes in the particulars referred to in paragraphs *(a)* and *(b)*, as they occur, with the date and nature of each such change.

(2) To protect personal privacy, the Minister, by notice in the *Gazette*, may exempt from the application of subsection (1)*(a)* categories of names as formerly used by any person—

(a) before attaining majority, or by persons who have been adopted, married, divorced or widowed; or

(b) in other circumstances prescribed by the Minister.

(3) Within 10 business days after making an appointment contemplated in subsection (1), or after the termination of service of such an appointment, a company must file a notice of the appointment or termination, as the case may be, subject to subsection (4).

(4) The incorporators of a company may file a notice of the appointment of the company's first company secretary, auditor or audit committee as part of the company's Notice of Incorporation.

Part B

Company secretary

Mandatory appointment of company secretary

86. (1) A public company or state-owned company must appoint a person knowledgeable or experienced in relevant laws as a company secretary.

(2) Every company secretary must be a permanent resident of the Republic, and must remain so while serving in that capacity, irrespective of whether the appointment is made as required by subsection (1), or voluntarily as contemplated in section 34(2).

(3) The first company secretary of a public company or state-owned company may be appointed by—

(a) the incorporators of the company; or

(b) within 40 business days after the incorporation of the company, by either—
  (i) the directors of the company; or
  (ii) an ordinary resolution of the holders of the company's securities.

(4) Within 60 business days after a vacancy arises in the office of company secretary, the board must fill the vacancy by appointing a person whom the directors consider to have the requisite knowledge and experience.

Juristic person or partnership may be appointed company secretary

87. (1) A juristic person or partnership may be appointed to hold the office of company secretary, provided that—

(a) every employee of that juristic person who provides company secretary services, or partner and employee of that partnership, as the case may be, satisfies the requirements contemplated in section 84(5); and

(b) at least one employee of that juristic person, or one partner or employee of that partnership, as the case may be, satisfies the requirements contemplated in section 86.

(2) A change in the membership of a juristic person or partnership that holds office as company secretary does not constitute a casual vacancy in the office of company secretary, if the juristic person or partnership continues to satisfy the requirements of subsection (1).

(3) If at any time a juristic person or partnership holds office as company secretary of a particular company—

(a) the juristic person or partnership must immediately notify the directors of the company if the juristic person or partnership no longer satisfies the requirements of subsection (1), and is regarded to have resigned as company secretary upon giving that notice to the company;

(b) the company is entitled to assume that the juristic person or partnership satisfies the requirements of subsection (1), until the company has received a notice contemplated in paragraph *(a)*; and

(c) any action taken by the juristic person or partnership in performance of its functions as company secretary is not invalidated merely because the juristic person or partnership had ceased to satisfy the requirements of subsection (1) at the time of that action.

Duties of company secretary

88. (1) A company's secretary is accountable to the company's board.

(2) A company secretary's duties include, but are not restricted to—

(a) providing the directors of the company collectively and individually with guidance as to their duties, responsibilities and powers;

(b) making the directors aware of any law relevant to or affecting the company;

(c) reporting to the company's board any failure on the part of the company or a director to comply with the Memorandum of Incorporation or rules of the company or this Act;

(d) ensuring that minutes of all shareholders meetings, board meetings and the meetings of any committees of the directors, or of the company's audit committee, are properly recorded in accordance with this Act;

(e) certifying in the company's annual financial statements whether the company has filed required returns and notices in terms of this Act, and whether all such returns and notices appear to be true, correct and up to date;

(f) ensuring that a copy of the company's annual financial statements is sent, in accordance with this Act, to every person who is entitled to it; and

(g) carrying out the functions of a person designated in terms of section 33(3).

Resignation or removal of company secretary

89. (1) A company secretary may resign from office by giving the company—

(a) one month written notice; or

(b) less than one month written notice, with the approval of the board.

(2) If the company secretary is removed from office by the board, the company secretary may require the company to include a statement in its annual financial statements relating to that financial year, not exceeding a reasonable length, setting out the company secretary's contention as to the circumstances that resulted in the removal.

(3) If the company secretary wishes to exercise the power referred to in subsection (2), the company secretary must give written notice to that effect to the company by not later than the end of the financial year in which the removal took place and that notice must include the statement referred to in subsection (2).

(4) The statement of the company secretary referred to in subsection (2) must be included in the directors' report in the company's annual financial statements.

Part C

Auditors

Appointment of auditor

90. (1) Upon its incorporation, and each year at its annual general meeting, a public company or state-owned company must appoint an auditor.

(2) To be appointed as an auditor of a company, whether as required by subsection (1) or as contemplated in section 34(2), a person or firm—

(a) must be a registered auditor;

(b) in addition to the prohibition contemplated in section 84(5), must not be—

(i) a director or prescribed officer of the company;

(ii) an 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;

(iii) a director, officer or employee of a person appointed as company secretary in terms of Part B of this Chapter;

(iv) a person who, alone or with a partner or employees, habitually or regularly performs the duties of accountant or bookkeeper, or performs related secretarial work, for the company;

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

(vi) a person related to a person contemplated in subparagraphs (i) to (v); and

(c) must be acceptable to the company's audit committee as being independent of the company, having regard to the matters enumerated in section 94(8), in the case of a company that has appointed an audit committee, whether as required by section 94, or voluntarily as contemplated in section 34(2).

(3) If a company appoints a firm as an auditor, the individual determined by that firm, in terms of section 44(1) of the Auditing Profession Act, to be responsible for performing the functions of auditor must satisfy the requirements of subsection (2).

(4) If a company that is required to appoint an auditor does not do so when it registers the incorporation of the company, the directors of the company must appoint the first auditor of the company within 40 business days after the date of incorporation of the company.

(5) The first auditor of a company holds office until the conclusion of the first annual general meeting of the company.

(6) A retiring auditor may be automatically reappointed at an annual general meeting without any resolution being passed, unless—

(a) the retiring auditor is—

(i) no longer qualified for appointment;

(ii) no longer willing to accept the appointment, and has so notified the company; or

(iii) required to cease serving as auditor, in terms of section 92;

(b) an audit committee appointed by the company in terms of this Act objects to the reappointment; or

(c) the company has notice of an intended resolution to appoint some other person or persons in place of the retiring auditor.

(7) If an annual general meeting of a company does not appoint or reappoint an auditor the directors must fill the vacancy in the office in terms of the procedure contemplated in section 91within 40 business days after the date of the meeting.

Resignation of auditors and vacancies

91. (1) The resignation of an auditor is effective when the notice is filed.

(2) Subject to subsection (3), if a vacancy arises in the office of auditor of a company, the board of that company—

(a) must appoint a new auditor within 40 business days, if there was only one incumbent auditor of the company; and

(b) may appoint a new auditor at any time, if there was more than one incumbent, but while any such vacancy continues, the surviving or continuing auditor may act as auditor of the company.

(3) Before making an appointment in terms of subsection (2)—

(a) the board must propose to the company's audit committee, within 15 business days after the vacancy occurs, the name of at least one registered auditor to be considered for appointment as the new auditor; and

(b) may proceed to make an appointment of a person proposed in terms of paragraph *(a)* if, within five business days after delivering the proposal, the audit committee does not give notice in writing to the board rejecting the proposed auditor.

(4) If a company appoints a firm as its auditor, any change in the composition of the members of that firm does not by itself create a vacancy in the office of auditor for that year, subject to subsection (5).

(5) If, by comparison with the membership of a firm at the time of its latest appointment, less than one half of the members remain after a change contemplated in subsection (4), that change constitutes the resignation of the firm as auditor of the company, giving rise to a vacancy.

Rotation of auditors

92. (1) The same individual may not serve as the auditor or designated auditor of a company for more than five consecutive financial years.

(2) If an individual has served as the auditor or designated auditor of a company for two or more consecutive financial years and then ceases to be the auditor or designated auditor, the individual may not be appointed again as the auditor or designated auditor of that company until after the expiry of at least two further financial years.

(3) If a company has appointed two or more persons as joint auditors, the company must manage the rotation required by this section in such a manner that all of the joint auditors do not relinquish office in the same year.

Rights and restricted functions of auditors

93. (1) The auditor of a company—

(a) has the right of access at all times to the accounting records and all books and documents of the company, and is entitled to require from the directors or prescribed officers of the company any information and explanations necessary for the performance of the auditor's duties;

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

(c) is entitled to—

(i) attend any general shareholders meeting;

(ii) receive all notices of and other communications relating to any general shareholders meeting; and

(iii) be heard at any general shareholders meeting contemplated in this paragraph on any part of the business of the meeting that concerns the auditor's duties or functions.

(2) An auditor may apply to a court for an appropriate order to enforce the rights set out in subsection (1)*(a)* or *(b)*, and a court may—

(a) make any order that is just and reasonable to prevent frustration of the auditor's duties by the company or any of its directors, prescribed officers or employees; and

(b) make an order of costs personally against any director or prescribed officer whom the court has found to have wilfully and knowingly frustrated, or attempted to frustrate, the performance of the auditor's functions.

(3) An auditor appointed by a company may not perform any services for that company—

(a) that would place the auditor in a conflict of interest as prescribed or determined by the Independent Regulatory Board for Auditors in terms of section 44(6) of the Auditing Profession Act; or

(b) as may be determined by the company's audit committee in terms of section 94(7)*(d)*.

Part D

Audit committees

Audit committees

94. (1) This section—

(a) applies concurrently with section 64 of the Banks Act, to any company that is subject to that section of that Act, but subsections (2), (3) and (4) of this section do not apply to the appointment of an audit committee by any such company; and

(b) does not apply to a company that has been granted an exemption in terms of section 64(4) of the Banks Act.

(2) At each annual general meeting, a public company or state-owned company, or other company that has voluntarily determined to have an audit committee as contemplated in section 34(2), must elect an audit committee comprising at least three members, unless—

(a) the company is a subsidiary of another company that has an audit committee; and

(b) the audit committee of that other company will perform the functions required under this section on behalf of that subsidiary company.

(3) The first members of the audit committee may be appointed by—

(a) the incorporators of a company; or

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

(4) Each member of an audit committee of a company must—

(a) be a director of the company, who satisfies any applicable requirements prescribed in terms of subsection (5);

(b) not be—

(i) involved in the day-to-day management of the company's business or have been so involved at any time during the previous financial year;

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

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

(c) not be related to any person who falls within any of the criteria set out in paragraph *(b)*.

(5) The Minister may prescribe minimum qualification requirements for members of an audit committee as necessary to ensure that any such committee, taken as a whole, comprises persons with adequate relevant knowledge and experience to equip the committee to perform its functions.

(6) The board of a company contemplated in section 84(1) must appoint a person to fill any vacancy on the audit committee within 40 business days after the vacancy arises.

(7) An audit committee of a company has the following duties:

(a) To nominate, for appointment as auditor of the company under section 90, a registered auditor who, in the opinion of the audit committee, is independent of the company;

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

(c) to ensure that the appointment of the auditor complies with the provisions of this Act and any other legislation relating to the appointment of auditors;

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

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

(f) to prepare a report, to be included in the annual financial statements for that financial year—

(i) describing how the audit committee carried out its functions;

(ii) stating whether the audit committee is satisfied that the auditor was independent of the company; and

(iii) commenting in any way the committee considers appropriate on the financial statements, the accounting practices and the internal financial control of the company;

(g) to receive and deal appropriately with any concerns or complaints, whether from within or outside the company, or on its own initiative, relating to—

(i) the accounting practices and internal audit of the company;

(ii) the content or auditing of the company's financial statements;

(iii) the internal financial controls of the company; or

(iv) any related matter;

(h) to 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, including the development and implementation of a policy and plan for a systematic, disciplined approach to evaluate and improve the effectiveness of risk management, control, and governance processes within the company.

(8) In considering whether, for the purposes of this Part, a registered auditor is independent of a company, the audit committee of that company must—

(a) ascertain that the auditor does not receive any direct or indirect remuneration or other benefit from the company, except—

(i) as auditor; or

(ii) for rendering other services to the company, to the extent permitted in terms of subsection (6)*(d)*;

(b) consider whether the auditor's independence may have been prejudiced—

(i) as a result of any previous appointment as auditor; or

(ii) having regard to the extent of any consultancy, advisory or other work undertaken by the auditor for the company; and

(c) consider compliance with other criteria relating to independence or conflict of interest as prescribed by the Independent Regulatory Board for Auditors established by the Auditing Profession Act,

in relation to the company, and if the company is a member of a group of companies, any other company within that group.

(9) Nothing in this section precludes the appointment by a public company at its annual general meeting of an auditor other than one nominated by the audit committee, but if such an auditor is appointed, the appointment is valid only if the audit committee is satisfied that the proposed auditor is independent of the company.

(10) Neither the appointment nor the duties of an audit committee reduce the functions and duties of the board or the directors of the company, except with respect to the appointment, fees and terms of engagement of the auditor.

(11) A company must pay all expenses reasonably incurred by its audit committee, including, if the audit committee considers it appropriate, the fees of any consultant or specialist engaged by the audit committee to assist it in the performance of its functions.

CHAPTER 4

PUBLIC OFFERINGS OF COMPANY SECURITIES

Application and interpretation of Chapter

95. (1) In this Chapter, unless the context indicates otherwise —

(a) **"company"**, in addition to the meaning set out in section 1, also includes a foreign company;

(b) **"compliance officer"** means a compliance officer appointed by a company in respect of its employee share scheme;

(c) **"employee share scheme"** means a scheme established by a company, whether by means of a trust or otherwise, for the purpose of offering participation therein solely to employees and officers of the company or a subsidiary of the company, either—

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

(ii) by the grant of options for shares in the company;

(d) **"expert"** means—

(i) a geologist, engineer, architect, quantity surveyor, valuer, accountant or auditor; or

(ii) any person who professes—

(aa) to be a person referred to in subparagraph (i); or

(bb) to have extensive knowledge or experience, or to exercise special skill which gives or implies authority to a statement made by that person;

(e) **"initial public offering"** means an offer to the public of any securities of a company, if—

(i) no securities of that company have previously been the subject of an offer to the public; or

(ii) all of the securities of that company that had previously been the subject of an offer to the public have subsequently been re-acquired by the company;

(f) **"letter of allocation"** means any document conferring a right to subscribe for shares in terms of a rights offer;

(g) **"offer"**, in relation to securities, means an offer made in any way by any person with respect to the acquisition, for consideration, of any securities in a company;

(h) **"offer to the public"**—

(i) includes an offer of securities to be issued by a company to any section of the public, whether selected—

(aa) as holders of that company's securities;

(bb) as clients of the person issuing the prospectus;

(cc) as the holders of any particular class of property; or

(dd) in any other manner; but

(ii) does not include—

(aa) an offer made in any of the circumstances contemplated in section 96; or

(bb) a secondary offer effected through an exchange;

(i) **"primary offering"** means an offer to the public, made by or on behalf of a company, of securities to be issued by that company, or another company—

(aa) within a group of companies of which the first company is a member; or

(bb) with whom the first company proposes to merge; or

(cc) into which the first company proposes to be amalgamated;

(j) **"promoter"**, in relation to civil and criminal liability in respect of an untrue statement in a prospectus, means—

(i) a person who was a party to the preparation of the prospectus, or of the portion of it that contains the untrue statement; but

(ii) does not include any person acting in a professional capacity for persons engaged in procuring the formation of the company or preparing the prospectus;

(k) **"registered prospectus"** means a prospectus that complies with this Act and—

(i) in the case of listed securities, has been approved by the relevant exchange; or

(ii) otherwise, has been filed;

(l) **"rights offer"** means an offer, with or without a right to renounce in favour of other persons, made to any holders of a company's securities for subscription of any securities of that company, or any other company within the same group of companies;

(m) **"secondary offering"** means an offer for sale to the public of any securities of a company or its subsidiary, made by or on behalf of a person other than that company or its subsidiary;

(n) **"specified shares"** means shares, including options on shares, offered to employees of a company in terms of an employee share scheme;

(o) **"unit"** means any right or interest in any securities; and

(p) **"untrue statement"** includes a statement that is misleading in the form and context in which it is made, subject to subsections (3) and (4).

(2) For the purposes of this Chapter, a person is to be regarded, by or in respect of a company, as being a member of the public, despite that person being a shareholder of the company or a purchaser of goods from the company.

(3) An untrue statement is regarded to have been included in a prospectus, written statement, or summary directing a person to either a prospectus or written statement, if it is contained in any report or memorandum—

(a) that appears on the face of the prospectus, written statement, or summary; or

(b) that is incorporated by reference within, or is attached to or accompanies, the prospectus, written statement or summary.

(4) An omission from a prospectus or written statement of any matter that, in the context, is calculated to mislead by omission constitutes the making of an untrue statement in that prospectus or written statement, irrespective of whether this Act requires that matter to be included in the prospectus or written statement.

(5) A provision of an agreement is void to the extent that it—

(a) requires an applicant for securities to waive compliance with a requirement of this Chapter; or

(b) purports to affect an applicant for securities with any notice of any agreement, document or matter not specifically referred to in a prospectus or written statement.

(6) Nothing in this Chapter limits any liability that a person may incur under this Act apart from this Chapter, or under any other public regulation, or under the common law.

Offers that are not offers to public

96. (1) An offer is not an offer to the public—

(a) if the offer is made only to—

(i) persons whose ordinary business, or part of whose ordinary business, is to deal in securities, whether as principals or agents;

(ii) the Public Investment Corporation as defined in the Public Investment Corporation Act, 2004 (Act No. 23 of 2004);

(iii) a person or entity regulated by the Reserve Bank of South Africa;

(iv) an authorised financial services provider, as defined in the Financial Advisory and Intermediary Services Act, 2002 (Act No. 37 of 2002);

(v) a financial institution, as defined in the Financial Services Board Act, 1990 (Act No. 97 of 1990);

(vi) a wholly-owned subsidiary of a person contemplated in subparagraph (iii), (iv) or (v), acting as agent in the capacity of an authorised portfolio manager for a pension fund registered in terms of the Pension Funds Act, 1956 (Act No. 24 of 1956), or as manager for a collective investment

scheme registered in terms of the Collective Investment Schemes Control Act, 2002 (Act No. 45 of 2002); or

(vii) any combination of persons contemplated in paragraphs (i) to (vi);

(b) if the total contemplated acquisition cost of the securities, for any single addressee acting as principal, is equal to or greater than the amount prescribed in terms of subsection (2)*(a)*;

(c) if it is a non-renounceable offer made only to—

(i) existing holders of the company's securities; or

(ii) persons related to existing holders of the company's securities; or

(d) if it is a rights offer that satisfies the prescribed requirements, and—

(i) an exchange has granted or has agreed to grant a listing for the securities that are the subject of the offer; and

(ii) the rights offer complies with any relevant requirements of that exchange at the time the offer is made;

(e) if the offer is made only to a director or prescribed officer of the company, or a person related to a director or prescribed officer, unless the offer is renounceable in favour of a person who is not a director or prescribed officer of the company or a person related to a director or prescribed officer;

(f) if it pertains to an employee share scheme that satisfies the requirements of section 97; or

(g) if it is an offer, or one of a series of offers, for subscription, made in writing, and—

(i) no offer in the series is accompanied by or made by means of an advertisement and no selling expenses are incurred in connection with any offer in the series;

(ii) the issue of securities under any one offer in the series is finalised within six months after the date that the offer was first made;

(iii) the offer, or series of offers in aggregate, is or are accepted by a maximum of fifty persons acting as principals;

(iv) the subscription price, including any premium, of the securities issued in respect of the series of offers, does not exceed, in aggregate, the amount prescribed in terms of subsection (2)*(a)*; and

(v) no similar offer, or offer in a series of offers, has been made by the company within the period prescribed in terms of subsection (2)*(b)* immediately before the offer, or first of a series of offers, as the case may be.

(2) The Minister, by notice in the *Gazette*, may prescribe—

(a) a value of not less than R100 000, to be the minimum value for the purposes of subsection (1)*(b)* and the maximum value for the purposes of subsection (1)*(g)*(iv); and

(b) a minimum period for the purposes of subsection (1)*(g)*(v), which must not be less than six months.

Standards for qualifying employee share schemes

97. (1) An employee share scheme qualifies for exemptions contemplated in sections 41(2)*(d)*, 44(2)*(c)*(i) or 45(2)*(c)*(i) of this Chapter, if—

(a) the company has—

(i) appointed a compliance officer for the scheme to be accountable to the directors of the company;

(ii) states in its annual financial statements the number of specified shares that it has allotted during that financial year in terms of its employee share scheme; and

(b) the compliance officer has complied with the requirements of subsection (2).

(2) A compliance officer who is appointed in respect of any employee share scheme—

(a) is responsible for the administration of that scheme;

(b) must provide a written statement to any employee who receives an offer of specified shares in terms of that employee scheme, setting out—

(i) full particulars of the nature of the transaction, including the risks associated with it;

(ii) information relating to the company, including its latest annual financial statements, the general nature of its business and its profit history over the last three years; and

(iii) full particulars of any material changes that occur in respect of any information provided in terms of subparagraph (i) or (ii);

(c) ensure that copies of the documents containing the information referred to in paragraph *(b)* are filed within 20 business days after the employee share scheme has been established; and

(d) file a certificate within 60 business days after the end of each financial year, certifying that the compliance officer has complied with the obligations in terms of this section during the past financial year.

Advertisements relating to offers

98. (1) As an alternative to any other manner of making or presenting an offer to the public, such an offer may be made or presented by way of an advertisement that—

(a) satisfies all of the requirements of this Act with respect to a registered prospectus; and

(b) is subject to every provision of this Act relating to the making of a prospectus.

(2) In addition to making or presenting an offer to the public by publishing a prospectus, such an offer may be drawn to the attention of the public by an advertisement, but any such advertisement—

(a) must include a statement—

(i) clearly stating that it is not a prospectus; and

(ii) indicating where and how a person may obtain a copy of the full registered prospectus relating to that offer;

(b) must not contain any untrue statement or, by express statement, omission or reasonable implication, be such as would reasonably mislead a person reading the advertisement—

(i) to believe that the advertisement is a prospectus; or

(ii) as to any material particular addressed in the prospectus relating to that offer; and

(c) is subject to sections 102 to 111, read with the changes required by the context.

(3) An advertisement drawing attention to an offer to the public, as contemplated in subsection (2)—

(a) is not required to be filed, or registered with an exchange; and

(b) will be regarded as having been intended to be a prospectus, issued by the person responsible for publishing or disseminating the advertisement, if it does not include the statements required by subsection (2)*(a)*, despite any statement to the contrary contained in the advertisement.

General restrictions on offers to public

99. (1) A person must not offer to the public any securities of any person unless that second person—

(a) is a company; and

(b) in the case of a foreign company, a copy of its Memorandum of Incorporation, and a list of the names and addresses of its directors, has been filed within 90 business days before the offer to the public is made.

(2) A person must not make an initial public offering unless that offer is accompanied by a registered prospectus.

(3) Except with respect to securities that are the subject of a company's initial public offering, a person must not make a—

(a) primary offer to the public of any—

(i) listed securities of a company, otherwise than in accordance with the requirements of the relevant exchange; or

(ii) unlisted securities of a company, unless the offer is accompanied by a registered prospectus that satisfies the requirements of section 100; or

(b) secondary offer to the public of any securities of a company, unless the offer satisfies the requirements of section 101.

(4) A person must not issue, distribute, deliver or cause to be issued, distributed or delivered a letter of allocation unless it is accompanied by all documents that are required, and have been—

(a) filed, in the case of unlisted securities; or

(b) approved by the relevant exchange, in the case of listed securities.

(5) Subject to subsection (6), a person must not issue, distribute or deliver or cause to be issued, distributed or delivered, any form of application in respect of securities of a company, unless the form—

(a) is accompanied by—

(i) a registered prospectus in the case of a primary offering; or

(ii) a written statement that satisfies the requirements of section 101, in the case of a secondary offering; and

(b) bears on the face of it the date on which the prospectus in respect of those securities was filed.

(6) Subsection (5) does not apply if the form of application was issued either—

(a) in connection with a genuine invitation to enter into an underwriting agreement with respect to the securities; or

(b) in relation to securities that were not offered to the public.

(7) Despite anything contained in a company's Memorandum of Incorporation, the company may exclude from any rights offer any category of holders of the company's securities who are not resident within the Republic—

(a) if the Commission has approved that exclusion in advance, on application by the company in the prescribed manner and form on the grounds that the number of those persons is insignificant relative to—

(i) the number of existing holders of the company's securities who are resident within the Republic; and

(ii) the administrative cost and inconvenience of extending the rights offer to them; and

(b) subject to any conditions attached to the approval contemplated in paragraph *(a)*.

(8) A person must not issue a prospectus or a document that purports to be a prospectus, or a document that may reasonably be misapprehended to be intended as a prospectus, unless it is a registered prospectus.

(9) A prospectus may not be registered unless the requirements of this Act have been complied with and it has been filed for registration, together with any prescribed documents, within 10 business days after the date of that prospectus.

(10) As soon as the Commission has registered a prospectus, it must send notice of the registration to the person who filed the prospectus for registration.

(11) A prospectus may not be issued more than three months after the date of its registration, and if a prospectus is so issued, it is regarded to be unregistered.

Requirements concerning prospectus

100. (1) This section does not apply in respect of listed securities, except listed securities that are the subject of an initial public offering.

(2) Subject to the provisions of sections 102 to 111, a prospectus must—

(a) contain all the information that an investor may reasonably require to assess—

(i) the assets and liabilities, financial position, profits and losses, cash flow and prospects of the company in which a right or interest is to be acquired; and

(ii) the securities being offered and rights attached to them; and

(b) adhere to the prescribed specifications.

(3) The date of registration of a prospectus is the date of the issue of the prospectus unless the contrary is proven.

(4) A prospectus must not be registered unless there is attached to it—

(a) a copy of any material agreement as prescribed; or

(b) in the case of an unwritten agreement, a memorandum giving full particulars of the agreement.

(5) If any part of an agreement contemplated in subsection (4) is in a language that is not an official language, a certified translation, in an official language, of that part must be attached to the agreement.

(6) A prospectus containing a statement to the effect that the whole or any portion of the issue of the securities offered to the public has been or is being underwritten may not be registered until a copy of the underwriting agreement has been filed, together with a sworn declaration stating that to the best of the deponent's knowledge and belief the underwriter is and will be in a position to carry out the obligations contemplated in the agreement even if no shares are being applied for.

(7) A declaration contemplated in subsection (6) must be sworn by the person named as underwriter or, if the underwriter is a company, by each of two directors of that company, or if it has only one director, by that director.

(8) If an offer is made in respect of which no prospectus is required by this Act, the copy of the agreement and sworn declaration referred to in subsection (6) must be filed not later than the date of the proposed offer of shares.

(9) The Commission, or an exchange in the case of listed securities, on application may allow required information to be omitted from a prospectus, if the Commission or exchange is satisfied—

(a) that publication of the information would be unnecessarily burdensome for the applicant, seriously detrimental to the company whose securities are the subject of the prospectus, or against public interest; and

(b) that users will not be unduly prejudiced by the omission.

(10) An application under subsection (9) must be in writing and accompanied by the prescribed fee.

(11) As long as an initial public offering or other primary offering to the public of unlisted securities remains open, any person responsible for information in the prospectus must, when that person becomes aware of it—

(a) correct any error;

(b) report on any new matter; and

(c) report on any change of a matter included in the prospectus,

provided these are relevant or material in terms of this Chapter.

(12) A correction or report under subsection (11) must be registered as a supplement to the prospectus, simultaneously published to known recipients of the prospectus and included in future distributions of the prospectus.

(13) If a correction or report has been published, as contemplated in subsections (11) and (12)—

(a) any person who subscribed for the issue of shares as a result of the offer, before the date of that publication, may withdraw the subscription by written notice within 20 business days after the date of publication;

(b) the offeror, upon receipt of a notice in terms of paragraph *(a)*, may either—

(i) accept the withdrawal, and restore to the person any consideration already paid in respect of the subscription; or

(ii) apply to the court for an order in terms of paragraph *(c)*; and

(c) the court, on an application in terms of paragraph *(b)*(ii) may make any order that is just and equitable in the circumstances, including, but not limited to, an order—

(i) negating the right of the subscriber to withdraw the offer; or

(ii) to reverse any transaction, or restore any consideration paid or benefit received by any person in terms of the offer and subscription.

Secondary offers to public

101. (1) This section does not apply in respect of securities that are—

(a) listed on an exchange; or

(b) in respect of which an exchange has granted permission to deal.

(2) Subject only to subsection (3), a person making a secondary offering of the securities of a company must ensure that the offer is accompanied by either—

(a) the registered prospectus that accompanied the primary offering of those securities, together with any revisions required to address changes in any material matter since the date the prospectus was registered; or

(b) a written statement that satisfies the requirements of subsections (4) to (6).

(3) Subsection (2) does not apply—

(a) if the offer is made or the material is published—

(i) by a person acting in the capacity of an executor or administrator of a deceased estate or a trustee of an insolvent estate or a liquidator or trustee referred to in the Administration of Estates Act, 1965 (Act No. 66 of 1965); or

(ii) for the purpose of a sale in execution or by public auction or by public tender.

(4) If an offer contemplated in this section is in respect of securities of a public company, a person publishing or making the offer must—

(a) file a copy of the written statement for registration before it is issued, distributed or published; and

(b) not issue, distribute or publish the statement more than three months after the date on which it is registered.

(5) The written statement referred to in subsection (3) must be dated and signed by—

(a) the person making the offer or issuing, distributing or publishing the material; and

(b) if that person is a company, by every director of the company.

(6) The written statement referred to in subsection (3) must—

(a) not contain any matter other than the particulars required by this section;

(b) not be in characters smaller or less legible than any characters used in—

(i) the written offer, if any; or

(ii) any document that accompanies the statement;

(c) be accompanied by a copy of the last annual financial statements of the company, together with any subsequent interim report or provisional annual financial statements of that company; and

(d) contain particulars with respect to the following matters:

(i) Whether the person making the offer is acting as principal or agent and, if as agent—

(aa) the name of the principal;

(bb) an address in the Republic where that principal can be served with process; and

(cc) the nature and extent of the remuneration received or receivable by the agent for the services provided;

(ii) the date on which and the country in which the company was incorporated and the address of its registered office in the Republic or, if there is no such address, the address of its principal office outside the Republic;

(iii) the classes and number of securities in each class that have been authorised, and with respect to each class of securities—

(aa) the preferences, rights, limitations and other terms associated with the class, with respect to capital, dividends and voting;

(bb) the number of securities that have been issued for cash, and the total cash consideration received by the company for those issued securities of that class; and

(cc) the number of securities that have been issued for consideration other than cash, and the value of the consideration received by the company for those issued securities of that class;

(iv) the dividends, if any, paid by the company on each class of securities during each of the five financial years immediately preceding the offer, and if no dividend has been paid in respect of securities of any particular class during any of those years, a statement to that effect;

(v) the total amount of any securities other than shares issued by the company and outstanding at the date of the statement, together with the rate of interest payable thereon;

(vi) the names and addresses of the directors of the company;

(vii) whether or not the securities are listed or permission to deal in those securities has been granted by an exchange, other than that referred to in subsection (1), and, if so, which, and, if not, a statement that they are not so listed or that no such permission has been granted;

(viii) if the offer relates to units, particulars of the names and addresses of the persons in whom the securities represented by the units are vested, the date and the parties to any document defining the terms on which those securities are held, and an address in the Republic where that document or a copy of it can be inspected;

(ix) the dates on which and the prices at which the securities offered were originally issued by the company, and were acquired by the person making the offer or by that person's principal, giving the reasons for any difference between those prices and the prices at which the securities are being offered;

(x) if any securities were issued by the company as partly paid-up shares under the Companies Act, 1973 (Act No. 61 of 1973), to what extent they are paid up; and

(xi) the date of registration of the written statement by the Commission.

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

Consent to use of name in prospectus

102. (1) In any prospectus relating to securities of a company a person must not—

(a) name a second person as a director or proposed director of that company unless, before the registration of that prospectus—

(i) in the case of a company incorporated in the Republic, the second person consented in writing to act as a director before the prospectus was filed, and has not withdrawn the consent; and

(ii) the prescribed return reflecting the relevant particulars in regard to that second person, has been filed; or

(b) include any statement made by an expert, or reference to any statement purporting to be made by an expert, unless—

(i) the expert consented in writing to the use of that statement before the prospectus was filed, and has not withdrawn the consent;

(ii) the written consent is endorsed on or attached to the copy of the filed prospectus; and

(iii) the prospectus includes a statement that the expert has consented to the use of the statement and has not withdrawn that consent.

(2) A prospectus must not name any person as the auditor, attorney, banker or broker of a company, unless it is accompanied by the written consent of the named person, agreeing to—

(a) be named to act in the stated capacity; and
(b) to the use of that person's name in the prospectus.

Variation of agreement mentioned in prospectus

103. (1) Subject to subsection (2), within one year after the date of filing a prospectus, a company must not vary or agree to vary any material terms of an agreement referred to in the prospectus, other than in the ordinary course of business.

(2) A variation in the terms of an agreement, as contemplated in subsection (1), may be made or agreed by a company only if—

(a) the variation was contemplated and set out in the prospectus; or
(b) the specific terms of the variation are authorised or ratified by an ordinary resolution adopted at a general shareholders meeting.

Liability for untrue statements in prospectus

104. (1) If securities are offered to the public for subscription or sale, pursuant to a prospectus, every—

(a) person who becomes a director between the issuing of the prospectus and the holding of the first general shareholders meeting at which directors are elected or appointed;
(b) person who has consented to be named in the prospectus as a director, or as having agreed to become a director either immediately or after an interval of time;
(c) promoter of the company; or
(d) person who—
(i) authorised the issue of the prospectus, or under this Act, is regarded as having authorised the issue of that prospectus; or
(ii) made that offer to the public,
is liable to compensate any person who acquired securities on the faith of the prospectus for any loss or damage the person may have sustained as a result of any untrue statement in the prospectus, or in any report or memorandum appearing on the face of, issued with, or incorporated by reference in, the prospectus.

(2) The liability contemplated in subsection (1) is in addition to the liability of a director of the company, as set out in section 77(3)*(d)*(ii).

(3) Liability contemplated in this section does not attach to a person if—

(a) with respect to every untrue statement not purporting to be made on the authority of an expert or of a public official document or statement, that person had reasonable grounds to believe, and did up to the time of the allotment of the securities or the acceptance of the offer, as the case may be, believe that the statement was true;
(b) with respect to every untrue statement purporting to be a statement by an expert or contained in what purports to be a copy of or extract from the report or valuation of an expert—
(i) the untrue statement fairly represented the statement or was a correct and fair copy of or extract from the report or valuation; and
(ii) the person had reasonable grounds to believe and did up to the time of the issue of the prospectus believe that the expert who made the statement was competent to make it, and consented, as required by this Act, to the issue of the prospectus or the making of the offer and had not withdrawn that consent—
(aa) before the prospectus was filed; or
(bb) to that person's knowledge, before any allotment under the prospectus, or before the acceptance of the offer;
(c) any untrue statement purporting to be a statement made by an official person or contained in what purports to be a copy of or extract from a public official document was a correct and a fair representation of the statement or copy of or extract from the document;

(d) that person consented to become a director of the company, but subsequently withdrew that consent before the issue of the prospectus, and that it was issued without that person's consent;

(e) the prospectus was issued without the knowledge or consent of that person and, on becoming aware of its issue, that person forthwith gave reasonable public notice that it was issued without the knowledge or consent of that person; or

(f) after the issue of the prospectus and before allotment or acceptance thereunder, that person, on becoming aware of any untrue statement in it, withdrew any consent to the prospectus and gave reasonable public notice of the withdrawal and of the reason for it.

(4) If a prospectus contains the name of a person as a director of the company, or as having agreed to become a director of that company, and that person has not consented to becoming a director, or has withdrawn consent before the issue of the prospectus, and has not authorised or consented to the issue of the prospectus, the directors of the company, except any without whose knowledge or consent the prospectus was issued—

(a) are liable to the extent set out in section 77(3)*(d)*(ii); and

(b) any other person who issued the prospectus or authorised the issue of it, is liable, together with the directors, to indemnify any person incorrectly named as a director against any damage, cost or expense arising as a result of that person having been so named in the prospectus, or incurred in defending against any action or legal proceedings brought in respect of having been so named in the prospectus.

(5) Subsection (4), read with the changes required by the context, applies equally in respect of any other person whose consent is required in terms of this Act in connection with any thing contained in a prospectus, and who has either—

(a) not given that consent; or

(b) has withdrawn it before the issue of the prospectus.

(6) A person who, by reason of—

(a) being a director, or having been named as a director;

(b) having agreed to become a director;

(c) having authorised the issue of the prospectus; or

(d) having become a director between the issue of the prospectus and the holding of the first general shareholders meeting at which directors are elected or appointed,

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

Liability of experts and others

105. (1) If a person has consented to the use of their name, or the inclusion of any material in a prospectus, as contemplated in this Chapter—

(a) that consent does not make the person liable as one who has authorised the issue of the prospectus under section 104(1)*(d)*, either—

(i) to compensate persons purchasing on the faith of the prospectus, except in respect of any untrue statement purporting to be made by that person as an expert; or

(ii) to indemnify any person against liability under section 104(6).

(2) Despite subsection (1), a person contemplated in that subsection is liable under section 104 in respect of any untrue statement purporting to be made by that person as an expert unless—

(a) the expert person withdrew that consent in writing before the prospectus was filed for registration;

(b) between the filing of the prospectus for registration and any allotment in terms of it to a complainant, that expert person became aware of the untrue statement, withdrew the consent in writing and gave reasonable public notice of the withdrawal and of the reason for it; or

(c) the expert person—

(i) was competent to make the statement; and

(ii) had reasonable ground to believe and did up to the time of the allotment of the securities or the acceptance of the offer, as the case may be, believe that the statement was true.

(3) The defences available to a person in this subsection are in lieu of any applicable defence available in terms of section 104(3).

Responsibility for untrue statements in prospectus

106. (1) If a prospectus contains a statement that is untrue, every person referred to in section 104(1) or (2) is equally responsible in terms of the enforcement provisions of this Act, for that untrue statement, subject to the provisions of subsections (2) and (3).

(2) If—

(a) a published prospectus contains or is accompanied by a report of an expert, or an extract from such a report;

(b) the report or extract contains a statement that is untrue; and

(c) the expert has consented to the inclusion of the statement in the prospectus in the form and context in which it appears,

the expert person is solely responsible for that statement, subject to the provisions of subsection (3).

(3) A person is not responsible for an untrue statement contemplated in this section if—

(a) the untrue statement was immaterial; or

(b) liability for the untrue statement does not attach to that person for any reason set out in section 104(3).

Time limit for allotment or acceptance

107. A company that has offered securities to the public must not allot any of those securities or accept any subscription for any of those securities, more than four months after filing the prospectus for that offer.

Restrictions on allotment

108. (1) A company that has offered securities to the public must not allot any of those securities or accept any subscription for any of those securities unless—

(a) the subscription has been made on an application form that has been attached to or accompanied by a prospectus; or

(b) it is shown that the applicant, at the time of the application, was in fact in possession of a copy of the prospectus or was aware of its contents.

(2) A company that has offered securities to the public must not allot any of those securities unless the amount stated in that prospectus as the minimum amount which in the opinion of the directors of the company concerned must be raised by the issue of securities in order to provide for the matters prescribed to be covered by minimum subscription and the amount so stated has been paid to and received by the company.

(3) For the purposes of subsection (2)—

(a) an amount stated in any cheque received by the company must not be regarded to have been paid to it until the amount of the cheque has been unconditionally credited to its account with its bankers; and

(b) any amount paid to and received by the company must be reduced by the amount of any money, bill, promissory note or cheque that it has at any time delivered to the payer otherwise than in discharge of a debt *bona fide* due by the company.

(4) The minimum amount contemplated in subsection (2) must be reckoned exclusively of any amount payable otherwise than in cash.

(5) Until the minimum amount contemplated in subsection (2) has been made up, any amount paid on an application contemplated in this section must—

(a) be paid into a separate account with a banking institution registered under the Banks Act; and

(b) not be used or made available for the purposes of the company or for the satisfaction of its debts.

(6) If the circumstances contemplated in subsection (2) have not been realised within 40 business days after the issue of the prospectus, all amounts received from applicants must be repaid to them promptly without interest.

(7) If any money required to be repaid to an applicant in terms of subsection (6) has not been repaid within 55 business days after the issue of the prospectus, each director or prescribed officer of the company is jointly and severally liable, with all other such directors and prescribed officers of the company, to repay that money with interest at 6% per year, from the expiration of the 55th business day, unless the default in payment was not due to any misconduct or negligence on the part of that director or prescribed officer.

Voidable allotment

109. (1) If an allotment made by a company to an applicant, or the acceptance of an offer made by an applicant, is in contravention of section 108(2), and the relevant offer was not subsequently subscribed to the minimum extent contemplated in that section—

(a) that allotment is voidable at the instance of the applicant concerned, irrespective whether the company concerned may be in the course of being wound up; and

(b) every director of the company concerned and if the offeror is a company, every director of that company, is liable to the extent set out in section 77(3)*(e)*(vii), if the allotment or acceptance is declared void under paragraph *(a)*.

(2) Proceedings to recover any loss, damages or costs contemplated in this section may not be commenced after the earlier of—

(a) 20 business days after the applicant discovers the contravention; or

(b) three years after the date of the relevant allotment or acceptance.

Minimum interval before allotment or acceptance

110. (1) No allotment of securities or acceptance of an offer in respect of securities of a company may be made in pursuance of a prospectus, and no proceedings may be taken on applications made in pursuance of a prospectus, until the beginning of the third day after that on which the prospectus is first issued or such later time, if any, specified in the prospectus.

(2) The reference in subsection (1) to the day on which a prospectus was first issued—

(a) is a reference to the day on which it is first issued as a newspaper advertisement; or

(b) if it is not issued as a newspaper advertisement before the third day after the day on which it is first issued in any other manner, is a reference to the day on which it is first issued in that other manner.

(3) A contravention of subsection (1) does not affect the validity of an allotment or acceptance.

Conditional allotment if prospectus states securities to be listed

111. (1) A prospectus containing a statement to the effect that application has been or will be made for permission for the securities offered thereby to be listed on an exchange must not be issued unless—

(a) an application has in fact been made in accordance with the requirements of the relevant exchange on or before the date of issue of that prospectus; and

(b) the prospectus names the particular exchange to which the application has been made.

(2) Any allotment of securities in pursuance of a prospectus referred to in subsection (1) is subject to the condition that—

(a) the application contemplated in subsection (1)*(a)* is granted; or

(b) an appeal against a refusal of such an application is upheld.

CHAPTER 5

FUNDAMENTAL TRANSACTIONS, TAKEOVERS AND OFFERS

Part A

Approval for certain fundamental transactions

Proposals to dispose of all or greater part of assets or undertaking

112. (1) This section and section 115 do not apply to a proposal to dispose of all or the greater part of the assets or undertaking of a company, if that disposal would constitute a transaction—

(a) that is pursuant to or contemplated in a business rescue plan adopted in accordance with Chapter 6;

(b) between a wholly-owned subsidiary and its holding company; or

(c) between or among—

(i) two or more wholly-owned subsidiaries of the same holding company; or

(ii) a wholly-owned subsidiary of a holding company, on the one hand, and its holding company and one or more wholly-owned subsidiaries of that holding company, on the other hand.

(2) A company may not dispose of all or the greater part of its assets or undertaking unless—

(a) the disposal has been approved by a special resolution of the shareholders, in accordance with section 115; and

(b) the company has satisfied all other requirements set out in section 115, to the extent those requirements are applicable to such a disposal by that company.

(3) A notice of a shareholders meeting to consider a resolution to approve a disposal contemplated in subsection (2)*(a)* must—

(a) be delivered within the prescribed time, and in the prescribed manner to each shareholder of the company; and

(b) include or be accompanied by a written summary of—

(i) the precise terms of the transaction or series of transactions, to be considered at the meeting; and

(ii) the provisions of sections 115 and 164,

in a manner that satisfies the prescribed standards.

(4) Any part of the undertaking or assets of a company to be disposed of, as contemplated in this section, must be given its fair market value as at the date of the proposal, in accordance with the financial reporting standards.

(5) A resolution contemplated in subsection (2) is effective only to the extent that it authorises or ratifies a specific transaction.

Proposals for amalgamation or merger

113. (1) Two or more profit companies, including holding and subsidiary companies, may amalgamate or merge if, upon implementation of the amalgamation or merger, each amalgamated or merged company will satisfy the solvency and liquidity test.

(2) Two or more companies proposing to amalgamate or merge must enter into a written agreement setting out the terms and means of effecting the amalgamation or merger and, in particular, setting out—

(a) the proposed Memorandum of Incorporation of any new company to be formed by the amalgamation or merger;

(b) the name and identity number of each proposed director of any proposed amalgamated or merged company;

(c) the manner in which the securities of each amalgamating or merging company are to be converted into securities of any proposed amalgamated or merged company, or exchanged for other property;

(d) if any securities of any of the amalgamating or merging companies are not to be converted into securities of any proposed amalgamated or merged company, the consideration that the holders of those securities are to receive in addition to or instead of securities of any proposed amalgamated or merged company;

(e) the manner of payment of any consideration instead of the issue of fractional securities of an amalgamated or merged company or of any other juristic person the securities of which are to be received in the amalgamation or merger;

(f) details of the proposed allocation of the assets and liabilities of the amalgamating or merging companies among the companies that will be formed or continue to exist when the amalgamation or merger agreement has been implemented;

(g) details of any arrangement or strategy necessary to complete the amalgamation or merger, and to provide for the subsequent management and operation of the proposed amalgamated or merged company or companies; and

(h) the estimated cost of the proposed amalgamation or merger.

(3) If the securities of one of the amalgamating or merging companies are held by or on behalf of another of the amalgamating or merging companies, the agreement required by subsection (2) must provide for the cancellation of those securities when the amalgamation or merger becomes effective, without any repayment of capital in respect thereof, and no provision may be made in the agreement for the conversion of those securities into securities of an amalgamated or merged company.

(4) Subject to subsection (6), the board of each amalgamating or merging company—

(a) must consider whether, upon implementation of the agreement, each proposed amalgamated or merged company will satisfy the solvency and liquidity test; and

(b) if the board reasonably believes that each proposed amalgamated or merged company will satisfy the solvency and liquidity test, it may submit the agreement for consideration at a shareholders meeting of that amalgamating or merging company, in accordance with section 115.

(5) Subject to subsection (6), a notice of a shareholders meeting contemplated in subsection (4)*(b)* must be delivered to each shareholder of each respective amalgamating or merging company, and must include or be accompanied by a copy or summary of—

(a) the amalgamation or merger agreement; and

(b) the provisions of sections 115 and 164 in a manner that satisfies prescribed standards.

(6) The requirements of subsections (4) and (5) do not apply to a company engaged in business rescue proceedings, in respect of any transaction that is pursuant to or contemplated in the company's business rescue plan that has been adopted in accordance with Chapter 6.

Proposals for scheme of arrangement

114. (1) Unless it is in liquidation, or in the course of business rescue proceedings in terms of Chapter 6, the board of a company, may propose and, subject to approval in terms of this Part, implement any arrangement between the company and holders of any class of its securities, including a reorganisation of the share capital of the company by way of, among other things—

(a) a consolidation of securities of different classes;

(b) a division of securities into different classes;

(c) an expropriation of securities from the holders;
(d) exchanging any of its securities for other securities;
(e) a re-acquisition by the company of its securities; or
(f) a combination of the methods contemplated in this subsection.

(2) The company, or the offeror contemplated in subsection (1), if any, must retain an independent expert, who meets the following requirements, to compile a report as required by subsection (3):

(a) The person to be retained must be—
  (i) qualified, and have the competence and experience necessary to—
    (aa) understand the type of arrangement proposed;
    (bb) evaluate the consequences of the arrangement; and
    (cc) assess the effect of the arrangement on the value of securities and on the rights and interests of a holder of any securities, or a creditor of the company; and
  (ii) able to express opinions, exercise judgment and make decisions impartially.
(b) the person to be retained must not—
  (i) have any other relationship with the company or with a proponent of the arrangement, such as would lead a reasonable and informed third party to conclude that the integrity, impartiality or objectivity of that person is compromised by that relationship;
  (ii) have had any relationship contemplated in subparagraph (i) within the immediately preceding two years; or
  (iii) be related to a person who has or has had a relationship contemplated in subparagraph (i) or (ii).

(3) The person retained in terms of subsection (2) must prepare a report to the board, and cause it to be distributed to all holders of the company's securities, concerning the proposed arrangement, which must, at a minimum—

(a) state all prescribed information relevant to the value of the securities affected by the proposed arrangement;
(b) identify every type and class of holders of the company's securities affected by the proposed arrangement;
(c) describe the material effects that the proposed arrangement will have on the rights and interests of the persons mentioned in paragraph *(b)*;
(d) evaluate any material adverse effects of the proposed arrangement against—
  (i) the compensation that any of those persons will receive in terms of that arrangement; and
  (ii) any reasonably probable beneficial and significant effect of that arrangement on the business and prospects of the company;
(e) state any material interest of any director of the company or trustee for security holders, and state the effect of the arrangement on those interests and persons;
(f) state the effect of the proposed arrangement on the interest and person contemplated in paragraph *(e)*; and
(g) include a copy of sections 115 and 164.

Required approval for transactions contemplated in Part

115. (1) Despite section 65, and any provision of a company's Memorandum of Incorporation, or any resolution adopted by its board or holders of its securities, to the contrary, a company may not dispose of, or give effect to an agreement or series of agreements to dispose of, all or the greater part of its assets or undertaking, implement an amalgamation or a merger, or implement a scheme of arrangement, unless—

(a) the disposal, amalgamation or merger, or scheme of arrangement—
  (i) has been approved in terms of this section; or
  (ii) is pursuant to or contemplated in an approved business rescue plan for that company, in terms of Chapter 6; and
(b) to the extent that Parts B and C of this Chapter and the Takeover Regulations apply to a company that proposes to—
  (i) dispose of all or the greater part of the assets or undertaking;

(ii) amalgamate or merge with another company; or

(iii) implement a scheme of arrangement, the Panel has issued a compliance notice in respect of the transaction in terms of section 119(4)*(b)*, or exempted the transaction in terms of section 119(6).

(2) A proposed transaction contemplated in subsection (1) must be approved —

(a) by a special resolution adopted by persons entitled to exercise voting rights on such a matter, at a meeting called for that purpose and at which sufficient persons are present to exercise, in aggregate, at least 25% of all of the voting rights that are entitled to be exercised on that matter; and

(b) by a special resolution, also adopted in the manner required by paragraph *(a)*, by the shareholders of the company's holding company if any, if—

(i) the holding company is a company or an external company;

(ii) the proposed transaction concerns a disposal of all or the greater part of the assets or undertaking of the subsidiary; and

(iii) having regard to the consolidated financial statements of the holding company, the disposal by the subsidiary substantially constitutes a disposal of all or the greater part of the assets or undertaking of the holding company; and

(c) by the court, to the extent required in the circumstances and manner contemplated in subsections (3) to (6).

(3) Despite a resolution having been adopted as contemplated in subsections (2)*(a)* and *(b)*, a company may not proceed to implement that resolution without the approval of a court if—

(a) the resolution was opposed by at least 15% of the voting rights that were exercised on that resolution, and any person who voted against the resolution requires the company to seek court approval; or

(b) the court, on an application by any person who voted against the resolution, grants that person leave, in terms of subsection (6), to apply to a court for a review of the transaction in accordance with subsection (7).

(4) For the purposes of subsections (2) and (3), any voting rights controlled by an acquiring party, a person related to an acquiring party, or a person acting in concert with either of them, must not be included in calculating the percentage of voting rights—

(a) present in satisfaction of the quorum requirement; or

(b) voted in support of a resolution.

(5) If a resolution requires approval by a court as contemplated in terms of subsection (3)*(a)*, the company must either—

(a) apply to the court for approval, and bear the costs of that application; or

(b) treat the resolution as a nullity.

(6) On an application contemplated in subsection (3)*(b)*, the court may grant leave only if it is satisfied that the applicant—

(a) is acting in good faith;

(b) appears prepared and able to sustain the proceedings; and

(c) has alleged facts which, if proved, would support an order in terms of subsection (7).

(7) On reviewing a resolution that is the subject of an application in terms of subsection (5)*(a)*, or after granting leave in terms of subsection (6), the court may set aside the resolution only if—

(a) the resolution is manifestly unfair to any class of holders of the company's securities; or

(b) the vote was materially tainted by conflict of interest, inadequate disclosure, failure to comply with the Act, the Memorandum of Incorporation or any applicable rules of the company, or other significant and material procedural irregularity.

(8) The holder of any voting rights in a company is entitled to seek relief in terms of section 164 if that person—

(a) notified the company in advance of the intention to oppose a special resolution contemplated in this section; and

(b) was present at the meeting and voted against that special resolution.

(9) If a transaction contemplated in this Part has been approved, any person to whom assets are, or an undertaking is, to be transferred, may apply to a court for an order to effect—

(a) the transfer of the whole or any part of the undertaking, assets and liabilities of a company contemplated in that transaction;

(b) the allotment and appropriation of any shares or similar interests to be allotted or appropriated as a consequence of the transaction;

(c) the transfer of shares from one person to another;

(d) the dissolution, without winding-up, of a company, as contemplated in the transaction;

(e) incidental, consequential and supplemental matters that are necessary for the effectiveness and completion of the transaction; or

(f) any other relief that may be necessary or appropriate to give effect to, and properly implement, the amalgamation or merger.

Implementation of amalgamation or merger

116. (1) Subject to subsection (2), after a resolution approving an amalgamation or merger has been adopted by each company that is a party to the agreement, and the transaction has satisfied all of the applicable requirements set out in section 115—

(a) each of the amalgamating or merging companies must cause a notice of the amalgamation or merger to be given in the prescribed manner and form to every known creditor of that company;

(b) within 15 business days after delivery of a notice required by paragraph *(a)*, a creditor may seek leave to apply to a court for a review of the amalgamation or merger only on the grounds that the creditor will be materially prejudiced by the amalgamation or merger; and

(c) a court may grant leave contemplated in paragraph *(b)* only if it is satisfied that—

(i) the applicant for leave is acting in good faith;

(ii) if implemented, the amalgamation or merger would materially prejudice the creditor; and

(iii) there are no other remedies available to the creditor.

(2) Subsection (1) does not apply to a company engaged in business rescue proceedings, in respect of any transaction pursuant to or contemplated in the company's business rescue plan adopted in accordance with Chapter 6.

(3) A notice of amalgamation or merger must be filed—

(a) after the time contemplated in subsection (1)*(b)*, if no application has been made to the court in terms of that subsection; or

(b) in any other case—

(i) after the court has disposed of any proceedings arising in terms of subsection (1)*(b)* and *(c)*; and

(ii) subject to the order of the court.

(4) A notice of amalgamation or merger must include—

(a) confirmation that the amalgamation or merger—

(i) has satisfied the requirements of sections 113 and 115;

(ii) has been approved in terms of the Competition Act, if so required by that Act;

(iii) has been granted the consent of the Minister of Finance in terms of section 54 of the Banks Act, if so required by that Act; and

(iv) is not subject to—

(aa) further approval by any regulatory authority; or

(bb) any unfulfilled conditions imposed by or in terms of any law administered by a regulatory authority; and

(b) the Memorandum of Incorporation of any company newly incorporated in terms of the agreement.

(5) After receiving a notice of amalgamation or merger, the Commission must—

(a) issue a registration certificate for each company, if any, that has been newly incorporated in terms of the amalgamation or merger agreement; and

(b) deregister any of the amalgamating or merging companies that did not survive the amalgamation or merger.

(6) An amalgamation or merger—

(a) takes effect in accordance with, and subject to any conditions set out in the amalgamation or merger agreement;

(b) does not affect any—

(i) existing liability of a party to the agreement, or of a director of any of the amalgamating or merging companies, to be prosecuted in terms of any applicable law;

(ii) civil, criminal or administrative action or proceeding pending by or against an amalgamating or merging company, and any such proceeding may continue to be prosecuted by or against any of the amalgamated or merged company; or

(iii) conviction against, or ruling, order or judgment in favour of or against, an amalgamating or merging company, and any such ruling, order or judgement may be enforced by or against any of the amalgamated or merged, company.

(7) When an amalgamation or merger agreement has been implemented—

(a) the property of each amalgamating or merging company becomes property of the newly amalgamated, or surviving merged, company or companies; and

(b) each newly amalgamated, or surviving merged, company is liable for all of the obligations of every amalgamating or merging company subject to subsection (8), the requirements of section 113(1), and any provision of the merger agreement, or any other agreement.

(8) If, as a consequence of an amalgamation or merger, any property that is registered in terms of any public regulation is to be transferred from an amalgamating or merging company to an amalgamated or merged company, a copy of the amalgamation or merger agreement, together with a copy of the filed notice of amalgamation or merger, constitutes sufficient evidence for the keeper of the relevant property registry to effect a transfer of the registration of that property.

(9) If, with respect to a transaction involving a company that is regulated in terms of the Banks Act, there is a conflict between a provision of subsection (7) and a provision of section 54 of that Act, the provisions of that Act prevail.

Part B

Authority of Panel and Takeover Regulations

Definitions applicable to this Part, Part C and Takeover Regulations

117. (1) In this Part, Part C, and in the Takeover Regulations—

(a) **"acquisition"** includes an acquisition by a regulated company of its own securities as contemplated in section 48, but does not include the return of any securities of a regulated company to that company pursuant to the exercise of appraisal rights in terms of section 164;

(b) **"act in concert"** means any action pursuant to an agreement between or among two or more persons, in terms of which any of them co-operate for the purpose of entering into or proposing an affected transaction or offer;

(c) **"affected transaction"** means—

(i) a transaction or series of transactions amounting to the disposal of all or the greater part of the assets or undertaking of a regulated company, as contemplated in section 112, subject to section 118(3);

(ii) an amalgamation or merger, as contemplated in section 113, if it involves at least one regulated company, subject to section 118(3);

(iii) a scheme of arrangement between a regulated company and its shareholders, as contemplated in section 114, subject to section 118(3);
(iv) the acquisition of, or announced intention to acquire, a beneficial interest in any voting securities of a regulated company to the extent and in the circumstances contemplated in section 122(1);
(v) the announced intention to acquire a beneficial interest in the remaining voting securities of a regulated company not already held by a person or persons acting in concert;
(vi) a mandatory offer contemplated in section 123; or
(vii) compulsory acquisition contemplated in section 124;

(d) **"Executive Director"** means the person appointed under section 200;
(e) **"holder"** includes a person who holds a beneficial interest in any securities of a regulated company;
(f) **"offer"**, when used as a noun, means a proposal of any sort, including a partial offer, which, if accepted, would result in an affected transaction other than such a transaction that is exempted in terms of section 118(3);
(g) **"offer period"** means the period from the time when an announcement is made or ought to have been made, of a proposed or possible offer until the first closing date or, if later, the date when the offer becomes or is declared unconditional as to acceptances or lapses;
(h) **"partial offer"** means an offer that, if fully accepted, would result in the offeror, alone or together with a related or inter-related person, or a person acting in concert with any of them, holding less than 100% of the voting securities of the company whose securities are the subject of the offer;
(i) **"regulated company"** means a company to which this Part, Part C and the Takeover Regulations apply, as determined in accordance with section 118(1) and (2); and
(j) **"securities"** has the meaning referred to in section 1, but does not include any instrument issued by a regulated company unless that instrument—
(i) has associated with it the right to vote generally at a general shareholders meeting; or
(ii) is convertible to a instrument that satisfies the criteria set out in subparagraph (i).

(2) For the purposes of this Part, Part C and the Takeover Regulations, two or more related or inter-related persons are regarded to have acted in concert, unless there is satisfactory evidence that they acted independently in any particular matter.

Application of this Part, Part C and Takeover Regulations

118. (1) Subject to subsections (2) to (4), this Part, Part C and the Takeover Regulations apply with respect to an affected transaction or offer involving a profit company or its securities if the company is—
(a) a public company;
(b) a state-owned company, except to the extent that any such company has been exempted in terms of section 9; or
(c) a private company, but only if—
(i) the percentage of the issued securities of that company that have been transferred, other than by transfer between or among related or interrelated persons, within the period of 24 months immediately before the date of a particular affected transaction or offer exceeds the percentage prescribed in terms of subsection (2); or
(ii) the Memorandum of Incorporation of that company expressly provides that the company and its securities are subject to this Part, Part C and the Takeover Regulations, irrespective of whether the company falls within the criteria set out in subparagraph (i).

(2) The Minister, after consulting the Panel, may prescribe a minimum percentage, being not less than 10%, of the issued securities of a private company which, if

transferred within a 24-month period as contemplated in subsection (1)*(c)*(i), would bring that company and its securities within the application of this Part, Part C, and the Takeover Regulations in terms of that subsection.

(3) Despite the definition of 'affected transaction' set out in section 117(1)*(c)*, this Part, Part C and the Takeover Regulations do not apply to—

(a) a proposal to dispose, or disposal, of all or the greater part of the assets or undertaking of a regulated company;

(b) a proposed amalgamation or merger involving at least one regulated company; or

(c) a scheme of arrangement proposed by a regulated company,

to the extent that any such affected transaction is pursuant to or contemplated in an approved business rescue plan in terms of Chapter 6.

(4) If there is a conflict between any provision of this Part, Part C, or the Takeover Regulations, and any provision of another public regulation—

(a) the conflicting provisions apply concurrently to the extent that it is possible to apply and comply with one of the inconsistent provisions without contravening the second; and

(b) to the extent that it is impossible to apply or comply with one of the inconsistent provisions without contravening the second, the provisions of the other public regulation prevail.

(5) A person granted an option to acquire shares with a voting right in a regulated company is presumed to have acted in concert with the grantor of the option, unless the voting rights are retained by the grantor.

(6) A presumption under subsection (5) may be rebutted by evidence to the contrary.

Panel regulation of affected transactions

119. (1) The Panel must regulate any affected transaction or offer in accordance with this Part, Part C and the Takeover Regulations, but without regard to the commercial advantages or disadvantages of any transaction or proposed transaction, in order to—

(a) ensure the integrity of the marketplace and fairness to the holders of the securities of regulated companies;

(b) ensure the provision of—

(i) necessary information to holders of securities of regulated companies, to the extent required to facilitate the making of fair and informed decisions; and

(ii) adequate time for regulated companies and holders of their securities to obtain and provide advice with respect to offers; and

(c) prevent actions by a regulated company designed to impede, frustrate, or defeat an offer, or the making of fair and informed decisions by the holders of that company's securities.

(2) Subject to subsection (6), the Panel must regulate any affected transaction or offer, and the conduct of the parties in respect of any such transaction or offer, in a manner that promotes the objects set out in subsection (1) and, without limiting the generality of that subsection, ensures—

(a) that no person may enter into an affected transaction unless that person is ready, able and willing to implement that transaction;

(b) that all holders of—

(i) any particular class of voting securities of an offeree regulated company are afforded equivalent treatment; and

(ii) voting securities of an offeree regulated company are afforded equitable treatment, having regard to the circumstances;

(c) that no relevant information is withheld from the holders of relevant securities; and

(d) that all holders of relevant securities—

(i) receive the same information from an offeror, potential offeror, or offeree regulated company during the course of an affected transaction, or when an affected transaction is contemplated; and

(ii) are provided sufficient information, and permitted sufficient time, to enable them to reach a properly informed decision.

(3) Subsection (2)*(d)* is not to be construed or applied to prohibit—

(a) the furnishing of information in confidence by an offeree company to a *bona fide* potential offeror or vice versa; or

(b) the issue of circulars by brokers or advisers to any party to the transaction to their own investment clients,

with the prior approval of the Panel.

(4) In carrying out its mandate, the Panel may—

(a) require the filing, for approval or otherwise, of any document with respect to an affected transaction or offer, if the document is required to be prepared in terms of this Part, Part C and the Takeover Regulations;

(b) issue clearance notices, if the Panel is satisfied that the offer or transaction satisfies the requirements of this Part, Part C and the Takeover Regulations; and

(c) initiate or receive complaints, conduct investigations, and issue compliance notices, with respect to any affected transaction or offer, in accordance with Chapter 7, and the Takeover Regulations.

(5) To the extent necessary to ensure compliance with this Part, Part C and the Takeover Regulations, and to fulfil the purposes contemplated in subsection (1), a compliance order contemplated in subsection (4)*(b)* may, among other things—

(a) prohibit or require any action by a person; or

(b) order a person to—

(i) divest of an acquired asset; or

(ii) account for profits.

(6) The Panel may wholly or partially, and with or without conditions, exempt an offeror to an affected transaction or an offer from the application of any provision of this Part, Part C or the Takeover Regulations if—

(a) there is no reasonable potential of the affected transaction prejudicing the interests of any existing holder of a regulated company's securities;

(b) the cost of compliance is disproportionate relative to the value of the affected transaction; or

(c) doing so is otherwise reasonable and justifiable in the circumstances having regard to the principles and purposes of this Part, Part C and the Takeover Regulations.

Takeover regulations

120. The Minister, in consultation with the Panel, must prescribe regulations, to be known as the Takeover Regulations, to give effect to the purposes of this Part and Part C including, among other things, regulations to provide for—

(a) compliance with and enforcement of the provisions of this Part and Part C respecting affected transactions and offers;

(b) the administration, operation and procedures of the Panel;

(c) prescribed fees and levies imposed in terms of an Act of Parliament on certain companies; and

(d) any other matters relating to the powers and functions of the Panel.

Part C

Regulation of affected transactions and offers

General requirement concerning transactions and offers

121. Any person making an offer must—

(a) comply with all reporting or approval requirements, whether set out in this Part or in the Takeover Regulations, except to the extent that the Panel has granted the person an exemption from any such requirement; and

(b) not give effect to an affected transaction unless the Panel has—

(i) issued a clearance notice with respect to the transaction; or

(ii) granted an exemption for that transaction.

Required disclosure concerning certain share transactions

122. (1) A person must notify a regulated company in the prescribed manner within three business days after that person—

(a) acquires a beneficial interest in sufficient securities of a class issued by that company such that, as a result of the acquisition, the person holds a beneficial interest in securities amounting to 5%, 10%, 15%, or any further whole multiple of 5%, of the issued securities of that class; or

(b) disposes of a beneficial interest in sufficient securities of a class issued by a company such that, as a result of the disposition, the person no longer holds a beneficial interest in securities amounting to a particular multiple of 5% of the issued securities of that class.

(2) The requirements set out in subsection (1) apply to a person irrespective whether—

(a) the person acquires or disposes of any securities—

(i) directly or indirectly; or

(ii) individually, or in concert with any other person or persons, or

(b) the stipulated percentage of issued securities is held by that person alone, or in aggregate by that person together with any—

(i) related or inter-related person; and

(ii) person who has acted in concert with any other person.

(3) A regulated company that has received a notice in terms of this section must—

(a) file a copy with the Panel; and

(b) report the information to the holders of the relevant class of securities unless the notice concerned a disposition of less than 1% of the class of securities.

(4) For the purposes of this section—

(a) when determining the number of issued securities of a class, a person is entitled to rely on the most recently published statement by the company, unless that person knows or has reason to believe that the statement is inaccurate; and

(b) when determining the number of securities held by—

(i) a person or persons contemplated in subsection (1)—

(aa) to the extent that the person has the entire, or a partial or shared, beneficial interest in any securities, those interests must be aggregated, irrespective of the nature of the person's interest; and

(bb) any securities that may be acquired by the person if they exercised any options, conversion privileges or similar rights, are to be included; and

(ii) any other person, any securities that may be acquired by that other person if they exercised any options, conversion privileges or similar rights, are to be excluded.

Mandatory offers

123. (1) In this section, **"prescribed percentage"** means the percentage prescribed by the Minister in terms of subsection (5).

(2) This section applies if—

(a) either—

(i) a regulated company reacquires any of its voting securities as contemplated in section 48; or

(ii) a person acting alone has, or two or more related or inter-related persons, or two or more persons acting in concert, have, acquired a beneficial interest in any voting securities issued by a regulated company;

(b) before that acquisition a person was, or persons contemplated in paragraph *(a)*(ii) together were, able to exercise less than the prescribed percentage of all the voting rights attached to securities of that company; and

(c) as a result of that acquisition, together with any other securities of the company already held by the person or persons contemplated in paragraph *(a)*(ii), they are able to exercise at least the prescribed percentage of all the voting rights attached to securities of that company.

(3) Within one day after the date of a completed acquisition contemplated in subsection (2), the person or persons in whom the prescribed percentage, or more, of the voting securities beneficially vests must give notice in the prescribed manner to the holders of the remaining securities, including in that notice—

(a) a statement that they are in a position to exercise at least the prescribed percentage of all the voting rights attached to securities of that regulated company; and

(b) offering to acquire any remaining such securities on terms determined in accordance with this Act and the Takeover Regulations.

(4) Within one month after giving notice in terms of subsection (3), the person or persons contemplated in subsection (2) must deliver a written offer, in compliance with the Takeover Regulations, to the holders of the remaining securities of that company, to acquire those securities on the terms contemplated in subsection (3)*(b)*.

(5) For the purposes contemplated in this section, the Minister, on the advice of the Panel, may prescribe a percentage of not more than 35% of the voting securities of a company.

Compulsory acquisitions and squeeze out

124. (1) If, within four months after the date of an offer for the acquisition of any class of securities of a regulated company, that offer has been accepted by the holders of at least 90% of that class of securities, other than any such securities held before the offer by the offeror, a related or inter-related person, or persons acting in concert, or a nominee or subsidiary of any such person or persons—

(a) within two further months, the offeror may notify the holders of the remaining securities of the class, in the prescribed manner and form—

(i) that the offer has been accepted to that extent; and

(ii) that the offeror desires to acquire all remaining securities of that class; and

(b) subject to subsection (2), after giving notice in terms of paragraph *(a)*, the offeror is entitled, and bound, to acquire the securities concerned on the same terms that applied to securities whose holders accepted the original offer.

(2) Within 30 business days after receiving a notice in terms of subsection (1)*(a)*, a person may apply to a court for an order—

(a) that the offeror is not entitled to acquire the applicant's securities of that class; or

(b) imposing conditions of acquisition different from those of the original offer.

(3) If an offer to acquire the securities of a particular class has not been accepted to the extent contemplated in subsection (1)—

(a) the offeror may apply to a court for an order authorising the offeror to give a notice contemplated in subsection (1)*(a)*; and

(b) the court may make the order applied for, if—

(i) after making reasonable enquiries, the offeror has been unable to trace one or more of the persons holding securities to which the offer relates;

(ii) by virtue of acceptances of the original offer, the securities that are the subject of the application, together with the securities held by the person or persons referred to in subparagraph (i), amount to not less than the minimum specified in subsection (1);

(iii) the consideration offered is fair and reasonable; and

(iv) the court is satisfied that it is just and equitable to make the order, having regard, in particular, to the number of holders of securities who have been traced but who have not accepted the offer.

(4) If an offer for the acquisition of any class of securities of a regulated company has resulted in the acquisition by the offeror or a nominee or subsidiary of the offeror, or a

related or inter-related person of any of them, individually or in aggregate, of sufficient securities of that class such that, together with any other securities of that class already held by that person, or those persons in aggregate, they then hold at least 90% of the securities of that class—

(a) the offeror must notify the holders of the remaining securities of the class that the offer has been accepted to that extent;

(b) within three months after receiving a notice in terms of paragraph *(a)*, a person may demand that the offeror acquire all of the person's securities of the class concerned; and

(c) after receiving a demand in terms of paragraph *(b)*, the offeror is entitled, and bound, to acquire the securities concerned on the same terms that applied to securities whose holders accepted the original offer.

(5) If an offeror has given notice in terms of subsection (1), and no order has been made in terms of subsection (3), or if the offeror has received a demand in terms of subsection (4)*(b)*—

(a) six weeks after the date on which the notice was given or, if an application to a court is then pending, after the application has been disposed of, or after the date on which the demand was received, as the case may be, the offeror must—

(i) transmit a copy of the notice to the regulated company whose securities are the subject of the offer, together with an instrument of transfer, executed on behalf of the holder of the those securities by any person appointed by the offeror; and

(ii) pay or transfer to that company the consideration representing the price payable by the offeror for the securities concerned,

(b) subject to the payment of prescribed fees or duties, the company must thereupon register the offeror as the holder of those securities.

(6) An instrument of transfer contemplated in subsection (5) is not required for any securities for which a securities warrant is for the time being outstanding.

(7) A regulated company must deposit any consideration received under this section into a separate interest bearing bank account with a banking institution registered under the Banks Act and, subject to subsection (8), those deposits must be—

(a) held in trust by the company for the person entitled to the securities in respect of which the consideration was received; and

(b) paid on demand to the person contemplated in paragraph *(a)*, with interest to the date of payment.

(8) If a person contemplated in subsection (7)*(a)* fails for more than three years to demand payment of an amount held in terms of that paragraph, the amount, together with any accumulated interest, must be paid to the benefit of the Guardian's Fund of the Master of the High Court, to be held and dealt with in accordance with the rules of that Fund.

(9) In this section any reference to a ''holder of securities who has not accepted the offer'' includes any holder who has failed or refused to transfer their securities to the offeror in accordance with the offer.

Comparable and partial offers

125. (1) In this section—

(a) **"independent holder of voting rights"** mean a person who—

(i) holds any securities of a company that entitle that person to exercise general voting rights; and

(ii) is independent of an offeror or any related or inter-related person, or person acting in concert with any of them; and

(b) **"prescribed percentage"** means the percentage prescribed in terms of section 123(5).

(2) If a person makes an offer—

(a) for any securities of a company that has more than one class of securities; and

(b) that could result in the person, together with any related or inter-related person or person acting in concert with any of them, holding securities of the company entitling the persons or persons to exercise more than the prescribed percentage of the general voting rights of all issued securities of the company,

a comparable offer must be made for each class of issued securities of that company.

(3) A person making a partial offer for any class of issued securities of a company must—

(a) make the offer to all of the holders of that class of securities;

(b) if the offer could result in the person, together with any related or inter-related person or person acting in concert with any of them, holding securities of the company entitling the person or persons to exercise more than the prescribed percentage of the general voting rights of all issued securities of the company, make the offer conditional on—

(i) a specified number of acceptances being received; and

(ii) the offer being approved by the independent holders of more than 50% of the general voting rights of all issued securities of the company;

(c) state in the offer the precise number of shares offered for, if the offer could result in the person, together with any related or inter-related person or person acting in concert with any of them, holding securities of the company entitling the persons or persons to exercise more than the prescribed percentage, but less than 50%, of the general voting rights of all issued securities of the company; and

(d) if the offer could result in the person, together with any related or inter-related person or person acting in concert with any of them, holding securities of the company entitling the persons or persons to exercise more than 50% of the general voting rights of all issued securities of the company—

(i) include a specific and prominent notice that the offer could result in circumstances contemplated above; and

(ii) include a specific statement setting out the extent to which the person or persons referred to above will be free to acquire further securities in the company without making a general offer, if the offer succeeds to the extent contemplated above.

(4) An offer that is conditional, as contemplated in subsection (3)*(b)*, may not be declared to be unconditional as to acceptances unless it has been accepted to the extent specified in terms of subsection (3)*(b)*(i).

(5) If a partial offer has been made for a class of securities—

(a) any holder of those securities is entitled to accept the offer in full for the relevant percentage of that person's holding; and

(b) any securities tendered in excess of the relevant percentage must be accepted by the offeror from each holder of securities in the same proportion to the number tendered as will enable the offeror to obtain the total number of shares for which it has offered.

Restrictions on frustrating action

126. (1) If the board of a regulated company believes that a *bona fide* offer might be imminent, or has received such an offer, the board must not—

(a) take any action in relation to the affairs of the company that could effectively result in—

(i) a *bona fide* offer being frustrated; or

(ii) the holders of relevant securities being denied an opportunity to decide on its merits;

(b) issue any authorised but unissued securities;

(c) issue or grant options in respect of any unissued securities;

(d) authorise or issue, or permit the authorisation or issue of, any securities carrying rights of conversion into or subscription for other securities;

(e) sell, dispose of or acquire, or agree to sell, dispose of or acquire, assets of a material amount except in the ordinary course of business;

(f) enter into contracts otherwise than in the ordinary course of business; or

(g) make a distribution that is abnormal as to timing and amount,

without the prior written approval of the Panel, and the approval of the holders of relevant securities, or in terms of a pre-existing obligation or agreement entered into before the time contemplated in this subsection.

(2) If a regulated company believes that it is subject to a pre-existing obligation contemplated in subsection (1), it may apply to the Panel for consent to proceed.

Prohibited dealings before and during an offer

127. (1) During an offer, or when one is reasonably in contemplation, an offeror or a person acting in concert with that offeror, must not—

(a) make arrangements with any holders of the relevant securities;

(b) deal in, or enter into arrangements to deal in, securities of the offeree regulated company; or

(c) enter into arrangements which involve acceptance of an offer,

if there are favourable conditions attached that are not being extended to all holders of the relevant securities.

(2) During an offer period, an offeror or a person acting in concert with that offeror must not—

(a) sell any securities in the offeree company, unless—

(i) the Panel has consented in advance to that sale;

(ii) the person selling those securities has given at least 24 hours notice to the public that sales of that type might be made, in the manner and form required by the Takeover Regulations; and

(iii) the sale is on the same terms and conditions as the offer; or

(b) acquire any securities in the offeree company after giving the notice contemplated in paragraph *(a)*(ii).

(3) If an offer has been announced or posted, but has not become or been declared unconditional, and has, as a result, subsequently been withdrawn or lapsed, then for a period of 12 months after the date on which the offer was withdrawn or lapsed, the offeror, any person who acted in concert with the offeror in the course of the original offer, or any person who is subsequently acting in concert with any of them, must not—

(a) make an offer for the relevant securities of the offeree company; or

(b) acquire any securities of the offeree company, if as a result of that acquisition, either the offeror or that person would be required to make a mandatory offer in terms of section 123.

(4) Subsection (3) applies equally to a partial offer whether or not the offer has become or been declared unconditional, but the period of 12 months runs from that date on which that offer became or was declared to be unconditional, or is withdrawn or lapsed, as the case may be.

(5) For a period of six months immediately following the later of the closing date of an offer, or the date on which the offer became unconditional—

(a) the offeror;

(b) any person who acted in concert with the offeror; or

(c) any person who is subsequently acting in concert with a person contemplated in paragraph *(a)* or *(b)*,

must not make a second offer to any holder of securities of the target company, or acquire any interest in any such securities, on more favourable terms than those made under the original offer.

CHAPTER 6

BUSINESS RESCUE AND COMPROMISE WITH CREDITORS

Part

Business rescue proceedings

Application and definitions applicable to Chapter

128. (1) In this Chapter—

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

(b) **"business rescue"** means proceedings to facilitate the rehabilitation of a company that is financially distressed by providing for—
  (i) the temporary supervision of the company, and of the management of its affairs, business and property;
  (ii) a temporary moratorium on the rights of claimants against the company or in respect of property in its possession; and
  (iii) the development and implementation, if approved, of a plan to rescue the company by 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 it is not possible for the company to so continue in existence, results in a better return for the company's creditors or shareholders than would result from the immediate liquidation of the company;

(c) **"business rescue plan"** means a plan contemplated in section 150;

(d) **"business rescue practitioner"** means a person appointed, or two or more persons appointed jointly, in terms of this Chapter to oversee a company during business rescue proceedings and 'practitioner' has a corresponding meaning;

(e) **"court"**, depending on the context, means either—
  (i) the High Court that has jurisdiction over the matter; or
  (ii) either—
    (aa) a designated judge of the High Court that has jurisdiction over the matter, if the Judge President has designated any judges in terms of subsection (3); or
    (bb) a judge of the High Court that has jurisdiction over the matter, as assigned by the Judge President to hear the particular matter, if the Judge President has not designated any judges in terms of subsection (3);

(f) **"financially distressed"**, in reference to a particular company at any particular time, means that—
  (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 within the immediately ensuing six months; or
  (ii) it appears to be reasonably likely that the company will become insolvent within the immediately ensuing six months;

(g) **"independent creditor"** means a person who—
  (i) is a creditor of the company, including an employee of the company who is a creditor in terms of section 144(2); and
  (ii) is not related to the company, a director, or the practitioner, subject to subsection (2);

(h) **"rescuing the company"** means achieving the goals set out in the definition of **"business rescue"** in paragraph *(b)*;

(i) **"supervision"** means the oversight imposed on a company during its business rescue proceedings; and

(j) **"voting interest"** means an interest as recognised, appraised and valued in terms of section 145(4) to (6).

(2) For the purpose of subsection (1)*(f)*, an employee of a company is not related to that company solely as a result of being a member of a trade union that holds shares of that company.

(3) For the purposes contemplated in subsection (1)*(e)* or in any other law, the Judge President of a High Court may designate any judge of that court generally as a specialist to determine issues relating to commercial matters, commercial insolvencies and business rescue.

Company resolution to begin business rescue proceedings

129. (1) Subject to subsection (2)*(a)*, the board of a company may resolve that the company voluntarily begin business rescue proceedings and place the company under supervision, if 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.

(2) A resolution contemplated in subsection (1)—

(a) may not be adopted if liquidation proceedings have been initiated by or against the company; and

(b) has no force or effect until it has been filed.

(3) Within five business days after a company has adopted and filed a resolution, as contemplated in subsection (1), or such longer time as the Commission, on application by the company, may allow, the company must—

(a) publish a notice of the resolution, and its effective date, in the prescribed manner to every affected person, including with the notice 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 section 138, and who has consented in writing to accept the appointment.

(4) After appointing a practitioner as required by subsection (3)*(b)*, a company must—

(a) file a notice of the appointment of a practitioner within two business days after making the appointment; and

(b) publish a copy of the notice of appointment to each affected person within five business days after the notice was filed.

(5) If a company fails to comply with any provision of subsection (3) or (4)—

(a) its resolution to begin business rescue proceedings and place the company under supervision lapses and is a nullity; and

(b) the company may not file a further resolution contemplated in subsection (1) for a period of three months after the date on which the lapsed resolution was adopted, unless a court, on good cause shown on an *ex parte* application, approves the company filing a further resolution.

(6) A company that has adopted a resolution contemplated in this section may not adopt a resolution to begin liquidation proceedings, unless the resolution has lapsed in terms of subsection (5), or until the business rescue proceedings have ended as determined in accordance with section 132(2).

(7) If the board of a company has reasonable grounds to believe that the company is financially distressed, but the board has not adopted a resolution contemplated in this section, the board must deliver a written notice to each affected person, setting out the criteria referred to in section 128(1)*(e)* that are applicable to the company, and its reasons for not adopting a resolution contemplated in this section.

Objections to company resolution

130. (1) Subject to subsection (2), at any time after the adoption of a resolution in terms of section 129, until the adoption of a business rescue plan in terms of section 152, an affected person may apply to a court for an order—

(a) setting aside the resolution, on the grounds that—

(i) there is no reasonable basis for believing that the company is financially distressed;

(ii) there is no reasonable prospect for rescuing the company; or
(iii) the company has failed to satisfy the procedural requirements set out in section 129;

(b) setting aside the appointment of the practitioner, on the grounds that the practitioner—
(i) does not satisfy the requirements of section 138;
(ii) is not independent of the company or its management; or
(iii) lacks the necessary skills, having regard to the company's circumstances; or

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

(2) An affected person who, as a director of a company, voted in favour of a resolution contemplated in section 129 may not apply to a court in terms of—
(a) subsection (1)*(a)* to set aside that resolution; or
(b) subsection (1)*(b)* to set aside the appointment of the practitioner appointed by the company,
unless that person satisfies the court that the person, in supporting the resolution, acted in good faith on the basis of information that has subsequently been found to be false or misleading.

(3) An applicant in terms of subsection (1) must—
(a) serve a copy of the application on the company and the Commission; and
(b) notify each affected person of the application in the prescribed manner.

(4) Each affected person has a right to participate in the hearing of an application in terms of this section.

(5) When considering an application in terms of subsection (1)*(a)* to set aside the company's resolution, the court may—
(a) set aside the resolution—
(i) on any grounds set out in subsection (1); or
(ii) if, having regard to all of the evidence, the court considers that it is otherwise just and equitable to do so;
(b) afford the practitioner sufficient time to form an opinion whether or not—
(i) the company appears to be financially distressed; or
(ii) there is a reasonable prospect of rescuing the company,
and after receiving a report from the practitioner, may set aside the company's resolution if the court concludes that the company is not financially distressed, or there is no reasonable prospect of rescuing the company; and
(c) if it makes an order under paragraph *(a)* or *(b)* setting aside the company's resolution, may make any further necessary and appropriate order, including—
(i) an order placing the company under liquidation; or
(ii) if the court has found that there were no reasonable grounds for believing that the company would be unlikely to pay all of its debts as they became due and payable, an order of costs against any director who voted in favour of the resolution to commence business rescue proceedings, unless the court is satisfied that the director acted in good faith and on the basis of information that the director was entitled to rely upon in terms of section 76(4) and (5).

(6) If, after considering an application in terms of subsection (1)*(b)*, the court makes an order setting aside the appointment of a practitioner—
(a) the court must appoint an alternate practitioner who satisfies the requirements of section 138, recommended by, or acceptable to, the holders of a majority of the independent creditors' voting interests who were represented in the hearing before the court; and
(b) the provisions of subsection (5)*(b)*, if relevant, apply to the practitioner appointed in terms of paragraph *(a)*.

Court order to begin business rescue proceedings

131. (1) Unless a company has adopted a resolution contemplated in section 129, an affected person may apply to a court at any time for an order placing the company under supervision and commencing business rescue proceedings.

(2) An applicant in terms of subsection (1) must—
(a) serve a copy of the application on the company and the Commission; and
(b) notify each affected person of the application in the prescribed manner.
(3) Each affected person has a right to participate in the hearing of an application in terms of this section.
(4) After considering an application in terms of subsection (1), the court may—
(a) make an order placing the company under supervision and commencing business rescue proceedings, if the court is satisfied that—
(i) the company is financially distressed;
(ii) the company has failed to pay over any amount in terms of an obligation under or in terms of a public regulation, or contract, with respect to employment-related matters; or
(iii) it is otherwise just and equitable to do so for financial reasons,
and there is a reasonable prospect for rescuing the company; or
(b) dismissing the application, together with any further necessary and appropriate order, including an order placing the company under liquidation.
(5) If the court makes an order in terms of subsection (4)*(a)*, the court may make a further order appointing as interim practitioner a person who satisfies the requirements of section 138, and who has been nominated by the affected person who applied in terms of subsection (1), subject to ratification by the holders of a majority of the independent creditors' voting interests at the first meeting of creditors, as contemplated in section 147.
(6) If liquidation proceedings have already been commenced by or against the company at the time an application is made in terms of subsection (1), the application will suspend those liquidation proceedings until—
(a) the court has adjudicated upon the application; or
(b) the business rescue proceedings end, if the court makes the order applied for.
(7) In addition to the powers of a court on an application contemplated in this section, a court may make an order contemplated in subsection (4), or (5) if applicable, at any time during the course of any liquidation proceedings or proceedings to enforce any security against the company.
(8) A company that has been placed under supervision in terms of this section—
(a) may not adopt a resolution placing itself in liquidation until the business rescue proceedings have ended as determined in accordance with section 132(2); and
(b) must notify each affected person of the order within five business days after the date of the order.

Duration of business rescue proceedings

132. (1) Business rescue proceedings begin when—
(a) the company—
(i) files a resolution to place itself under supervision in terms of section 129(3); or
(ii) applies to the court for consent to file a resolution in terms of section 129(5)*(b)*;
(b) a person applies to the court for an order placing the company under supervision in terms of section 131(1); or
(c) during the course of liquidation proceedings, or proceedings to enforce a security interest, a court makes an order placing the company under supervision.
(2) Business rescue proceedings end when—
(a) the court—
(i) sets aside the resolution or order that began those proceedings; or
(ii) has converted the proceedings to liquidation proceedings;
(b) the practitioner has filed with the Commission a notice of the termination of business rescue proceedings; or
(c) a business rescue plan has been—
(i) proposed and rejected in terms of Part D of this Chapter, and no affected person has acted to extend the proceedings in any manner contemplated in section 153; or

(ii) adopted in terms of Part D of this Chapter, and the practitioner has subsequently filed a notice of substantial implementation of that plan.

(3) If a company's business rescue proceedings have not ended within three months after the start of those proceedings, or such longer time as the court, on application by the practitioner, may allow, the practitioner must—

(a) prepare a report on the progress of the business rescue proceedings, and update it at the end of each subsequent month until the end of those proceedings; and

(b) deliver the report and each update in the prescribed manner to each affected person, and to the—

(i) court, if the proceedings have been the subject of a court order; or

(ii) Commission, in any other case.

General moratorium on legal proceedings against company

133. (1) During business rescue proceedings, no legal proceeding, including enforcement action, against the company, or in relation to any property belonging to the company, or lawfully in its possession, may be commenced or proceeded with in any forum, except—

(a) with the written consent of the practitioner;

(b) with the leave of the court and in accordance with any terms the court considers suitable;

(c) as a set-off against any claim made by the company in any legal proceedings, irrespective whether those proceedings commenced before or after the business rescue proceedings began;

(d) criminal proceedings against the company or any of its directors or officers; or

(e) proceedings concerning any property or right over which the company exercises the powers of a trustee.

(2) During business rescue proceedings, a guarantee or surety by a company in favour of any other person may not be enforced by any person against the company except with leave of the court and in accordance with any terms the court considers just and equitable in the circumstances.

(3) If any right to commence proceedings or otherwise assert a claim against a company is subject to a time limit, the measurement of that time must be suspended during the company's business rescue proceedings.

Protection of property interests

134. Subject to subsections (2) and (3), during a company's business rescue proceedings—

(a) the company may dispose, or agree to dispose, of property only—

(i) in the ordinary course of its business;

(ii) in a *bona fide* transaction at arm's length for fair value approved in advance and in writing by the practitioner; or

(iii) in a transaction contemplated within, and undertaken as part of the implementation of, a business rescue plan that has been approved in terms of section 152;

(b) any person who, as a result of an agreement made in the ordinary course of the company's business before the business rescue proceedings began, is in lawful possession of any property owned by the company may continue to exercise any right in respect of that property as contemplated in that agreement, subject to section 136; and

(c) despite any provision of an agreement to the contrary, no person may exercise any right in respect of any property in the lawful possession of the company, irrespective whether the property is owned by the company, except to the extent that the practitioner consents in writing.

(2) The practitioner may not unreasonably withhold consent in terms of subsection (1)*(c)*, having regard to—

(a) the purposes of this Chapter;

(b) the circumstances of the company; and

(c) the nature of the property, and the rights claimed in respect of it.

(3) If, during a company's business rescue proceedings, the company wishes to dispose of any property over which another person has any security or title interest, the company must—

(a) obtain the prior consent of that other person, unless the proceeds of the disposal would be sufficient to fully discharge the indebtedness protected by that person's security or title interest; and

(b) promptly—

(i) pay to that other person the sale proceeds attributable to that property up to the amount of the company's indebtedness to that other person; or

(ii) provide security for the amount of those proceeds, to the reasonable satisfaction of that other person.

Post-commencement finance

135. (1) To the extent that any remuneration, reimbursement for expenses or other amount of money relating to employment becomes due and payable by a company to an employee during the company's business rescue proceedings, but is not paid to the employee—

(a) the money is regarded to be post-commencement financing; and

(b) will be paid in the order of preference set out in subsection (3)*(a)*.

(2) During its business rescue proceedings, the company may obtain financing other than as contemplated is subsection (1), and any such financing—

(a) may be secured to the lender by utilising any asset of the company to the extent that it is not otherwise encumbered; and

(b) will be paid in the order of preference set out in subsection (3)*(b)*.

(3) After payment of the practitioner's remuneration and costs referred to in section 143, and other claims arising out of the costs of the business rescue proceedings, all claims contemplated—

(a) in subsection (1) will be treated equally, but will have preference over—

(i) all claims contemplated in subsection (2), irrespective whether or not they are secured; and

(ii) all unsecured claims against the company; or

(b) in subsection (2) will have preference in the order in which they were incurred over all unsecured claims against the company.

(4) If business rescue proceedings are superseded by a liquidation order, the preference conferred in terms of this section will remain in force, except to the extent of any claims arising out of the costs of liquidation.

Effect of business rescue on employees and contracts

136. (1) Despite any provision of an agreement to the contrary—

(a) during a company's business rescue proceedings employees of the company immediately before the beginning of those proceedings continue to be so employed on the same terms and conditions, except to the extent that—

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

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

(b) any retrenchment of any such employees contemplated in the company's business rescue plan is subject to section 189 and 189A of the Labour Relations Act, 1995 (Act No. 66 of 1995), and other applicable employment related legislation.

(2) Subject to sections 35A and 35B of the Insolvency Act, 1936 (Act No. 24 of 1936), despite any provision of an agreement to the contrary, during business rescue proceedings, the practitioner may cancel or suspend entirely, partially or conditionally any provision of an agreement to which the company is a party at the commencement of the business rescue period, other than an agreement of employment.

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

(4) If liquidation proceedings have been converted into business rescue proceedings, the liquidator is a creditor of the company to the extent of any outstanding claim by the liquidator for any remuneration due for work performed, or compensation for expenses incurred, before the business rescue proceedings began.

Effect on shareholders and directors

137. (1) During business rescue proceedings an alteration in the classification or status of any issued securities of a company, other than by way of a transfer of securities in the ordinary course of business, is invalid except to the extent—

(a) that the court otherwise directs; or

(b) contemplated in an approved business rescue plan.

(2) During a company's business rescue proceedings, each director of the company—

(a) must continue to exercise the functions of director, subject to the authority of the practitioner;

(b) has a duty to the company to exercise any management function within the company in accordance with the express instructions or direction of the practitioner, to the extent that it is reasonable to do so;

(c) remains bound by the requirements of section 75 concerning personal financial interests of the director or a related person; and

(d) to the extent that the director acts in accordance with paragraphs *(b)* and *(c)*, is relieved from the duties of a director as set out in section 76, and the liabilities set out in section 77, other than section 77(3)*(a)*, *(b)* and *(c)*.

(3) During a company's business rescue proceedings, each director of the company must attend to the requests of the practitioner at all times, and provide the practitioner with any information about the company's affairs as may reasonably be required.

(4) If, during a company's business rescue proceedings, the board, or one or more directors of the company, purports to take any action on behalf of the company that requires the approval of the practitioner, that action is void unless approved by the practitioner.

(5) At any time during the business rescue proceedings, the practitioner may apply to a court for an order removing a director from office on the grounds that the director has—

(a) failed to comply with a requirement of this Chapter; or

(b) by act or omission, has impeded, or is impeding—

(i) the practitioner in the performance of the powers and functions of practitioner;

(ii) the management of the company by the practitioner; or

(iii) the development or implementation of a business rescue plan in accordance with this Chapter.

(6) Subsection (5) is in addition to any right of a person to apply to a court for an order contemplated in section 162.

Part B

Practitioner's functions and terms of appointment

Qualifications of practitioners

138. (1) A person may be appointed as the practitioner of a company only if the person—

(a) is a member in good standing of a profession subject to regulation by a regulatory authority prescribed by the Minister in terms of subsection (2);

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

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

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

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

(2) The Minister may designate one person or association within the Republic to regulate the practice of persons as practitioners in terms of this Act, if that person or association—

(a) is committed to achieving the purposes of this Chapter;

(b) functions predominantly to promote sound principles and good practice of business turnaround or rescue; and

(c) has sufficient human, financial and operational resources, and adequate administrative procedures and safeguards, to enable it to function efficiently and to effectively carry out its functions in terms of this Chapter, or presents to the Minister a credible plan to acquire or develop those resources.

(3) The Minister may—

(a) impose reasonable conditions upon a person or association designated by the Minister in terms of subsection (2) with respect to the carrying out of its functions and powers in terms of this Chapter; and

(b) make regulations prescribing—

(i) minimum qualifications for admission of a person to the practice of a business rescue practitioner; and

(ii) procedures to be followed by a person or association designated by the Minister in terms of subsection (2) in carrying out its functions and powers in terms of this Chapter.

Removal and replacement of practitioner

139. (1) A practitioner may be removed only—

(a) by a court order in terms of section 130; or

(b) as provided for in this section.

(2) Upon request of an affected person, or on its own motion, the court may remove a practitioner from office on any of the following grounds:

(a) Incompetence or failure to perform duties;

(b) failure to exercise the proper degree of care in the performance of the practitioner's functions;

(c) engaging in illegal acts or conduct;

(d) if the practitioner no longer satisfies the requirements set out in section 138(1);

(e) conflict of interest or lack of independence; or

(f) the practitioner is incapacitated and unable to perform the functions of that office, and is unlikely to regain that capacity within a reasonable time.

(3) The company, or the creditor who nominated the practitioner, as the case may be, must appoint a new practitioner if a practitioner dies, resigns or is removed from office, subject to the right of an affected person to bring a fresh application in terms of section 130(1)*(b)* to set aside that new appointment.

General powers and duties of practitioners

140. (1) During a company's business rescue proceedings, the practitioner, in addition to any other powers and duties set out in this Chapter—

(a) has full management control of the company in substitution for its board and pre-existing management;

(b) may delegate any power or function of the practitioner to a person who was part of the board or pre-existing management of the company;

(c) may—

(i) remove from office any person who forms part of the pre-existing management of the company; or

(ii) appoint a person as part of the management of a company, whether to fill a vacancy or not, subject to subsection (2); and

(d) is responsible to—

(i) develop a business rescue plan to be considered by affected persons, in accordance with Part D of this Chapter; and

(ii) implement any business rescue plan that has been adopted in accordance with Part D of this Chapter.

(2) Except with the approval of the court on application by the practitioner, a practitioner may not appoint a person as part of the management of the company, or an advisor to the company or to the practitioner, if that person—

(a) has any other relationship with the company such as would lead a reasonable and informed third party to conclude that the integrity, impartiality or objectivity of that person is compromised by that relationship; or

(b) is related to a person who has a relationship contemplated in paragraph *(a)*.

(3) During a company's business rescue proceedings, the practitioner—

(a) is an officer of the court, and must report to the court in accordance with any applicable rules of, or orders made by, the court;

(b) has the responsibilities, duties and liabilities of a director of the company, as set out in sections 75 to 77; and

(c) other than as contemplated in paragraph *(b)*—

(i) is not liable for any act or omission in good faith in the course of the exercise of the powers and performance of the functions of practitioner; but

(ii) may be held liable in accordance with any relevant law for the consequences of any act or omission amounting to gross negligence in the exercise of the powers and performance of the functions of practitioner.

(4) If the business rescue process concludes with an order placing the company in liquidation, any person who has acted as practitioner during the business rescue process may not be appointed as liquidator of the company.

Investigation of affairs of company

141. (1) As soon as practicable after being appointed, a practitioner must investigate the company's affairs, business, property, and financial situation, and after having done so, consider whether there is any reasonable prospect of the company being rescued.

(2) If, at any time during business rescue proceedings, the practitioner concludes that—

(a) there is no reasonable prospect for the company to be rescued, the practitioner must—

(i) so inform the court, the company, and all affected persons in the prescribed manner; and

(ii) apply to the court for an order discontinuing the business rescue proceedings and placing the company into liquidation;

(b) there no longer are reasonable grounds to believe that the company is financially distressed, the practitioner must so inform the court, the company, and all affected persons in the prescribed manner, and—

(i) if the business rescue process was confirmed by a court order in terms of section 130, or initiated by an application to the court in terms of section 131, apply to a court for an order terminating the business rescue proceedings; or

(ii) otherwise, file a notice of termination of the business rescue proceedings; or

(c) there is evidence, in the dealings of the company before the business rescue proceedings began, of—

(i) voidable transactions, or a failure by the company or any director to perform any material obligation relating to the company, the practitioner must direct the management to take any necessary steps to rectify the matter;

(ii) reckless trading, fraud or other contravention of any law relating to the company, the practitioner must—

(aa) forward the evidence to the appropriate authority for further investigation and possible prosecution; and

(bb) direct the management to take any necessary steps to rectify the matter, including recovering any misappropriated assets of the company.

(3) A court to which an application has been made in terms of subsection (2)*(a)*(ii) may make the order applied for, or any other order that the court considers appropriate in the circumstances.

Directors of company to co-operate with and assist practitioner

142. (1) As soon as practicable after business rescue proceedings begin, each director of a company must deliver to the practitioner all books and records that relate to the affairs of the company and are in the director's possession.

(2) Any director of a company who knows where other books and records relating to the company are being kept, must inform the practitioner as to the whereabouts of those books and records.

(3) Within five business days after business rescue proceedings begin, or such longer period as the practitioner allows, the directors of a company must provide the practitioner with a statement of affairs containing, at a minimum, particulars of the following:

(a) Any material transactions involved the company or the assets of the company, and occurring within 12 months immediately before the business rescue proceedings began;

(b) any court, arbitration or administrative proceedings, including enforcement proceedings, involving the company;

(c) the assets and liabilities of the company, and its income and disbursements within the immediately preceding 12 months;

(d) the number of employees, and any collective agreements or other agreements relating to the rights of employees;

(e) any debtors and their obligations to the company; and

(f) any creditors and their rights or claims against the company.

(4) No person is entitled, as against the practitioner of a company, to retain possession of any books or records of the company, or to claim or enforce a lien over any such books or records.

Remuneration of practitioner

143. (1) The practitioner is entitled to charge an amount to the company for the remuneration and expenses of the practitioner in accordance with the tariff prescribed in terms of subsection (6).

(2) The practitioner may propose an agreement with the company providing for further remuneration, additional to that contemplated in subsection (1), to be calculated on the basis of a contingency related to—

(a) the adoption of a business rescue plan at all, or within a particular time, or the inclusion of any particular matter within such a plan; or

(b) the attainment of any particular result or combination of results relating to the business rescue proceedings.

(3) Subject to subsection (4), an agreement contemplated in subsection (2) is final and binding on the company if it is approved by—

(a) the holders of a majority of the creditors' voting interests, as determined in accordance with section 145(4) to (6), present and voting at a meeting called for the purpose of considering the proposed agreement; and

(b) the holders of a majority of the voting rights attached to any shares of the company that entitle the shareholder to a portion of the residual value of the company on winding-up, present and voting at a meeting called for the purpose of considering the proposed agreement.

(4) A creditor or shareholder who voted against a proposal contemplated in this section may apply to a court within 10 business days after the date of voting on that proposal, for an order setting aside the agreement on the grounds that—

(a) the agreement is not just and equitable; or

(b) that the remuneration provided for in the agreement is egregiously unreasonable having regard to the financial circumstances of the company.

(5) To the extent that the practitioner's remuneration and expenses are not fully paid, the practitioner's claim for those amounts will rank in priority before the claims of all other secured and unsecured creditors.

(6) The Minister may make regulations prescribing a tariff of fees and expenses for the purpose of subsection (1).

Part C

Rights of affected persons during business rescue proceedings

Rights of employees

144. (1) During a company's business rescue proceedings any employees of the company who are—

(a) represented by a registered trade union may exercise any rights set out in this Chapter—

(i) collectively through their trade union; and

(ii) in accordance with applicable labour law; or

(b) not represented by a registered trade union may elect to exercise any rights set out in this Chapter either directly, or by proxy through an employee organisation or representative.

(2) To the extent that any remuneration, reimbursement for expenses or other amount of money relating to employment became due and payable by a company to an employee at any time before the beginning of the company's business rescue proceedings, and had not been paid to that employee immediately before the beginning of those proceedings, the employee is a preferred unsecured creditor of the company for the purposes of this Chapter.

(3) During a company's business rescue process, every registered trade union representing any employees of the company, and any employee who is not so represented, is entitled to—

(a) notice of each court proceeding, decision, meeting or other relevant event concerning the business rescue proceedings and such notice must be given to employees at their workplace and served at the head office of the relevant trade union;

(b) participate in any court proceedings arising during the business rescue proceedings;

(c) form a committee of employees' representatives;

(d) be consulted by the practitioner during the development of the business rescue plan, and afforded sufficient opportunity to review any such plan and prepare a submission contemplated in section 152(1)*(c)*;

(e) be present and make a submission to the meeting of the holders of voting interests before a vote is taken on any proposed business rescue plan, as contemplated in section 152(1)*(c)*;

(f) vote with creditors on a motion to approve a proposed business plan, to the extent that the employee is a creditor, as contemplated in subsection (1); and

(g) if the proposed business rescue plan is rejected, to—

(i) propose the development of an alternative plan, in the manner contemplated in section 153; or

(ii) present an offer to acquire the interests of one or more affected persons, in the manner contemplated in section 153.

(4) A medical scheme, or a pension scheme including a provident scheme, for the benefit of the past or present employees of a company is an unsecured creditor of the company for the purposes of this Chapter to the extent of—

(a) any amount that was due and payable by the company to the trustees of the scheme at any time before the beginning of the company's business rescue proceedings, and that had not been paid immediately before the beginning of those proceedings; and

(b) in the case of a defined benefit pension scheme, the present value at the commencement of the business rescue proceedings of any unfunded liability under that scheme.

(5) The rights set out in this section are in addition to any other rights arising or accruing in terms of any law, contract, collective agreement, shareholding, security or court order.

Participation by creditors

145. (1) Each creditor is entitled to—

(a) notice of each court proceeding, decision, meeting or other relevant event concerning the business rescue proceedings;

(b) participate in any court proceedings arising during the business rescue proceedings;

(c) formally participate in a company's business rescue proceedings to the extent provided for in this Chapter; and

(d) informally participate in those proceedings by making proposals for a business rescue plan to the practitioner.

(2) In addition to the rights set out in subsection (1), each creditor has—

(a) the right to vote to amend, approve or reject a proposed business rescue plan, in the manner contemplated in section 152; and

(b) if the proposed business rescue plan is rejected, a further right to—

(i) propose the development of an alternative plan, in the manner contemplated in section 153; or

(ii) present an offer to acquire the interests of any or all of the other creditors in the manner contemplated in section 153.

(3) The creditors of a company are entitled to form a creditors' committee, and through that committee are entitled to be consulted by the practitioner during the development of the business rescue plan.

(4) In respect of any decision contemplated in this Chapter that requires the support of the holders of creditors' voting interests—

(a) a secured or unsecured creditor has a voting interest equal to the value of the amount owed to that creditor by the company; and

(b) a concurrent creditor who would be subordinated in a liquidation has a voting interest, as independently and expertly appraised and valued at the request of the practitioner, equal to the amount, if any, that the creditor could reasonably expect to receive in such a liquidation of the company.

(5) The practitioner of a company must—

(a) determine whether a creditor is independent for the purposes of this Chapter;

(b) request a suitably qualified person to independently and expertly appraise and value an interest contemplated in subsection (4)*(b)*; and

(c) give a written notice of the determination, or appraisal and valuation, to the person concerned at least 15 business days before the date of the meeting to be convened in terms of section 151.

(6) Within five business days after receiving a notice of a determination contemplated in subsection (5), a person may apply to a court to—

(a) review the practitioner's determination that the person is, or is not, an independent creditor; or

(b) review, re-appraise and re-value that person's voting interest, as determined in terms of subsection (5)*(b)*.

Participation by holders of company's securities

146. During a company's business rescue proceedings, each holder of any issued security of the company is entitled to—

(a) notice of each court proceeding, decision, meeting or other relevant event concerning the business rescue proceedings;

(b) participate in any court proceedings arising during the business rescue proceedings;

(c) formally participate in a company's business rescue proceedings to the extent provided for in this Chapter;

(d) vote to approve or reject a proposed business rescue plan in the manner contemplated in section 152, if the plan would alter the rights associated with the class of securities held by that person; and

(e) if the business rescue plan is rejected, to—

(i) propose the development of an alternative plan, in the manner contemplated in section 153; or

(ii) present an offer to acquire the interests of any or all of the creditors or other holders of the company's securities in the manner contemplated in section 153.

First meeting of creditors

147. (1) Within 10 business days after being appointed, the practitioner must convene, and preside over, a first meeting of creditors, at which—

(a) the practitioner—

(i) must inform the creditors whether the practitioner believes that there is a reasonable prospect of rescuing the company; and

(ii) may receive proof of claims by creditors; and

(b) the creditors may determine whether or not a committee of creditors should be appointed and, if so, may appoint the members of the committee.

(2) The practitioner must give notice of the first meeting of creditors to every creditor of the company whose name and address is known to, or can reasonably be obtained by, the practitioner, setting out the—

(a) date, time and place of the meeting; and

(b) agenda for the meeting.

(3) At any meeting of creditors, other than the meeting contemplated in section 151, a decision supported by the holders of a simple majority of the independent creditors' voting interests voted on a matter, is the decision of the meeting on that matter.

First meeting of employees' representatives

148. (1) Within 10 business days after being appointed, the practitioner must convene, and preside over, a first meeting of employees' representatives, at which—

(a) the practitioner must inform the employees' representatives whether the practitioner believes that there is a reasonable prospect of rescuing the company; and

(b) the employees' representatives may determine whether or not an employees' committee should be appointed and, if so, may appoint the members of the committee.

(2) The practitioner must give notice of the meeting to every registered trade union representing employees of the company and, if there are any employees who are not represented by such a registered trade union, to those employees, or their representatives, setting out the—

(a) date, time and place of the meeting; and

(b) agenda for the meeting.

Functions, duties and membership of committees of affected persons

149. (1) A committee of employees, or of creditors, appointed in terms of section 147 or 148, respectively—

(a) may consult with the practitioner about any matter relating to the business rescue proceedings, but may not direct or instruct the practitioner;

(b) may, on behalf of the general body of creditors or employees, respectively, receive and consider reports relating to the business rescue proceedings; and

(c) must act independently of the practitioner to ensure fair and unbiased representation of creditors' or employees' interests.

(2) A person may be a member of a committee of creditors or employees, respectively, only if the person is—

(a) an independent creditor, or an employee, of the company;

(b) an agent, proxy or attorney of an independent creditor or employee, or other person acting under a general power of attorney; or

(c) authorised in writing by an independent creditor or employee to be a member.

Part D

Development and approval of business rescue plan

Proposal of business rescue plan

150. (1) The practitioner, after consulting the creditors, other affected persons, and the management of the company, must prepare a business rescue plan for consideration and possible adoption at a meeting held in terms of section 151.

(2) The business rescue plan must contain all the information reasonably required to facilitate affected persons in deciding whether or not to accept or reject the plan, and must be divided into three Parts, as follows:

(a) **Part A—Background**, which must include at least—

(i) a complete list of all the material assets of the company, as well as an indication as to which assets were held as security by creditors when the business rescue proceedings began;

(ii) a complete list of the creditors of the company when the business rescue proceedings began, as well as an indication as to which creditors would qualify as secured, statutory preferent and concurrent in terms of the laws of insolvency, and an indication of which of the creditors have proved their claims;

(iii) the probable dividend that would be received by creditors, in their specific classes, if the company were to be placed in liquidation;

(iv) a complete list of the holders of the company's issued securities;

(v) a copy of the written agreement concerning the practitioner's remuneration; and

(vi) a statement whether the business rescue plan includes a proposal made informally by a creditor of the company.

(b) **Part B—Proposals**, which must include at least—

(i) the nature and duration of any moratorium for which the business rescue plan makes provision;

(ii) the extent to which the company is to be released from the payment of its debts, and the extent to which any debt is proposed to be converted to equity in the company, or another company;

(iii) the ongoing role of the company, and the treatment of any existing agreements;

(iv) the property of the company that is to be available to pay creditors' claims in terms of the business rescue plan;

(v) the order of preference in which the proceeds of property will be applied to pay creditors if the business rescue plan is adopted;

(vi) the benefits of adopting the business rescue plan as opposed to the benefits that would be received by creditors if the company were to be placed in liquidation; and

(vii) the effect that the business rescue plan will have on the holders of each class of the company's issued securities.

(c) **Part C—Assumptions and conditions**, which must include at least—

(i) a statement of the conditions that must be satisfied, if any, for the business rescue plan to—

(aa) come into operation; and

(bb) be fully implemented;

(ii) the effect, if any, that the business rescue plan contemplates on the number of employees, and their terms and conditions of employment;

(iii) the circumstances in which the business rescue plan will end; and
(iv) a projected—
(aa) balance sheet for the company; and
(bb) statement of income and expenses for the ensuing three years,
prepared on the assumption that the proposed business plan is adopted.

(3) The projected balance sheet and statement required by subsection (2)*(c)*(iv)—
(a) must include a notice of any material assumptions on which the projections are based; and
(b) may include alternative projections based on varying assumptions and contingencies.

(4) A proposed business rescue plan must conclude with a certificate by the practitioner stating that any—
(a) actual information provided appears to be accurate, complete, and up to date; and
(b) projections provided are estimates made in good faith on the basis of factual information and assumptions as set out in the statement.

(5) The business rescue plan must be published by the company within 25 business days after the date on which the practitioner was appointed, or such longer time as may be allowed by—
(a) the court, on application by the company; or
(b) the holders of a majority of the creditors' voting interests.

Meeting to determine future of company

151. (1) The practitioner must convene and preside over a meeting of creditors and any other holders of a voting interest, called for the purpose of considering the proposed rescue plan within 10 business days after the publication of that plan in terms of section 150.

(2) At least five business days before the meeting contemplated in subsection (1), the practitioner must deliver a notice of the meeting to all affected persons, setting out—
(a) the date, time and place of the meeting;
(b) the agenda of the meeting; and
(c) a summary of the rights of affected persons to participate in and vote at the meeting.

(3) The meeting contemplated in this section may be adjourned from time to time, as necessary or expedient, until a decision regarding the company's future has been taken in accordance with sections 152 and 153.

Consideration of business rescue plan

152. (1) At a meeting convened in terms of section 151, the practitioner must—
(a) introduce the proposed business rescue plan for consideration by the creditors, and if applicable, by the shareholders;
(b) inform the meeting whether the practitioner continues to believe that there is a reasonable prospect of the company being rescued;
(c) provide an opportunity for the employees' representatives to address the meeting;
(d) invite discussion, and entertain and conduct a vote, on any motions to—
(i) amend the proposed plan, in any manner moved and seconded by holders of creditors' voting interests, and satisfactory to the practitioner; or
(ii) direct the practitioner to adjourn the meeting in order to revise the plan for further consideration; and
(e) call for a vote for preliminary approval of the proposed plan, as amended if applicable, unless the meeting has first been adjourned in accordance with paragraph *(d)*(ii).

(2) In a vote called in terms of subsection (1)*(e)*, the proposed business rescue plan will be approved on a preliminary basis if—
(a) it was supported by the holders of more than 75% of the creditors' voting interests that were voted; and

(b) the votes in support of the proposed plan included at least 50% of the independent creditors' voting interests, if any, that were voted.

(3) If a proposed business rescue plan—

(a) is not approved on a preliminary basis, as contemplated in subsection (2), the plan is rejected, and may be considered further only in terms of section 153;

(b) does not alter the rights of the holders of any class of the company's securities, approval of that plan on a preliminary basis in terms of subsection (2) constitutes also the final adoption of that plan, subject to satisfaction of any conditions on which that plan is contingent; or

(c) does alter the rights of any class of holders of the company's securities—

(i) the practitioner must immediately hold a meeting of holders of the class, or classes of securities who rights would be altered by the plan, and call for a vote by them to approve the adoption of the proposed business rescue plan; and

(ii) if, in a vote contemplated in subparagraph (i), a majority of the voting rights that were exercised—

(aa) support adoption of the plan, it will have been finally adopted, subject only to satisfaction of any conditions on which it is contingent; or

(bb) oppose adoption of the plan, the plan is rejected, and may be considered further only in terms of section 153.

(4) A business rescue plan that has been adopted is binding on the company, and on each of the creditors of the company and every holder of the company's securities, whether or not such a person—

(a) was present at the meeting;

(b) voted in favour of adoption of the plan; or

(c) in the case of creditors, had proven their claims against the company.

(5) The company, under the direction of the practitioner, must take all necessary steps to—

(a) attempt to satisfy any conditions on which the business rescue plan is contingent; and

(b) implement the plan as adopted.

(6) To the extent necessary to implement an adopted business rescue plan—

(a) the practitioner may, in accordance with that plan, determine the consideration for, and issue, any authorised securities of the company, despite section 38 or 40 to the contrary; and

(b) if the business rescue plan was approved by the shareholders of the company, as contemplated in subsection (3)*(c)*, the practitioner may amend the company's Memorandum of Incorporation to authorise, and determine the preferences, rights, limitations and other terms of, any securities that are not otherwise authorised, but are contemplated to be issued in terms the business rescue plan, despite any provision of section 16, 36 or 37 to the contrary.

(7) Except to the extent that an approved business rescue plan provides otherwise, a pre-emptive right of any shareholder of the company, as contemplated in section 39, does not apply with respect to an issue of shares by the company in terms of the business rescue plan.

(8) When the business rescue plan has been substantially implemented, the practitioner must file a notice of the substantial implementation of the business rescue plan.

Failure to adopt business rescue plan

153. (1) *(a)* If a business rescue plan has been rejected as contemplated in section 152(3)*(a)* or *(c)*(ii)*(bb)* the practitioner may—

(i) seek a vote of approval from the holders of voting interests to prepare and publish a revised plan; or

(ii) advise the meeting that the company will apply to a court to set aside the result of the vote by the holders of voting interests or shareholders, as the case may be, on the grounds that it was inappropriate.

(b) If the practitioner does not take any action contemplated in paragraph *(a)*—

(i) any affected person present at the meeting may—

(aa) call for a vote of approval from the holders of voting interests requiring the practitioner to prepare and publish a revised plan; or

(bb) apply to the court to set aside the result of the vote by the holders of voting interests or shareholders, as the case may be, on the grounds that it was inappropriate; or

(ii) any affected person, or combination of affected persons, may make a binding offer to purchase the voting interests of one or more persons who opposed adoption of the business rescue plan, at a value independently and expertly determined, on the request of the practitioner, to be a fair and reasonable estimate of the return to that person, or those persons, if the company were to be liquidated.

(2) If the practitioner, acting in terms of subsection (1)*(a)*(ii), or an affected person, acting in terms of subsection (1)*(b)*(i)*(bb)*, informs the meeting that an application will be made to the court as contemplated in those provisions, the practitioner must adjourn the meeting—

(a) for five business days, unless the contemplated application is made to the court during that time; or

(b) until the court has disposed of the contemplated application.

(3) If, on the request of the practitioner in terms of subsection (1)*(a)*(i), or a call by an affected person in terms of subsection (1)*(b)*(i)*(aa)*, the meeting directs the practitioner to prepare and publish a revised business rescue plan—

(a) the practitioner must—

(i) conclude the meeting after that vote; and

(ii) prepare and publish a new or revised business rescue plan within 10 business days; and

(b) the provisions of this Part apply afresh to the publishing and consideration of that new or revised plan.

(4) If an affected person makes an offer contemplated in subsection (1)*(b)*(ii), the practitioner must—

(a) adjourn the meeting for no more than five business days, as necessary to afford the practitioner an opportunity to make any necessary revisions to the business rescue plan to appropriately reflect the results of the offer; and

(b) set a date for resumption of the meeting, without further notice, at which the provisions of section 152 and this section will apply afresh.

(5) If no person takes any action contemplated in subsection (1), the practitioner must promptly file a notice of the termination of the business rescue proceedings.

(6) A holder of a voting interest, or a person acquiring that interest in terms of a binding offer, may apply to a court to review, re-appraise and re-value a determination by an independent expert in terms of subsection (1)*(b)*(ii).

Discharge of debts and claims

154. (1) A business rescue plan may provide that, if it is implemented in accordance with its terms and conditions, a creditor who has acceded to the discharge of the whole or part of a debt owing to that creditor will lose the right to enforce the relevant debt or part of it.

(2) If a business rescue plan has been approved and implemented in accordance with this Chapter, 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.

Part E

Compromise with creditors

Compromise between company and creditors

155. (1) This section applies to a company, irrespective of whether or not it is financially distressed as defined in section 128(1)*(f)*, unless it is engaged in business rescue proceedings in terms of this Chapter.

(2) The board of a company, or the liquidator of such a company if it is being wound up, may propose an arrangement or a compromise of its financial obligations to all of its creditors, or to all of the members of any class of its creditors, by delivering a copy of the proposal, and notice of meeting to consider the proposal, to—

(a) every creditor of the company, or every member of the relevant class of creditors whose name or address is known to, or can reasonably be obtained by, the company; and

(b) the Commission.

(3) A proposal contemplated in subsection (2) must contain all information reasonably required to facilitate creditors in deciding whether or not to accept or reject the proposal, and must be divided into three Parts, as follows:

(a) **Part A—Background**, which must include at least—

(i) a complete list of all the material assets of the company, as well as an indication as to which assets are held as security by creditors as of the date of the proposal;

(ii) a complete list of the creditors of the company as of the date of the proposal, as well as an indication as to which creditors would qualify as secured, statutory preferent and concurrent in terms of the laws of insolvency, and an indication of which of the creditors have proved their claims;

(iii) the probable dividend that would be received by creditors, in their specific classes, if the company were to be placed in liquidation;

(iv) a complete list of the holders of the company issued securities, and the effect that the proposal would have on them, if any; and

(v) whether the proposal includes a proposal made informally by a creditor of the company.

(b) **Part B—Proposals**, which must include at least—

(i) the nature and duration of any proposed debt moratorium;

(ii) the extent to which the company is to be released from the payment of its debts, and the extent to which any debt is proposed to be converted to equity in the company, or another company;

(iii) the treatment of contracts and ongoing role of the company;

(iv) the property of the company that is proposed to be available to pay creditors' claims;

(v) the order of preference in which the proceeds of property of the company will be applied to pay creditors if the proposal is adopted; and

(vi) the benefits of adopting the proposal as opposed to the benefits that would be received by creditors if the company were to be placed in liquidation.

(c) **Part C—Assumptions and conditions**, which must include at least—

(i) a statement of the conditions that must be satisfied, if any, for the proposal to—

(aa) come into operation; and

(bb) be fully implemented;

(ii) the effect, if any, that the plan contemplates on the number of employees, and their terms and conditions of employment; and

(iii) a projected—

(aa) balance sheet for the company; and

(bb) statement of income and expenses for the ensuing three years, prepared on the assumption that the proposal is accepted.

(4) The projected balance sheet and statement required by subsection (3)*(c)*(iii)—

(a) must include a notice of any significant assumptions on which the projections are based; and

(b) may include alternative projections based on varying assumptions and contingencies.

(5) A proposal must conclude with a certificate by an authorised director or prescribed officer of the company stating that any—

(a) factual information provided appears to be accurate, complete, and up to the date; and

(b) projections provided are estimates made in good faith on the basis of factual information and assumptions as set out in the statement.

(6) A proposal contemplated in this section will have been adopted by the creditors of the company, or the members of a relevant class of creditors, if it is supported by a majority in number, representing at least 75% in value of the creditors or class, as the case may be, present and voting in person or by proxy, at a meeting called for that purpose.

(7) If a proposal is adopted as contemplated in subsection (6)—

(a) the company may apply to the court for an order approving the proposal; and

(b) the court, on an application in terms of paragraph *(a)* may sanction the compromise as set out in the adopted proposal, if it considers it just and equitable to do so, having regard to—

(i) the number of creditors of any affected class of creditors, who were present or represented at the meeting, and who voted in favour of the proposal; and

(ii) in the case of a compromise in respect of a company being wound up, the report of the Master required in terms of the laws contemplated in item 9 of Schedule 5.

(8) A copy of an order of the court sanctioning a compromise—

(a) must be filed by the company within five business days;

(b) must be attached to each copy of the company's Memorandum of Incorporation that is kept at the company's registered office, or elsewhere as contemplated in section 25; and

(c) is final and binding on all of the company's creditors or all of members of the relevant class of creditors, as the case may be, as of the date on which it is filed.

(9) An arrangement or a compromise contemplated in this section does not affect the liability of any person who is a surety of the company.

CHAPTER 7

REMEDIES AND ENFORCEMENT

Part A

General principles

Alternative procedures for addressing complaints or securing rights

156. A person referred to in section 157(1) may seek to address an alleged contravention of this Act, or to enforce any provision of, or right in terms of this Act, a company's Memorandum of Incorporation or rules, or a transaction or agreement contemplated in this Act, the company's Memorandum of Incorporation or rules, by—

(a) attempting to resolve any dispute with or within a company through alternative dispute resolution in accordance with Part C of this Chapter;

(b) applying to the Companies Tribunal for adjudication in respect of any matter for which such an application is permitted in terms of this Act;

(c) applying for appropriate relief to the division of the High Court that has jurisdiction over the matter; or

(d) filing a complaint in accordance with Part D of this Chapter within the time permitted by section 219 with—

(i) the Panel, if the complaint concerns a matter within its jurisdiction; or
(ii) the Commission in respect of any matter arising in terms of this Act, other than a matter contemplated in subparagraph (i).

Extended standing to apply for remedies

157. (1) When, in terms of this Act, an application can be made to, or a matter can be brought before, a court, the Companies Tribunal, the Panel or the Commission, the right to make the application or bring the matter may be exercised by a person—

(a) directly contemplated in the particular provision of this Act;
(b) acting on behalf of a person contemplated in paragraph *(a)*, who cannot act in their own name;
(c) acting as a member of, or in the interest of, a group or class of affected persons, or an association acting in the interest of its members; or
(d) acting in the public interest, with leave of the court.

(2) The Commission or the Panel, acting in either case on its own motion and in its absolute discretion, may—

(a) commence any proceedings in a court in the name of a person who, when filing a complaint with the Commission or Panel, as the case may be, in respect of the matter giving rise to those proceedings, also made a written request that the Commission or Panel do so; or
(b) apply for leave to intervene in any court proceedings arising in terms of this Act, in order to represent any interest that would not otherwise be adequately represented in those proceedings.

(3) For greater certainty, nothing in this section creates a right of any person to commence any legal proceedings contemplated in section 165(1), other than—

(a) on behalf of a person entitled to make a demand in terms of section 165(2); and
(b) in the manner set out in section 165.

Remedies to promote purpose of Act

158. When determining a matter brought before it in terms of this Act, or making an order contemplated in this Act—

(a) a court must develop the common law as necessary to improve the realisation and enjoyment of rights established by this Act; and
(b) the Commission, the Panel, the Companies Tribunal or a court—
(i) must promote the spirit, purpose and objects of this Act; and
(ii) if any provision of this Act, or other document in terms of this Act, read in its context, can be reasonably construed to have more than one meaning, must prefer the meaning that best promotes the spirit and purpose of this Act, and will best improve the realisation and enjoyment of rights.

Protection for whistle-blowers

159. (1) To the extent that this section creates any right of, or establishes any protection for, an employee, as defined in the Protected Disclosures Act, 2000 (Act No. 26 of 2000)—

(a) that right or protection is in addition to, and not in substitution for, any right or protection established by that Act; and
(b) that Act applies to a disclosure contemplated in this section by an employee, as defined in that Act, irrespective whether that Act would otherwise apply to that disclosure.

(2) Any provision of a company's Memorandum of Incorporation or rules, or an agreement, is void to the extent that it is inconsistent with, or purports to limit, set aside or negate the effect of this section.

(3) This section applies to any disclosure of information by a person contemplated in subsection (4) if—

(a) it is made in good faith to the Commission, the Companies Tribunal, the Panel, a regulatory authority, an exchange, a legal adviser, a director, prescribed officer, company secretary, auditor, board or committee of the company concerned; and

(b) the person making the disclosure reasonably believed at the time of the disclosure that the information showed or tended to show that a company or external company, or a director or prescribed officer of a company acting in that capacity, has—

(i) contravened this Act, or a law mentioned in Schedule 4;

(ii) failed or is failing to comply with any statutory obligation to which the company is subject;

(iii) engaged in conduct that has endangered or is likely to endanger the health or safety of any individual, or damage the environment;

(iv) unfairly discriminated, or condoned unfair discrimination, against any person, as contemplated in section 9 of the Constitution and the Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act No. 4 of 2000); or

(v) contravened any other legislation in a manner that could expose the company to an actual or contingent risk of liability, or is inherently prejudicial to the interests of the company.

(4) A shareholder, director, company secretary, prescribed officer or employee of a company, a registered trade union that represents employees of the company or another representative of the employees of that company, a supplier of goods or services to a company, or an employee of such a supplier, who makes a disclosure contemplated in this section—

(a) has qualified privilege in respect of the disclosure; and

(b) is immune from any civil, criminal or administrative liability for that disclosure.

(5) A person contemplated in subsection (4) is entitled to compensation from another person for any damages suffered if the first person is entitled to make, or has made, a disclosure contemplated in this section and, because of that possible or actual disclosure, the second person—

(a) engages in conduct with the intent to cause detriment to the first person, and the conduct causes such detriment; or

(b) directly or indirectly makes an express or implied threat, whether conditional or unconditional, to cause any detriment to the first person or to another person, and—

(i) intends the first person to fear that the threat will be carried out; or

(ii) is reckless as to causing the first person to fear that the threat will be carried out, irrespective of whether the first person actually feared that the threat would be carried out.

(6) Any conduct or threat contemplated in subsection (5) is presumed to have occurred as a result of a possible or actual disclosure that a person is entitled to make, or has made, unless the person who engaged in the conduct or made the threat can show satisfactory evidence in support of another reason for engaging in the conduct or making the threat.

(7) A public company and state-owned company must directly or indirectly—

(a) establish and maintain a system to receive disclosures contemplated in this section confidentially, and act on them; and

(b) routinely publicise the availability of that system to the categories of persons contemplated in subsection (4).

Part B

Rights to seek specific remedies

Disputes concerning reservation or registration of company names

160. (1) A person to whom a notice is delivered in terms of section 12(3) or section 14(3), or any other person with an interest in the name of a company, may apply to the Companies Tribunal in the prescribed manner and form for a determination whether the name satisfies the requirements of section 11.

(2) An application in terms of subsection (1) may be made—

(a) within three months after the date of a notice contemplated in subsection (1), if the applicant received such a notice; or

(b) on good cause shown at any time after the date of the reservation or registration of the name that is the subject of the application, in any other case.

(3) After considering an application made in terms of subsection (1), and any submissions by the applicant and any other person with an interest in the name or proposed name that is the subject of the application, the Companies Tribunal—

(a) must make a determination whether that name satisfies the requirements of section 11; and

(b) may make an administrative order directing—

(i) the Commission to—

(aa) reserve a contested name for the applicant in terms of section 12;

(bb) register the contested name, or amended name as the name of a company; or

(cc) cancel a reservation granted in terms of section 12, if the reserved name has not been used by the person entitled to it; or

(ii) a company to choose a new name, and to file a notice of an amendment to its Memorandum of Incorporation, within a period and on any conditions that the Tribunal considers just, equitable and expedient in the circumstances, including a condition exempting the company from the requirement to pay the prescribed fee for filing the notice of amendment contemplated in this paragraph.

(4) Within 20 business days after receiving a notice or a decision issued by the Companies Tribunal in terms of this section, an incorporator of a company, a company, a person who received a notice in terms of section 12(3) or 14(3), an applicant under subsection (1) or and any other person with an interest in the name or proposed name that is the subject of the application, as the case may be, may apply to a court to review the notice or decision.

Application to protect rights of securities holders

161. (1) A holder of issued securities of a company may apply to a court for—

(a) an order determining any rights of that securities holder in terms of this Act, the company's Memorandum of Incorporation, any rules of the company, or any applicable debt instrument; or

(b) any appropriate order necessary to—

(i) protect any right contemplated in paragraph *(a)*; or

(ii) rectify any harm done to the securities holder by—

(aa) the company as a consequence of an act or omission that contravened this Act or the company's Memorandum of Incorporation, rules or applicable debt instrument, or violated any right contemplated in paragraph *(a)*; or

(bb) any of its directors to the extent that they are or may be held liable in terms of section 77.

(2) The right to apply to a court in terms of this section is in addition to any other remedy available to a holder of a companies securities—

(a) in terms of this Act; or

(b) in terms of the common law, subject to this Act.

Application to declare director delinquent or under probation

162. (1) In this section, ''legislation'' means any national or provincial legislation—

(a) relating to the promotion, formation or management of a juristic person;

(b) regulating an industry or sector of an industry; or

(c) imposing obligations on, prohibiting any conduct by, or otherwise regulating the activities of, a juristic person.

(2) A company, a shareholder, director, company secretary or prescribed officer of a company, a registered trade union that represents employees of the company or another representative of the employees of a company may apply to a court for a order declaring a person delinquent or under probation if—

(a) the person is a director of that company or, within the 24 months immediately preceding the application, was a director of that company; and

(b) any of the circumstances contemplated in—

(i) subsection (5)*(a)* to *(c)* apply, in the case of an application for a declaration of delinquency; or

(ii) subsections (7)*(a)* and (8) apply, in the case of an application for probation.

(3) The Commission or the Panel may apply to a court for an order declaring a person delinquent or under probation if—

(a) the person is a director of a company or, within the 24 months immediately preceding the application, was a director of a company; and

(b) any of the circumstances contemplated in—

(i) subsection (5) apply, in the case of an application for a declaration of delinquency; or

(ii) subsections (7) and (8) apply, in the case of an application for probation.

(4) Any organ of state responsible for the administration of any legislation may apply to a court for an order declaring a person delinquent if—

(a) the person is a director of a company or, within the 24 months immediately preceding the application, was a director of a company; and

(b) any of the circumstances contemplated in subsection (5)*(d)* to *(f)* apply with respect to any legislation administered by that organ of state.

(5) A court must make an order declaring a person to be a delinquent director if the person—

(a) consented to serve as a director, or acted in the capacity of a director or prescribed officer, while ineligible or disqualified in terms of section 69, unless the person was acting—

(i) under the protection of a court order contemplated in section 69(11); or

(ii) as a director as contemplated in section 69(12);

(b) while under an order of probation in terms of this section or section 47 of the Close Corporations Act, 1984 (Act No. 69 of 1984), acted as a director in a manner that contravened that order;

(c) while a director—

(i) grossly abused the position of director;

(ii) took personal advantage of information or an opportunity, contrary to section 76(2)*(a)*;

(iii) intentionally, or by gross negligence, inflicted harm upon the company or a subsidiary of the company, contrary to section 76(2)*(a)*;

(iv) acted in a manner—

(aa) that amounted to gross negligence, wilful misconduct or breach of trust in relation to the performance of the director's functions within, and duties to, the company; or

(bb) contemplated in section 77(3)*(a)*, *(b)* or *(c)*;

(d) has repeatedly been personally subject to a compliance notice or similar enforcement mechanism, for substantially similar conduct, in terms of any legislation;

(e) has at least twice been personally convicted of an offence, or subjected to an administrative fine or similar penalty, in terms of any legislation; or

(f) within a period of five years, was a director of one or more companies or a managing member of one or more close corporations, or controlled or participated in the control of a juristic person, irrespective whether concurrently, sequentially or at unrelated times, that were convicted of an offence, or subjected to an administrative fine or similar penalty, in terms of any legislation, and—

(i) the person was a director of each such company, or a managing member of each such close corporation or was responsible for the management of each such juristic person, at the time of the contravention that resulted in the conviction, administrative fine or other penalty; and

(ii) the court is satisfied that the declaration of delinquency is justified, having regard to the nature of the contraventions, and the person's conduct in relation to the management, business or property of any company, close corporation or juristic person at the time.

(6) A declaration of delinquency in terms of—

(a) subsection (5)*(a)* or *(b)* is unconditional, and subsists for the lifetime of the person declared delinquent; or

(b) subsection (5)*(c)* to *(f)*—

(i) may be made subject to any conditions the court considers appropriate, including conditions limiting the application of the declaration to one or more particular categories of companies; and

(ii) subsists for seven years from the date of the order, or such longer period as determined by the court at the time of making the declaration, subject to subsections (11) and (12);

(7) A court may make an order placing a person under probation, if—

(a) while serving as a director, the person—

(i) was present at a meeting and failed to vote against a resolution despite the inability of the company to satisfy the solvency and liquidity test, contrary to this Act;

(ii) otherwise acted in a manner materially inconsistent with the duties of a director; or

(iii) acted in, or supported a decision of the company to act in, a manner contemplated in section 163(1); or

(b) within any period of 10 years after the effective date—

(i) the person has been a director of more than one company, or a managing member of more than one close corporation, irrespective whether concurrently, sequentially or at unrelated times; and

(ii) during the time that the person was a director of each such company or managing member of each such close corporation, two or more of those companies or close corporations each failed to fully pay all of its creditors or meet all of its obligations, except in terms of—

(aa) a business rescue plan resulting from a resolution of the board in terms of section 129; or

(bb) a compromise with creditors in terms of section 155.

(8) The court may declare a person under probation in the circumstances contemplated in—

(a) subsection (7)*(a)*(iii), only if the court is satisfied that the declaration is justified having regard to the circumstances of the company's or close corporation's conduct, if applicable, and the person's conduct in relation to the management, business or property of the company or close corporation at the time; or

(b) subsection (7)*(b)*, only if the court is satisfied that—

(i) the manner in which the company or close corporation was managed was wholly or partly responsible for it failing to meet its obligations; and

(ii) the declaration is justified, having regard to the circumstances of the company's or close corporation's failure, and the person's conduct in relation to the management, business or property of the company or close corporation at the time.

(9) A declaration placing a person under probation—

(a) may be made subject to any conditions the court considers appropriate, including conditions limiting the application of the declaration to one or more particular categories of companies; and

(b) subsists for a period not exceeding five years, as determined by the court at the time it makes the declaration, subject to subsections (11) and (12).

(10) Without limiting the powers of the court, a court may order, as conditions applicable or ancillary to a declaration of delinquency or probation, that the person concerned—

(a) undertake a designated programme of remedial education relevant to the nature of the person's conduct as director;

(b) carry out a designated programme of community service;

(c) pay compensation to any person adversely affected by the person's conduct as a director, to the extent that such a victim does not otherwise have a legal basis to claim compensation; or

(d) in the case of an order of probation—

(i) be supervised by a mentor in any future participation as a director while the order remains in force; or

(ii) be limited to serving as a director of a private company, or of a company of which that person is the sole shareholder.

(11) A person who has been declared delinquent, other than as contemplated in subsection (6)*(a)*, or is subject to an order of probation, may apply to a court—

(a) to suspend the order of delinquency, and substitute an order of probation, with or without conditions, at any time more than three years after the order of delinquency was made; or

(b) to set aside an order of—

(i) delinquency at any time more than two years after it was suspended as contemplated in paragraph *(a)*; or

(ii) of probation, at any time more than two years after it was made.

(12) On considering an application contemplated in subsection (11), the court may—

(a) not grant the order applied for unless the applicant has satisfied any conditions that were attached to the original order, or imposed in terms of subsection (11)*(a)*; and

(b) grant an order if, having regard to the circumstances leading to the original order, and the conduct of the applicant in the ensuing period, the court is satisfied that—

(i) the applicant has demonstrated satisfactory progress towards rehabilitation, and

(ii) there is a reasonable prospect that the applicant would be able to serve successfully as a director of a company in the future.

(13) An applicant in terms of subsection (4) must serve the Commission with a copy of the application.

Relief from oppressive or prejudicial conduct or from abuse of separate juristic personality of company

163. (1) A shareholder or a director of a company may apply to a court for relief if—

(a) any act or omission of the company, or a related person, has had a result that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant;

(b) the business of the company, or a related person, is being or has been carried on or conducted in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant; or

(c) the powers of a director or prescribed officer of the company, or a person related to the company, are being or have been exercised in a manner that is oppressive or unfairly prejudicial to, or that unfairly disregards the interests of, the applicant.

(2) Upon considering an application in terms of subsection (1), the court may make any interim or final order it considers fit, including—

(a) an order restraining the conduct complained of;

(b) an order appointing a liquidator, if the company appears to be insolvent;
(c) an order placing the company under supervision and commencing business rescue proceedings in terms of Chapter 6, if the court is satisfied that the circumstances set out in section 131(4)*(a)* apply;
(d) an order to regulate the company's affairs by directing the company to amend its Memorandum of Incorporation or to create or amend a unanimous shareholder agreement;
(e) an order directing an issue or exchange of shares;
(f) an order—
(i) appointing directors in place of or in addition to all or any of the directors then in office; or
(ii) declaring any person delinquent or under probation, as contemplated in section 162;
(g) an order directing the company or any other person to restore to a shareholder any part of the consideration that the shareholder paid for shares, or pay the equivalent value, with or without conditions;
(h) an order varying or setting aside a transaction or an agreement to which the company is a party and compensating the company or any other party to the transaction or agreement;
(i) an order requiring the company, within a time specified by the court, to produce to the court or an interested person financial statements in a form required by this Act, or an accounting in any other form the court may determine;
(j) an order to pay compensation to an aggrieved person, subject to any other law entitling that person to compensation;
(k) an order directing rectification of the registers or other records of a company; or
(l) an order for the trial of any issue as determined by the court.

(3) If an order made under this section directs the amendment of the company's Memorandum of Incorporation—
(a) the directors must promptly file a notice of amendment to give effect to that order, in accordance with section 16(4); and
(b) no further amendment altering, limiting or negating the effect of the court order may be made to the Memorandum of Incorporation, until a court orders otherwise.

(4) Whenever a court, on application by an interested person, or in any proceedings in which a company is involved, finds that the incorporation of, or any act by or on behalf of, or any use of, that company constitutes an unconscionable abuse of the juristic personality of the company as a separate entity, the court may declare that the company is to be deemed not to be a juristic person in respect of such rights, obligations or liabilities of the company, or of such member or shareholder thereof, or of such other person as specified in the declaration, and the court may give such further order or orders as it may deem fit in order to give effect to such declaration.

Dissenting shareholders appraisal rights

164. (1) This section does not apply in any circumstances relating to a transaction, agreement or offer pursuant to a business rescue plan that was approved by shareholders of a company, in terms of section 152.

(2) If a company has given notice to shareholders of a meeting to consider adopting a resolution to—
(a) amend its Memorandum of Incorporation by altering the preferences, rights, limitations or other terms of any class of its shares in any manner materially adverse to the rights or interests of holders of that class of shares, as contemplated in section 37(8); or
(b) enter into a transaction contemplated in section 112, 113, or 114,

that notice must include a statement informing shareholders of their rights under this section.

(3) At any time before a resolution referred to in subsection (2) is to be voted on, a dissenting shareholder may give the company a written notice objecting to the resolution.

(4) Within 10 business days after a company has adopted a resolution contemplated in this section, the company must send a notice that the resolution has been adopted to each shareholder who—

(a) gave the company a written notice of objection in terms of subsection (3); and

(b) has neither—

(i) withdrawn that notice; or

(ii) voted in support of the resolution.

(5) A shareholder may demand that the company pay the shareholder the fair value for all of the shares of the company held by that person if—

(a) the shareholder—

(i) sent the company a notice of objection, subject to subsection (6); and

(ii) in the case of an amendment to the company's Memorandum of Incorporation, holds shares of a class that is materially and adversely affected by the amendment;

(b) the company has adopted the resolution contemplated in subsection (2); and

(c) the shareholder—

(i) voted against that resolution; and

(ii) has complied with all of the procedural requirements of this section.

(6) The requirement of subsection (5)*(a)*(i) does not apply if the company failed to give notice of the meeting, or failed to include in that notice a statement of the shareholders rights under this section.

(7) A shareholder who satisfies the requirements of subsection (5) may make a demand contemplated in that subsection by delivering a written notice to the company within—

(a) 20 business days after receiving a notice under subsection (4); or

(b) if the shareholder does not receive a notice under subsection (4), within 20 business days after learning that the resolution has been adopted.

(8) A demand delivered in terms of subsections (5) to (7) must state—

(a) the shareholder's name and address;

(b) the number and class of shares in respect of which the shareholder seeks payment; and

(c) a demand for payment of the fair value of those shares.

(9) A shareholder who has sent a demand in terms of subsections (5) to (8) has no further rights in respect of those shares, other than to be paid their fair value, unless—

(a) the shareholder withdraws that demand before the company makes an offer under subsection (11), or allows an offer made by the company to lapse, as contemplated in subsection (12)*(b)*;

(b) the company fails to make an offer in accordance with subsection (11) and the shareholder withdraws the demand; or

(c) the company revokes the adopted resolution that gave rise to the shareholder's rights under this section.

(10) If any of the events contemplated in subsection (9) occur, all of the shareholder's rights in respect of the shares are reinstated without interruption.

(11) Within five business days after the later of—

(a) the day on which the action approved by the resolution is effective;

(b) the last day for the receipt of demands in terms of subsection (7)*(a)*; or

(c) the day the company received a demand as contemplated in subsection (7)*(b)*, if applicable, the company must send to each shareholder who has sent such a demand a written offer to pay an amount considered by the company's directors to be the fair value of the relevant shares, subject to subsection (16), accompanied by a statement showing how that value was determined.

(12) Every offer made under subsection (11)—

(a) in respect of shares of the same class or series must be on the same terms; and

(b) lapses if it has not been accepted within 30 business days after it was made.

(13) If a shareholder accepts an offer made under subsection (12)—

(a) the shareholder must either in the case of—

(i) shares evidenced by certificates, tender the relevant share certificates to the company or the company's transfer agent; or

(ii) uncertificated shares, take the steps required in terms of section 53 to direct the transfer of those shares to the company or the company's transfer agent; and

(b) the company must pay that shareholder the agreed amount within 10 business days after the shareholder accepted the offer and—

(i) tendered the share certificates; or

(ii) directed the transfer to the company of uncertificated shares.

(14) A shareholder who has made a demand in terms of subsections (5) to (8) may apply to a court to determine a fair value in respect of the shares that were the subject of that demand, and an order requiring the company to pay the shareholder the fair value so determined, if the company has—

(a) failed to make an offer under subsection (11); or

(b) made an offer that the shareholder considers to be inadequate, and that offer has not lapsed.

(15) On an application to the court under subsection (14)—

(a) all dissenting shareholders who have not accepted an offer from the company as at the date of the application must be joined as parties and are bound by the decision of the court;

(b) the company must notify each affected dissenting shareholder of the date, place and consequences of the application and of their right to participate in the court proceedings; and

(c) the court—

(i) may determine whether any other person is a dissenting shareholder who should be joined as a party;

(ii) must determine a fair value in respect of the shares of all dissenting shareholders, subject to subsection (16);

(iii) in its discretion may—

(aa) appoint one or more appraisers to assist it in determining the fair value in respect of the shares; or

(bb) allow a reasonable rate of interest on the amount payable to each dissenting shareholder from the date the action approved by the resolution is effective, until the date of payment;

(iv) may make an appropriate order of costs, having regard to any offer made by the company, and the final determination of the fair value by the court; and

(v) must make an order requiring—

(aa) the dissenting shareholders to either withdraw their respective demands, in which case the shareholder is reinstated to their full rights as a shareholder, or to comply with subsection (13)*(a)*; and

(bb) the company to pay the fair value in respect of their shares to each dissenting shareholder who complies with subsection (13)*(a)*, subject to any conditions the court considers necessary to ensure that the company fulfils its obligations under this section.

(16) The fair value in respect of any shares must be determined as at the date on which, and time immediately before, the company adopted the resolution that gave rise to a shareholder's rights under this section.

(17) If there are reasonable grounds to believe that compliance by a company with subsection (13)*(b)*, or with a court order in terms of subsection (15)*(c)*(v)*(bb)*, would result in the company being unable to pays its debts as they fall due and payable for the ensuing 12 months—

(a) the company may apply to a court for an order varying the company's obligations in terms of the relevant subsection; and

(b) the court may make an order that—

(i) is just and equitable, having regard to the financial circumstances of the company; and

(ii) ensures that the person to whom the company owes money in terms of this section is paid at the earliest possible date compatible with the company satisfying its other financial obligations as they fall due and payable.

(18) If the resolution that gave rise to a shareholder's rights under this section authorised the company to amalgamate or merge with one or more other companies, such that the company whose shares are the subject of a demand in terms of this section has ceased to exist, the obligations of that company under this section are obligations of the successor to that company resulting from the amalgamation or merger.

(19) For greater certainty, the making of a demand, tendering of shares and payment by a company to a shareholder in terms of this section do not constitute a distribution by the company, or an acquisition of its shares by the company within the meaning of section 48, and therefore are not subject to—

(a) the provisions of that section; or

(b) the application by the company of the solvency and liquidity test set out in section 4.

Derivative actions

165. (1) Any right at common law of a person other than a company to bring or prosecute any legal proceedings on behalf of that company is abolished, and the rights in this section are in substitution for any such abolished right.

(2) A person may serve a demand upon a company to commence or continue legal proceedings, or take related steps, to protect the legal interests of the company if the person—

(a) is a shareholder or a person entitled to be registered as a shareholder, of the company or of a related company;

(b) is a director or prescribed officer of the company or of a related company;

(c) is a registered trade union that represents employees of the company, or another representative of employees of the company; or

(d) has been granted leave of the court to do so, which may be granted only if the court is satisfied that it is necessary or expedient to do so to protect a legal right of that other person.

(3) A company that has been served with a demand in terms of subsection (2) may apply within 15 business days to a court to set aside the demand only on the grounds that it is frivolous, vexatious or without merit.

(4) If a company does not make an application contemplated in subsection (3), or the court does not set aside the demand in terms of that subsection, the company must—

(a) appoint an independent and impartial person or committee to investigate the demand, and report to the board on—

(i) any facts or circumstances—

(aa) that may gave rise to a cause of action contemplated in the demand; or

(bb) that may relate to any proceedings contemplated in the demand;

(ii) the probable costs that would be incurred if the company pursued any such cause of action or continued any such proceedings; and

(iii) whether it appears to be in the best interests of the company to pursue any such cause of action or continue any such proceedings; and

(b) within 60 business days after being served with the demand, or within a longer time as a court, on application by the company, may allow, either—

(i) initiate or continue legal proceedings, or take related legal steps to protect the legal interests of the company, as contemplated in the demand; or

(ii) serve a notice on the person who made the demand, refusing to comply with it.

(5) A person who has made a demand in terms of subsection (2) may apply to a court for leave to bring or continue proceedings in the name and on behalf of the company, and the court may grant leave only if—

(a) the company—

(i) has failed to take any particular step required by subsection (4);

(ii) appointed an investigator or committee who was not independent and impartial;

(iii) accepted a report that was inadequate in its preparation, or was irrational or unreasonable in its conclusions or recommendations;

(iv) acted in a manner that was inconsistent with the reasonable report of an independent, impartial investigator or committee; or

(v) has served a notice refusing to comply with the demand, as contemplated in subsection (4)*(b)*(ii); and

(b) the court is satisfied that—

(i) the applicant is acting in good faith;

(ii) the proposed or continuing proceedings involve the trial of a serious question of material consequence to the company; and

(iii) it is in the best interests of the company that the applicant be granted leave to commence the proposed proceedings or continue the proceedings, as the case may be.

(6) In exceptional circumstances, a person contemplated in subsection (2) may apply to a court for leave to bring proceedings in the name and on behalf of the company without making a demand as contemplated in that subsection, or without affording the company time to respond to the demand in accordance with subsection (4), and the court may grant leave only if the court is satisfied that—

(a) the delay required for the procedures contemplated in subsections (3) to (5) to be completed may result in—

(i) irreparable harm to the company; or

(ii) substantial prejudice to the interests of the applicant or another person;

(b) there is a reasonable probability that the company may not act to prevent that harm or prejudice, or act to protect the company's interests that the applicant seeks to protect; and

(c) that the requirements of subsection (5)*(b)* are satisfied.

(7) A rebuttable presumption that granting leave is not in the best interests of the company arises if it is established that—

(a) the proposed or continuing proceedings are by—

(i) the company against a third party; or

(ii) a third party against the company;

(b) the company has decided—

(i) not to bring the proceedings;

(ii) not to defend the proceedings; or

(iii) to discontinue, settle or compromise the proceedings; and

(c) all of the directors who participated in that decision—

(i) acted in good faith for a proper purpose;

(ii) did not have a personal financial interest in the decision, and were not related to a person who had a personal financial interest in the decision;

(iii) informed themselves about the subject matter of the decision to the extent they reasonably believed to be appropriate; and

(iv) reasonably believed that the decision was in the best interests of the company.

(8) For the purposes of subsection (7)—

(a) a person is a third party if the company and that person are not related or interrelated; and

(b) proceedings by or against the company include any appeal from a decision made in proceedings by or against the company.

(9) If a court grants leave to a person under this section—

(a) the court must also make an order stating who is liable for the remuneration and expenses of the person appointed;

(b) the court may vary the order at any time;

(c) the persons who may be made liable under the order, or the order as varied, are—

(i) all or any of the parties to the proceedings or application; and

(ii) the company;

(d) if the order, or the order as varied, makes two or more persons liable, the order may also determine the nature and extent of the liability of each of those persons; and

(e) the person to whom leave has been granted is entitled, on giving reasonable notice to the company, to inspect any books of the company for any purpose connected with the legal proceedings.

(10) At any time, a court may make any order it considers appropriate about the costs of the following persons in relation to proceedings brought or intervened in with leave under this section, or in respect of an application for leave under this section:

(a) The person who applied for or was granted leave;

(b) the company; or

(c) any other party to the proceedings or application.

(11) An order under this section may require security for costs.

(12) At any time after a court has granted leave in terms of this section, a person contemplated in subsection (2) may apply to a court for an order that they be substituted for the person to whom leave was originally granted, and the court may make the order applied for if it is satisfied that—

(a) the applicant is acting in good faith; and

(b) it is appropriate to make the order in all the circumstances.

(13) An order substituting one person for another has the effect that—

(a) the grant of leave is taken to have been made in favour of the substituting person; and

(b) if the person originally granted leave has already brought the proceedings, the substituting person is taken to have brought those proceedings or to have made that intervention.

(14) If the shareholders of a company have ratified or approved any particular conduct of the company—

(a) the ratification or approval—

(i) does not prevent a person from making a demand, applying for leave, or bringing or intervening in proceedings with leave under this section; and

(ii) does not prejudice the outcome of any application for leave, or proceedings brought or intervened in with leave under this section; or

(b) the court may take that ratification or approval into account in making any judgement or order.

(15) Proceedings brought or intervened in with leave under this section must not be discontinued, compromised or settled without the leave of the court.

(16) For greater certainty, the right of a person in terms of this section to serve a demand on a company, or apply to a court for leave, may be exercised by that person directly, or by the Commission or Panel, or another person on behalf of that first person, in the manner permitted by section 157.

Part C

Voluntary resolution of disputes

Alternative dispute resolution

166. (1) As an alternative to applying for relief to a court, or filing a complaint with the Commission in terms of Part D, a person who would be entitled to apply for relief, or file a complaint in terms of this Act, may refer a matter that could be the subject of such an application or complaint to—

(a) the Companies Tribunal; or

(b) an accredited entity, as defined in subsection (3), for resolution by mediation, conciliation or arbitration.

(2) If the Companies Tribunal, or an accredited entity, to whom a matter is referred for alternative dispute resolution concludes that either party to the conciliation, mediation or arbitration is not participating in that process in good faith, or that there is no reasonable probability of the parties resolving their dispute through that process, the Companies Tribunal or accredited entity must issue a certificate in the prescribed form stating that the process has failed.

(3) In this section, **"accredited entity"** means—

(a) a juristic person or an association of persons accredited by the Commission in terms of subsection (4); or

(b) an organ of state, or entity established by or in terms of a public regulation that—

(i) is mandated, among other things, to perform mediation, conciliation or arbitration; and

(ii) has been designated by the Minister in terms of subsection (5) as an accredited entity for the purposes of this Part.

(4) For the purposes of this Part, the Commission—

(a) may accredit, with or without conditions, a juristic person or an association that—

(i) functions predominantly to provide conciliation, mediation or arbitration services;

(ii) has the demonstrated capacity to perform such services within the context of company law; and

(iii) satisfies the prescribed requirements for accreditation;

(b) must monitor the effectiveness of any accredited person or an association relative to the purposes and policies of this Act; and

(c) may—

(i) reasonably require any person or association accredited by it to provide information necessary for the purpose of monitoring in terms of paragraph *(b)*; and

(ii) with reasonable notice, withdraw any accreditation granted by it in terms of this section if the person or association no longer satisfies the criteria set out in paragraph *(a)*.

(5) The Minister, after consulting the Commission—

(a) may designate any organ of state or other entity contemplated in subsection (3)*(b)* as an accredited entity for the purposes of this Part; and

(b) must prescribe criteria for the Commission to follow in assessing whether an applicant for accreditation in terms of subsection (4) meets the requirements of this section.

Dispute resolution may result in consent order

167. (1) If the Companies Tribunal, or an entity accredited in terms of section 166, has resolved, or assisted parties in resolving, a dispute in terms of this Part the Tribunal or accredited entity may—

(a) record the resolution of that dispute in the form of an order; and

(b) if the parties to the dispute consent to that order, submit it to a court to be confirmed as a consent order, in terms of its rules.

(2) After hearing an application for a consent order, the court may—

(a) make the order as agreed and proposed in the application;

(b) indicate any changes that must be made to the draft order before it will be made an order of the court; or

(c) refuse to make the order.

(3) A consent order confirmed in terms of subsection (2)—

(a) may include an award of damages; and

(b) does not preclude a person applying for an award of civil damages, unless the consent order includes an award of damages to that person.

(4) A court hearing any proceedings concerning a dispute arising out of a consent order may order the proceedings closed to the public if it is the interest of the confidentiality of the parties to the consent order to do so.

Part D

Complaints to Commission or Panel

Initiating a complaint

168. (1) Any person may file a complaint in writing—

(a) with the Panel in respect of a matter contemplated in Part B or C of Chapter 5, or in the Takeover Regulations; or

(b) with the Commission in respect of any provision of this Act not referred to in paragraph *(a)*, alleging that a person has acted in a manner inconsistent with this Act, or that the complainant's rights under this Act, or under a company's Memorandum of Incorporation or rules, have been infringed.

(2) A complaint may be initiated directly by the Commission, or the Panel, as the case may be, on its own motion or on the request of another regulatory authority.

(3) The Minister may direct the Commission, as contemplated in section 190(2)*(b)*, or the Panel to investigate—

(a) an alleged contravention of this Act; or

(b) other specified circumstances.

Investigation by Commission or Panel

169. (1) Upon initiating or receiving a complaint, or receiving a direction from the Minister, in terms of this Act, the Commission or Panel, as the case may be, may—

(a) except in the case of a direction from the Minister, issue a notice to the complainant in the prescribed form indicating that it will not investigate the complaint, if the complaint appears to be frivolous or vexatious, or does not allege any facts that, if proven, would constitute grounds for remedy under this Act;

(b) if they think it expedient as a means of resolving the matter, refer the complainant to the Companies Tribunal, or to an accredited entity, as defined in section 166(3), with a recommendation that the complainant seek to resolve the matter with the assistance of that agency; or

(c) direct an inspector or investigator to investigate the complaint as quickly as practicable, in any other case.

(2) At any time during an investigation, the Commission or Panel, as the case may be, may—

(a) designate one or more persons to assist the inspector or investigator conducting the investigation; or

(b) if a complaint concerns a dispute that is internal to a particular company, and does not appear to implicate a party other than the company, the holders of its securities, its directors, committees, prescribed officers, company secretary, or auditor—

(i) submit a proposal to the company seeking an agreement to jointly appoint an independent investigator—

(aa) at the expense of the company, or on a cost-shared basis; and
(bb) to report to both the company, and to the Commission or Panel, as the case may be; or

(ii) apply to a court for an order appointing an independent investigator—
(aa) at the expense of the company; and
(bb) to report to both the Commission or Panel, as the case may be, and the company.

(3) In conducting an investigation contemplated in this section an inspector or investigator may investigate any person—

(a) named in the complaint, or related to a person named in the complaint; or
(b) whom the inspector reasonably considers may have information relevant to the investigation of the complaint.

Outcome of investigation

170. (1) After receiving the report of an inspector or independent investigator, the Commission or Panel, as the case may be, may—

(a) excuse any person as a respondent in the complaint, if the Commission or Panel considers it reasonable to do so, having regard to the person's conduct, and the degree to which the person has cooperated with the Commission or Panel in the investigation;
(b) refer the complaint to the Companies Tribunal, or to the Commission or the Panel as the case may be, if the matter falls within their respective jurisdictions in terms of this Act;
(c) issue a notice of non-referral to the complainant, with a statement advising the complainant of any rights they may have under this Act to seek a remedy in court;
(d) in the case of the Commission, propose that the complainant and any affected person meet with the Commission or with the Companies Tribunal, with a view to resolving the matter by consent order;
(e) commence proceedings in a court in the name of the complainant, if the complainant—
(i) has a right in terms of this Act to apply to a court in respect of that matter; and
(ii) has consented to the Commission or Panel, as the case may be, doing so;
(f) refer the matter to the National Prosecuting Authority, or other regulatory authority concerned, if the Commission or Panel, as the case may be, alleges that a person has committed an offence in terms of this Act or any other legislation; or
(g) in the case of—
(i) the Commission, issue a compliance notice in terms of section 171; or
(ii) the Panel, refer the matter to the Executive Director, who may, among other things, issue a compliance notice in terms of section 171.

(2) The Commission or Panel, as the case may be—

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

Issuance of compliance notices

171. (1) Subject to subsection (3), the Commission, or the Executive Director of the Panel, may issue a compliance notice in the prescribed form to any person whom the Commission or Executive Director, as the case may be, on reasonable grounds believes—

(a) has contravened this Act; or

(b) assented to, was implicated in, or directly or indirectly benefited from, a contravention of this Act, unless the alleged contravention could otherwise be addressed in terms of this Act by an application to a court or to the Companies Tribunal.

(2) A compliance notice may require the person to whom it is addressed to—

(a) cease, correct or reverse any action in contravention of this Act;

(b) take any action required by this Act;

(c) restore assets or their value to a company or any other person;

(d) provide a community service, in the case of a notice issued by the Commission; or

(e) take any other steps reasonably related to the contravention and designed to rectify its effect.

(3) When issuing a notice in terms of subsection (1) to a regulated person or entity, the Commission or Executive Director, as the case may be, must send a copy of the notice to the regulatory authority that granted a licence or similar authority to that regulated person or entity, and in terms of which that person is authorised to conduct business.

(4) A compliance notice contemplated in subsection (1)—

(a) must set out—

(i) the person or an association to whom the notice applies;

(ii) the provision of this Act that has been contravened;

(iii) details of the nature and extent of the non-compliance;

(iv) any steps that are required to be taken and the period within which those steps must be taken; and

(v) any penalty that may be imposed in terms of this Act if those steps are not taken.

(5) A compliance notice issued in terms of this section, or any part of it, remains in force until—

(a) it is set aside by—

(i) the Companies Tribunal, or a court upon a review of the notice, in the case of a notice issued by the Commission; or

(ii) the Takeover Special Committee, or a court upon a review of the notice, in the case of a notice issued by the Executive Director; or

(b) the Commission, or Executive Director, as the case may be, issues a compliance certificate contemplated in subsection (6).

(6) If the requirements of a compliance notice issued in terms of subsection (1) have been satisfied, the Commission or the Executive Director, as the case may be, must issue a compliance certificate.

(7) If a person to whom a compliance notice has been issued fails to comply with the notice, the Commission or the Executive Director, as the case may be, may either—

(a) apply to a court for the imposition of an administrative fine; or

(b) refer the matter to the National Prosecuting Authority for prosecution as an offence in terms of section 214(3), but may not do both in respect of any particular compliance notice.

Objection to notices

172. (1) Any person issued with a compliance notice in terms of section 171 may apply to the Companies Tribunal in the case of a notice issued by the Commission, or to the Takeover Special Committee in the case of a notice issued by the Executive Director, or to a court in either case, to review the notice within—

(a) 15 business days after receiving that notice; or

(b) such longer period as may be allowed on good cause shown.

(2) After considering any representations by the applicant and any other relevant information, the Companies Tribunal, the Takeover Special Committee, or a court may confirm, modify or cancel all or part of a compliance notice.

(3) If the Companies Tribunal, the Takeover Special Committee or a court confirms or modifies all or part of a notice, the applicant must comply with that notice as confirmed or modified, within the time period specified in it, subject to subsection (4).

(4) A decision by the Companies Tribunal or the Takeover Special Committee in terms of this section is binding, subject to any right of review or appeal by a court.

Consent orders

173. (1) If a matter has been investigated in terms of this Part, and the Commission and the respondent have agreed a resolution of the complaint, the Commission may—

(a) record the resolution in the form of an order; and

(b) if the person who is the subject of the complaint consents to that order, apply to the High Court to have it confirmed as a consent order, in terms of its rules.

(2) Section 167(2) to (4), read with the changes required by the context, applies to an application contemplated in subsection (1).

Referral of complaints to court

174. (1) If the Commission or Panel, as the case may be, issues a notice of non-referral in response to a complaint, the complainant concerned may apply to a court for leave to refer the matter directly to the court, but no such complaint may be referred directly to a court in respect of a person who has been excused as a respondent, as contemplated in section 170(1)*(a)*.

(2) A court—

(a) may grant leave contemplated in subsection (1) only if it appears that the applicant has no other remedy available in terms of this Act; and

(b) if it grants leave, and after conducting a hearing, determines that the respondent has contravened the Act, may—

(i) require the Commission or Executive Director, as the case may be, to issue a compliance notice sufficient to address that contravention; or

(ii) make any other order contemplated in this Act that is just and reasonable in the circumstances.

Administrative fines

175. (1) A court, on application by the Commission or Panel, may impose an administrative fine—

(a) only for failure to comply with a compliance notice, as contemplated in section 171(7); and

(b) not exceeding the greater of—

(i) 10% of the respondent's turnover for the period during which the company failed to comply with the compliance notice; and

(ii) the maximum prescribed in terms of subsection (5).

(2) When determining the amount of an appropriate administrative fine, the following factors must be considered:

(a) The nature, duration, gravity and extent of the contravention;

(b) any loss or damage suffered as a result of the contravention;

(c) the behaviour of the respondent;

(d) the market circumstances in which the contravention took place;

(e) the level of profit derived from the contravention;

(f) the degree to which the respondent has co-operated with the Commission or Panel, as the case may be, and a court; and

(g) whether the respondent has previously been found in contravention of this Act.

(3) For the purpose of this section, the annual turnover of any person, is the amount determined in the prescribed manner.

(4) A fine payable in terms of this section must be paid into the National Revenue Fund referred to in section 213 of the Constitution.

(5) The Minister may make a regulation prescribing the maximum amount of an administrative fine, which amount must be not less than R1 000 000.

Part E

Powers to support investigations and inspections

Summons

176. (1) At any time during an investigation being conducted by it, the Commission, or the Panel, as the case may be, may issue a summons to any person who is believed to be able to furnish any information on the subject of the investigation, or to have possession or control of any book, document or other object that has a bearing on that subject to—

(a) appear before the Commission or Panel, or before an inspector or independent investigator, to be questioned at a time and place specified in the summons; or

(b) deliver or produce to the Commission or Panel, or to an inspector or independent investigator, any book, document or other object referred to in paragraph *(a)* at a time and place specified in the summons.

(2) A summons contemplated in subsection (1)—

(a) must be signed by the Commissioner or the Executive Director, as the case may be, or by an employee of the Commission or Panel designated by the Commissioner or the Executive Director, as the case may be; and

(b) may be served in the same manner as a subpoena in a criminal case issued by the magistrate's court.

(3) An inspector or investigator before whom a person is summoned to appear, or to whom a person is required to deliver any book, document or other object, may—

(a) interrogate and administer an oath to, or accept an affirmation from, the person named in the summons; and

(b) retain any such book, document or other object for examination, for a period not exceeding two months, or such longer period as the court, on good cause shown, may allow.

(4) A person questioned by the Commission, the Panel, or an inspector or independent investigator conducting an investigation must answer each question truthfully and to the best of that person's ability, but—

(a) a person is not obliged to answer any question if the answer is self-incriminating; and

(b) the person asking the questions must inform that person of the right set out in paragraph *(a)*.

(5) No self-incriminating answer given or statement made by any person to the Commission, Panel, or an inspector or independent investigator exercising powers in terms of this Act will be admissible as evidence against that person in criminal proceedings against that person instituted in any court, except in criminal proceedings for perjury or in which that person is tried for an offence contemplated in section 215(2)*(e)*, and then only to the extent that the answer or statement is relevant to prove the offence charged.

Authority to enter and search under warrant

177. (1) A judge of the High Court or a magistrate, may issue a warrant to enter and

search any premises that are within the jurisdiction of that judge or magistrate, if, from information on oath or affirmation, there are reasonable grounds to believe that—

(a) a contravention of this Act has taken place, is taking place, or is likely to take place on or in those premises; or

(b) that anything connected with an investigation in terms of this Act is in the possession of, or under the control of, a person who is on or in those premises.

(2) A warrant to enter and search may be issued at any time and must specifically—

(a) identify the premises that may be entered and searched; and

(b) authorise an inspector or a police officer to enter and search the premises and to do anything listed in section 178.

(3) A warrant to enter and search is valid until one of the following events occurs:

(a) The warrant is executed;

(b) the warrant is cancelled by the person who issued it or, in that person's absence, by a person with similar authority;

(c) the purpose for issuing it has lapsed; or

(d) the expiry of one month after the date it was issued.

(4) A warrant to enter and search may be executed only during the day, unless the judge or magistrate who issued it authorises that it may be executed at night at a time that is reasonable in the circumstances.

(5) A person authorised by a warrant issued in terms of subsection (2) may enter and search premises named in that warrant.

(6) Immediately before commencing with the execution of a warrant, a person executing that warrant must either—

(a) if the owner, or person in control, of the premises to be searched is present—

(i) provide identification to that person and explain to that person the authority by which the warrant is being executed; and

(ii) hand a copy of the warrant to that person or to the person named in it; or

(b) if none of those persons is present, affix a copy of the warrant to the premises in a prominent and visible place.

Powers to enter and search

178. (1) A person who is authorised under section 177 to enter and search premises may—

(a) enter upon or into those premises;

(b) search those premises;

(c) search any person on those premises if there are reasonable grounds for believing that the person has personal possession of an article or document that has a bearing on the investigation;

(d) examine any article or document that is on or in those premises that has a bearing on the investigation;

(e) request information about any article or document from the owner of, or person in control of, the premises or from any person who has control of the article or document, or from any other person who may have the information;

(f) take extracts from, or make copies of, any book or document that is on or in the premises that has a bearing on the investigation;

(g) use any computer system on the premises, or require assistance of any person on the premises to use that computer system, to—

(i) search any data contained in or available to that computer system; or

(ii) reproduce any record from that data; and

(h) seize any output from that computer for examination and copying; and

(i) attach, and, if necessary, remove from the premises for examination and safekeeping, anything that has a bearing on the investigation.

(2) Section 176(4) and (5) apply to—

(a) any person questioned by an inspector or police officer in terms of this section; or

(b) to any answer given or statement made to an inspector or police officer in terms of this section.

(3) An inspector authorised to conduct an entry and search in terms of section 177 may be accompanied and assisted by a police officer.

Conduct of entry and search

179. (1) A person who enters and searches any premises under section 178 must conduct the entry and search with strict regard for decency and order, and with regard for each person's right to dignity, freedom, security and privacy.

(2) During any search under section 178(1)*(c)*, only a female inspector or police officer may search a female person, and only a male inspector or police officer may search a male person.

(3) A person who enters and searches premises under section 178, before questioning anyone—

(a) must advise that person of the right to be assisted at the time by an advocate or attorney; and

(b) allow that person to exercise the right contemplated in paragraph *(a)*.

(4) A person who removes anything from premises being searched must—

(a) issue a receipt for it to the owner of, or person in control of, the premises; and

(b) return it as soon as practicable after achieving the purpose for which it was removed.

(5) During a search, a person may refuse to permit the inspection or removal of an article or document on the grounds that it contains privileged information.

(6) If the owner or person in control of an article or document refuses in terms of subsection (5) to give that article or document to the person conducting the search, the person conducting the search may request the registrar or sheriff of the High Court that has jurisdiction to attach and remove the article or document for safe custody until that court determines whether or not the information is privileged.

(7) A police officer who is authorised to enter and search premises under section 177, or who is assisting an inspector who is authorised to enter and search premises under section 178 may overcome resistance to the entry and search by using as much force as is reasonably required, including breaking a door or window of the premises.

(8) Before using force in terms of subsection (7), a police officer must audibly demand admission and must announce the purpose of the entry, unless it is reasonable to believe that doing so may induce someone to destroy or dispose of an article or document that is the object of the search.

(9) The Commission may compensate anyone who suffers damage because of a forced entry during a search when no one responsible for the premises was present.

Part F

Companies Tribunal adjudication procedures

Adjudication hearings before Tribunal

180. (1) The Companies Tribunal—

(a) must conduct its adjudication proceedings contemplated in this Act expeditiously and in accordance with the principles of natural justice; and

(b) may conduct those proceedings informally.

(2) If adjudication proceedings before the Tribunal are open to the public, the Tribunal may exclude members of the public, or specific persons or categories of persons, from attending the proceedings—

(a) if evidence to be presented is confidential information, but only to the extent that the information cannot otherwise be protected;

(b) if the proper conduct of the hearing requires it; or

(c) for any other reason that would be justifiable in civil proceedings in a High Court.

(3) At the conclusion of adjudication proceedings, the presiding member must issue a decision together with written reasons for the decision.

Right to participate in hearing

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

(a) The Commission;

(b) the applicant or complainant; and

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

Powers of Tribunal adjudication hearing

182. The Companies Tribunal may—

(a) direct or summon any person to appear at any specified time and place;

(b) question any person under oath or affirmation;

(c) summon or order any person—

(i) to produce any book, document or item necessary for the purposes of the hearing; or

(ii) to perform any other act in relation to this Act; and

(d) give directions prohibiting or restricting the publication of any evidence given to the Tribunal.

Rules of procedure

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

Witnesses

184. (1) Every person giving evidence before the Companies Tribunal at an adjudication hearing must answer any relevant question.

(2) The law regarding a witness's privilege in a criminal case in a court of law applies equally to a person who provides information during an adjudication hearing.

(3) During an adjudication hearing, the Companies Tribunal may order a person to answer any question, or to produce any article or document, subject to subsection (4).

(4) Section 176(4) and (5) apply to any person questioned, or any evidence given, before the Companies Tribunal in terms of this section.

CHAPTER 8

REGULATORY AGENCIES AND ADMINISTRATION OF ACT

Part A

Companies and Intellectual Property Commission

Establishment of Companies and Intellectual Property Commission

185. (1) The Commission is hereby established as a juristic person to function as an organ of state within the public administration, but as an institution outside the public service.

(2) The Commission—

(a) has jurisdiction throughout the Republic;

(b) is independent, and subject only to—

(i) the Constitution and the law; and
(ii) any policy statement, directive or request issued to it by the Minister in terms of this Act;

(c) must be impartial and perform its functions without fear, favour, or prejudice; and

(d) must exercise the functions assigned to it in terms of this Act or any other law, or by the Minister, in—
(i) the most cost-efficient and effective manner; and
(ii) in accordance with the values and principles mentioned in section 195 of the Constitution.

(3) Each organ of state must assist the Commission to maintain its independence and impartiality, and to exercise its authority and perform its functions effectively.

(4) Except to the extent prescribed otherwise by or in terms of this Act, a certificate, notice, decision, determination or ruling issued or made with respect to any particular matter contemplated in this Act by—

(a) the Commissioner; or

(b) a person designated by the Commissioner to perform a particular function of the Commission,

is the certificate, notice, decision, determination or ruling of the Commission with respect to that matter.

Commission objectives

186. (1) The objectives of the Commission are—

(a) the efficient and effective registration of—
(i) companies, and external companies, in terms of this Act;
(ii) other juristic persons, in terms of any applicable legislation referred to in Schedule 4; and
(iii) intellectual property rights, in terms of any relevant legislation;

(b) the maintenance of accurate, up-to-date and relevant information concerning companies, foreign companies and other juristic persons contemplated in subsection (1)*(a)*(ii), and concerning intellectual property rights, and the provision of that information to the public and to other organs of state;

(c) the promotion of education and awareness of company and intellectual property laws, and related matters;

(d) the promotion of compliance with this Act, and any other applicable legislation; and

(e) the efficient, effective and widest possible enforcement of this Act, and any other legislation listed in Schedule 4.

(2) To achieve its objectives, the Commission may—

(a) have regard to international developments in the field of company and intellectual property law; or

(b) consult any person, organisation or institution with regard to any matter.

Functions of Commission

187. (1) In this section, **"this Act"** has the meaning set out in section 1, but also includes any legislation listed in Schedule 4.

(2) Other than with respect to matters within the jurisdiction of the Takeover Regulation Panel, the Commission must enforce this Act, by, among other things,—

(a) promoting voluntary resolution of disputes arising in terms of this Act between a company on the one hand and a shareholder or director on the other, as contemplated in Part C of Chapter 7, without intervening in, or adjudicating any such dispute;

(b) monitoring proper compliance with this Act;

(c) receiving or initiating complaints concerning alleged contraventions of this Act, evaluating those complaints, and initiating investigations into complaints;

(d) receiving directions from the Minister in terms of section 190, concerning

investigations to be conducted into alleged contraventions of this Act, or other circumstances, and conducting any such investigation;

(e) ensuring that contraventions of this Act are promptly and properly investigated;

(f) negotiating and concluding undertakings and consent orders contemplated in section 169(1)*(b)* and 173;

(g) issuing and enforcing compliance notices;

(h) referring alleged offences in terms of this Act to the National Prosecuting Authority; and

(i) referring matters to a court, and appearing before the court or the Companies Tribunal, as permitted or required by this Act.

(3) The Commission must promote the reliability of financial statements by, among other things—

(a) monitoring patterns of compliance with, and contraventions of, financial reporting standards; and

(b) making recommendations to the Council for amendments to financial reporting standards, to secure better reliability and compliance.

(4) The Commission must—

(a) establish and maintain in the prescribed manner and form—

(i) a companies register; and

(ii) any other register contemplated in this Act, or in any other legislation that assigns a registry function to the Commission;

(b) receive and deposit in the registry any documents required to be filed in terms of this Act;

(c) make the information in those registers efficiently and effectively available to the public, and to other organs of state;

(d) register and deregister companies, directors, business names and intellectual property rights, in accordance with relevant legislation; and

(e) perform any related functions assigned to it by legislation, or reasonably necessary to carry out its assigned registry functions.

(5) Subject to the provisions of subsections (6) and (7), any person, on payment of the prescribed fee, may—

(a) inspect a document filed under this Act;

(b) obtain a certificate from the Commission as to the contents or part of the contents of any document that—

(i) has been filed under this Act in respect of any company; and

(ii) is open to inspection; or

(c) obtain a copy of or extract from any document contemplated in paragraph *(b)*; or

(d) through any electronic medium approved by the Commission—

(i) inspect, or obtain a copy of or extract from, any document contemplated in paragraph *(b)* that has been converted into electronic format; or

(ii) obtain a certificate contemplated in paragraph *(b)*.

(6) Subsection (5) does not apply to any part of a filed document if that part has been determined to be confidential, or contain confidential information, in accordance with section 212.

(7) The Commission—

(a) must waive any prescribed registry fee contemplated in subsection (5) if the Commission is satisfied—

(i) that an inspection, certificate, copy or extract is required on behalf of a foreign government accredited to the Republic; and

(ii) that no fees are payable in the foreign country concerned in respect of such inspection, certificate, copy or extract required on behalf of the Republic; and

(b) may waive any such fee if satisfied that any inspection, certificate, copy or extract is required for the purposes of research by or under the control of an institution for higher education.

Reporting, research, public information and relations with other regulators

188. (1) In addition to any other advice or reporting requirements set out in this Part, the Commission is responsible to—

(a) advise the Minister on matters of national policy relating to company and intellectual property law, and recommend to the Minister changes to bring the law and the administration of this Act up to date and in line with international best practice;

(b) report to the Minister annually on the volume and nature of registration and enforcement activities in terms of this Act and on any other matter as prescribed by the Minister; and

(c) enquire into and report to the Minister on any matter concerning the purposes of this Act, and advise the Minister in respect of any matter referred to it by the Minister.

(2) The Commission must increase knowledge of the nature and dynamics of company and intellectual property law, and promote public awareness of company and intellectual property law matters, by—

(a) implementing education and information measures to develop public awareness of the provisions of this Act, and in particular to advance the purposes of this Act;

(b) providing guidance to the public by—

(i) issuing explanatory notices outlining its procedures, or its non-binding opinion on the interpretation of any provision of this Act; or

(ii) applying to a court for a declaratory order on the interpretation or application of any provision of this Act;

(c) conducting research relating to its mandate and activities and, from time to time, publishing the results of that research; and

(d) over time, reviewing legislation and public regulations, and reporting to the Minister concerning matters relating to company and intellectual property law.

(3) The Commission may—

(a) liaise with any regulatory authority on matters of common interest, and without limiting the generality of this paragraph, may exchange information with, and receive information from any such regulatory authority pertaining to—

(i) matters of common interest; or

(ii) a specific complaint or investigation;

(b) negotiate agreements with any regulatory authority, and exercise its authority through any such agreement, to—

(i) co-ordinate and harmonise the exercise of jurisdiction over company and intellectual property law matters within the relevant industry or sector; and

(ii) ensure the consistent application of the principles of this Act;

(c) participate in the proceedings of any regulatory authority; and

(d) advise, or receive advice from, any regulatory authority.

(4) The Commission may liaise with any foreign or international authorities having any objects similar to the functions and powers of the Commission.

(5) The Commission may refer to—

(a) the Competition Commission any concerns regarding conduct that may be prohibited or regulated in terms of the Competition Act;

(b) the South Africa Revenue Service any concerns regarding behaviour or conduct that may be prohibited or regulated in terms of legislation within the jurisdiction of that Service;

(c) the Independent Regulatory Board for Auditors any concerns regarding behaviour or conduct that may be prohibited or regulated in terms of the Auditing Profession Act; or

(d) any other regulatory authority any concerns regarding behaviour or conduct that may be prohibited or regulated in terms of legislation within the jurisdiction of that regulatory authority.

Appointment of Commissioner

189. (1) The Minister must appoint a suitably qualified and experienced person to be—

(a) the Commissioner of the Commission, who—
  (i) holds office for an agreed term not exceeding five years; and
  (ii) is responsible for all matters pertaining to the functions of the Commission; and

(b) the Deputy Commissioner of the Commission, who—
  (i) holds office for an agreed term not exceeding five years; and
  (ii) may perform any function of the Commissioner when the office of the Commissioner is vacant, or when the Commissioner is absent or is for any reason unable to perform the functions of that office.

(2) A person may be reappointed as Commissioner or Deputy Commissioner on the expiry of an agreed term of office.

(3) The Commissioner is the accounting authority of the Commission, and as such, is responsible for—

(a) the proper control and management of the Commission;
(b) the effectiveness and efficiency of the Commission;
(c) all income and expenditure of the Commission;
(d) all revenue collected by the Commission;
(e) all assets, and the discharge of all liabilities, of the Commission; and
(f) the proper and diligent implementation of the Public Finance Management Act, 1999 (Act No. 1 of 1999), with respect to the Commission.

(4) The Commissioner may—

(a) assign management or other duties to employees of the Commission, who have appropriate skills to assist in the management, or control over any function of the Commission; and

(b) delegate, with or without conditions, any of the powers or functions of the Commissioner to the Deputy Commissioner or any other suitably qualified employee of the Commission, but any such delegation does not divest the Commissioner of responsibility for the exercise or any power or performance of any duty.

Minister may direct policy and require investigation

190. (1) In this section, **"this Act"** has the meaning set out in section 1, but also includes any legislation listed in Schedule 4.

(2) The Minister—

(a) by notice in the *Gazette*, may issue policy directives to the Commission with respect to the application, administration and enforcement of this Act, but any such directive must be consistent with this Act; and

(b) may at any time direct the Commission to investigate—
  (i) an alleged contravention of this Act; or
  (ii) any matter or circumstances with respect to the administration of one or more companies in terms of this Act, whether or not those circumstances appear at the time of the direction to amount to a possible contravention of this Act.

Establishment of specialist committees

191. (1) The Minister may appoint one or more specialist committees to advise the—

(a) Minister on any matter relating to company law or policy; or
(b) Commissioner on the management of the Commission's resources.

(2) The Minister may assign specific powers to the members of a specialist committee for the purposes of performing any function contemplated in subsection (1).

(3) A specialist committee may—

(a) be established for an indefinite term, or for a period determined by the Minister when the committee is established; and

(b) determine its own procedures.

Constitution of specialist committees

192. (1) A specialist committee established under section 191 must—

(a) perform its functions impartially and without fear, favour or prejudice; and

(b) consist of—

(i) not more than eight persons who are independent from the Commission and are appointed by the Minister to serve for a period of not more than five years, as determined by the Minister when the person is appointed; and

(ii) not more than two senior employees of the Commission designated by the Commissioner.

(2) To be appointed or designated as a member of a specialist committee in terms of this section, a person must—

(a) be a fit and proper person;

(b) have appropriate expertise or experience; and

(c) have the ability to perform effectively as a member of that committee.

(3) The members of a specialist committee must not—

(a) act in any way that is inconsistent with subsection (1)*(a)* or expose themselves to any situation in which the risk of a conflict may arise between their responsibilities and any personal financial interest; or

(b) use their position or any information entrusted to them to enrich themselves or improperly benefit any other person.

(4) A member ceases to be a member of a specialist committee if the—

(a) person resigns from the committee;

(b) Minister terminates the person's membership because the member no longer complies with subsection (2) or has contravened subsection (3); or

(c) member's term has expired.

(5) A member of a specialist committee who has a personal or financial interest in any matter on which the committee gives advice must disclose that interest and withdraw from the proceedings of the specialist committee when that matter is discussed.

(6) The Commission must remunerate and compensate for expenses—

(a) a member mentioned in subsection (1)*(b)*(i), as determined by the Minister; and

(b) a member designated as contemplated in (1)*(b)*(ii), to the extent that the member's remuneration and expense compensation as an employee of the Commission does not extend to that person's services as a member of the specialist committee.

Part B

Companies Tribunal

Establishment of Companies Tribunal

193. (1) There is hereby established a juristic person to be known as the Companies Tribunal, which—

(a) has jurisdiction throughout the Republic;

(b) is independent, and subject only to the Constitution and the law;

(c) must exercise its functions in accordance with this Act; and

(d) must perform its functions impartially and without fear, favour, or prejudice, and in as transparent a manner as is appropriate having regard to the nature of the specific function.

(2) Each organ of state must assist the Companies Tribunal to maintain its independence and impartiality, and to perform its functions effectively.

(3) In carrying out its functions, the Companies Tribunal may—

(a) have regard to international developments in the field of company law; or

(b) consult any person, organisation or institution with regard to any matter.

(4) The Companies Tribunal consists of a chairperson and not less than 10 other women or men appointed by the Minister, on a full or part-time basis.

Appointment of Companies Tribunal

194. (1) The Minister must—

(a) appoint the chairperson and other members of the Companies Tribunal no later than the date on which this Act comes into operation; and

(b) appoint a person to fill any vacancy on the Tribunal.

(2) A person may not be—

(a) appointed as chairperson or member of the Tribunal unless the person satisfies the requirements of section 205; or

(b) reappointed to a second term as chairperson of the Tribunal.

(3) The Tribunal must comprise—

(a) persons with suitable qualifications and experience in economics, law, commerce, industry or public affairs; and

(b) sufficient persons with legal training to satisfy the requirements of subsection 3*(a)*.

(4) The Minister must designate a member of the Tribunal as deputy chairperson of the Tribunal.

(5) The deputy chairperson performs the functions of chairperson whenever—

(a) the office of chairperson is vacant; or

(b) the chairperson is for any other reason temporarily unable to perform those functions.

(6) Sections 206 and 207 apply to the chairperson and other members of the Tribunal.

Functions of Companies Tribunal

195. (1) The Companies Tribunal, or a member of the Tribunal acting alone in accordance with this Act, may—

(a) adjudicate in relation to any application that may be made to it in terms of this Act, and make any order provided for in this Act in respect of such an application;

(b) assist in the resolution of disputes as contemplated in Part C of Chapter 7; and

(c) perform any other function assigned to it by or in terms of this Act, or any law mentioned in Schedule 4.

(2) The chairperson is responsible to manage the caseload of the Companies Tribunal, and must assign each matter referred to the Tribunal to—

(a) a member of the Tribunal, to the extent that this Act provides for a matter to be considered by a single member of the Tribunal; or

(b) a panel composed of any three members of the Tribunal, in any other case.

(3) When assigning a matter to a panel in terms of subsection (2)*(b)*, the chairperson must—

(a) ensure that at least one member of the panel is a person who has suitable legal qualifications and experience; and

(b) designate a member of the panel to preside over the panel's proceedings.

(4) If, because of resignation, illness, death, or withdrawal from a hearing in terms of section 206(3), a member of the panel is unable to complete the proceedings in a matter assigned to that panel, the chairperson must—

(a) direct that the hearing of that matter proceed before the remaining members of the panel, subject to the requirements of subsection (3)*(a)*; or

(b) terminate the proceedings before that panel and constitute another panel, which may include any member of the original panel, and direct that panel to conduct a new hearing.

(5) The decision of a panel on a matter referred to it must be in writing and include reasons for that decision.

(6) A decision of a single member of the Companies Tribunal hearing a matter as contemplated in subsection (1)*(a)*, or of a majority of the members of a panel in any other case, is the decision of the Tribunal.

(7) An decision by the Companies Tribunal with respect to a decision, notice or order by the Commission is binding on the Commission, subject to any review by the court.

(8) An order of the Companies Tribunal may be filed in the High Court as an order of the court, in accordance with its rules.

(9) A member of the Tribunal may not represent any person before the Tribunal.

(10) If, on the expiry of the term of office of a member of the Companies Tribunal, that member is still considering a matter before the Tribunal, that member may continue to act as a member in respect of that matter only.

Part C

Takeover Regulation Panel

Establishment of Takeover Regulation Panel

196. (1) The Takeover Regulation Panel is hereby established as a juristic person, to function as an organ of state within the public administration, but as an institution outside the public service.

(2) The Panel—

(a) has jurisdiction throughout the Republic;

(b) is independent, and subject only to—

(i) the Constitution and the law; and

(ii) any policy statement, directive or request issued to it by the Minister in terms of this Act;

(c) must be impartial and perform its functions without fear, favour, or prejudice; and

(d) must exercise the functions assigned to it in terms of this Act or any other law, or by the Minister, in—

(i) the most cost-efficient and effective manner; and

(ii) in accordance with the values and principles mentioned in section 195 of the Constitution.

(3) Each organ of state must assist the Panel to maintain its independence and impartiality, and to exercise its authority and perform its functions effectively.

(4) In carrying out its functions, the Panel may—

(a) have regard to international developments in the field of company law; or

(b) consult any person, organisation or institution with regard to any matter.

Composition of Panel

197. (1) The Panel comprises—

(a) the Commissioner, or a person designated by the Commissioner;

(b) the Commissioner of the Competition Commission established by section 19 of the Competition Act, or a person designated by that Commissioner;

(c) three persons designated by each exchange named for the purpose by the Minister by notice in the *Gazette*; and

(d) not more than a number, being 15 minus the total number of persons designated in terms of paragraph *(c)*, of other persons appointed by the Minister on the basis of their knowledge and experience in the regulation of securities and takeovers.

(2) At any time, the Panel may co-opt additional members for a particular purpose and a limited period.

(3) Persons designated, appointed or co-opted to be members of the Panel—

(a) must have the qualifications, and satisfy the further requirements set out in section 205; and

(b) are subject to the provisions of sections 206 and 207.

(4) Members of the Panel—

(a) contemplated in subsection (1)*(a)* or *(b)* serve so long as they hold the relevant office referred to in that subsection;

(b) designated in terms of subsection (1)*(c)*, serve for a term of five years unless replaced earlier by the designating exchange;

(c) appointed in terms of subsection (1)*(d)*, serve for a term not exceeding five years, as determined by the Minister at the time the person is appointed; or

(d) co-opted in terms of subsection (2), serve until the completion of the purpose for which they were co-opted.

(5) A person whose term of service as a member of Panel has expired may be designated, appointed or co-opted to serve for a further term, or terms without limit, subject to the requirements of subsection (3) and section 205.

Chairperson and deputy chairpersons

198. (1) The Minister may designate—

(a) one of the members of the Panel to be the chairperson of the Panel; and

(b) two of its members to be deputy chairpersons of the Panel.

(2) Either deputy chairperson may exercise and perform the powers and duties of the chairperson whenever the chairperson is unable to do so or while the office of chairperson is vacant.

Meetings of Panel

199. (1) The chairperson of the Panel—

(a) may determine the date, time and place for meetings of the Panel; and

(b) presides at meetings of the Panel, if present.

(2) In the absence of the chairperson, and both deputy chairpersons, at a meeting of the Panel the members present may choose one of their number to preside at the meeting.

(3) The Takeover Regulations must determine the quorum for a meeting of the Panel.

(4) The member presiding at a meeting of the Panel may determine the procedure at the meeting.

(5) The decision of a majority of the members of the Panel present at any meeting at which there is a quorum is the decision of the Panel.

(6) If there is an equality of votes on any question before a meeting of the Panel—

(a) the member presiding at the meeting may cast a deciding vote, if that presiding member did not initially have or cast a vote; or

(b) the matter being voted on fails, in any other case.

(7) Proceedings of the Panel are valid despite any vacancy that existed on the Panel at the time, or the absence of any member during any part of those proceedings.

(8) The Panel may delegate the exercise of any of its powers or performance of any of its functions to the chairperson, any member of the Executive as contemplated in terms of section 200, any committee that the Panel may establish, or any member of the Panel.

Executive of Panel

200. (1) The Panel may appoint—
(a) an Executive Director; and
(b) one or more deputy Executive Directors, on terms and conditions determined by the Panel.
(2) The Executive Director may—
(a) perform any function of the Panel, subject to—
(i) this Act and the Takeover Regulations; and
(ii) the policies and direction of the Panel; and
(b) appoint other officers and employees as are required for the proper performance of functions of the Panel.
(3) A deputy Executive Director may perform any function of the Executive Director when the office of the Executive Director is vacant, or when the Executive Director is absent or is for any reason unable to perform the functions of that office.

Functions of Panel

201. (1) The Panel is responsible to—
(a) regulate affected transactions and offers to the extent provided for, and in accordance with, Parts B and C of Chapter 5 and the Takeover Regulations;
(b) investigate complaints with respect to affected transactions and offers in accordance with Part D of Chapter 7;
(c) apply for a court order to wind up a company, in the manner contemplated in section 81(1)*(f)*; and
(d) consult with the Minister in respect of additions, deletions or amendments to the Takeover Regulations.
(2) The Panel may—
(a) consult with any person at the request of any interested party with a view to advising on the application of a provision of Parts B and C of Chapter 5, or the Takeover Regulations;
(b) issue, amend or withdraw information on current policy in regard to proposed affected transactions contemplated in Parts B and C of Chapter 5, to serve as guidelines for the benefit of persons concerned in such proposed transactions;
(c) receive and deal with representations relating to any matter with which it may deal in terms of this Act; and
(d) perform any other function assigned to it by legislation.
(3) In exercising its powers and performing its functions the Panel must not express any view or opinion on the commercial advantages or disadvantages of any transaction or proposed transaction.

The Takeover Special Committee

202. (1) There is hereby established a committee of the Panel, to be known as the Takeover Special Committee.
(2) The Takeover Special Committee consists of—
(a) a chairperson, who must be an attorney or advocate whether practicing or not; and
(b) at least two other persons, each of whom must be designated from time to time by the Panel from among those of its members appointed by the Minister in terms of section 197(1)*(d)*.
(3) The Takeover Special Committee may—
(a) hear and decide—
(i) any matter referred to it by the Panel; and
(ii) any matter that the Executive Director, or a deputy Executive Director acting in the capacity of the Executive Director, may refer to it; and
(b) review compliance notices issued by the Executive Director, or a deputy Executive Director acting in the capacity of the Executive Director.

(4) Subject to this Act and the Takeover Regulations, the chairperson of the Takeover Special Committee may determine the procedure relating to any hearing of any matter referred to the Takeover Special Committee.

(5) The decision of a majority of the members of the Takeover Special Committee is the decision of the Takeover Special Committee.

(6) If there is an equality of votes on any question before a meeting of the Takeover Special Committee—

(a) the member presiding at the meeting may cast a deciding vote, if that presiding member did not initially have or cast a vote; or

(b) the matter being voted on fails, in any other case.

Part D

Financial Reporting Standards Council

Establishment and composition of Council

203. (1) The Minister must establish a council, to be known as the Financial Reporting Standards Council consisting of—

(a) four persons, each of whom is registered and practicing as an auditor;

(b) two persons each of whom is responsible for preparing financial statements on behalf of public companies;

(c) two persons responsible for preparing financial statements for private companies;

(d) four persons who, in their capacity as holders of securities issued by a company, or as creditors of a company, are reasonably expected to rely on financial statements, as contemplated in the definition of **"financial statement"** in section (1);

(e) two persons knowledgeable in company law;

(f) one person nominated by the executive officer of the Financial Services Board as defined in section 1 of the Financial Services Board Act, 1990 (Act No. 97 of 1990), or any successor body to it;

(g) one person nominated by the Governor of the South African Reserve Bank, or any successor body to it; and

(h) a number of persons, nominated one each by any exchange that imposes adherence to financial reporting standards as a listing requirement each of whom must be appointed by the Minister, to serve for a term of three years.

(2) The Minister must select candidates—

(a) with the qualifications, knowledge and experience necessary to further the functions of the Council; and

(b) appoint the chairperson and deputy chairperson of the Council.

(3) Persons appointed as members of the Council—

(a) must satisfy the requirements of section 205; and

(b) are subject to sections 206 and 207.

(4) A person may be reappointed to the Council, subject to section 205.

(5) The Minister may require the Council to be a member of a relevant international accounting standards setting organisation.

Functions of Financial Reporting Standards Council

204. The Financial Reporting Standards Council must—

(a) receive and consider any relevant information relating to the reliability of, and compliance with, financial reporting standards and adapt international reporting standards for local circumstances and consider information from the Commission as contemplated in section 187(3)*(b)*;

(b) advise the Minister on matters relating to financial reporting standards; and

(c) consult with the Minister on the making of regulations establishing financial reporting standards, subject to the requirements set out in section 29(5).

Part E

Administrative provisions applicable to agencies

Qualifications for membership

205. (1) To be eligible for appointment, designation or co-option as a member of the Companies Tribunal, the Panel, or the Council, and to continue to hold that office, a person must, in addition to satisfying any other specific requirements set out in this Act—

(a) not be subject to any disqualification set out in subsection (2); and

(b) have submitted to the Minister a written declaration stating that the person is not disqualified in terms of subsection (2).

(2) A person may not become, or continue to be, a member of the Companies Tribunal, the Panel, or the Council, if that person—

(a) is an office-bearer of any party, movement, organisation or body of a partisan political nature;

(b) personally or through a related person has or acquires a personal financial interest that may conflict or interfere with the proper performance of the duties of a member of the Tribunal, Panel, or Council;

(c) is disqualified in terms of section 69 from serving as a director of a company; or

(d) is subject to an order of a competent court holding that person to be mentally unfit or disordered.

Conflicting interests of agency members

206. (1) A member of the Companies Tribunal, the Panel or the Council, must promptly inform the Minister in writing after that person or a related persons acquires a personal financial interest that is, or is likely to become, an interest contemplated in section 205(2)*(b)*.

(2) A member of the Companies Tribunal, the Panel or the Council, must not—

(a) engage in any activity that may undermine the integrity of the Companies Tribunal, the Panel or the Council, as the case may be;

(b) attend, participate in or influence the proceedings during a meeting of the Companies Tribunal, the Panel, or the Council, as the case may be if, in relation to the matter being considered, that member has a personal financial interest—

(i) contemplated in section 205(2)*(b)*; or

(ii) that precludes that person from performing the functions of a member of the Companies Tribunal, the Panel or the Council, in a fair, unbiased and proper manner;

(c) vote at any meeting of the Tribunal, Panel or Council, as the case may be, in connection with a matter contemplated in paragraph *(b)*;

(d) make private use of, or profit from, any confidential information obtained as a result of performing that person's functions as a member of the Companies Tribunal, the Panel or the Council; or

(e) divulge any confidential information referred to in paragraph *(d)* to any third party, except as contemplated in section 212(5), or—

(i) to—

(aa) the Commission, the Minister, or the National Treasury to the extent required by this Act or a law mentioned in Schedule 4;

(bb) the South African Reserve Bank;

(cc) the Independent Regulatory Board for Auditors, in terms of the Auditing Profession Act;

(dd) the Financial Intelligence Centre established by the Financial Intelligence Centre Act, 2001 (Act No. 38 of 2001); or

(ii) as otherwise required as part of that person's official functions as a member of the Companies Tribunal, the Panel or the Council.

(3) If, at any time, it appears to a member of the Companies Tribunal, Panel, or Council that a matter being considered at a meeting concerns a personal financial interest of that member or a related person, as contemplated in subsection (2)*(b)*, that member must—

(a) immediately and fully disclose the nature of that interest to the meeting; and

(b) withdraw from the meeting to allow the remaining members to discuss the matter and determine whether the member should be prohibited from participating in any further proceedings concerning that matter.

(4) The disclosure by a person in terms of subsection (3)*(a)*, and the decision by the Companies Tribunal, the Panel, or the Council in terms of subsection (3)*(b)*, must be expressly recorded in the minutes of the meeting in question.

(5) Proceedings of the Companies Tribunal, the Panel, or the Council, and any decisions taken by a majority of the members present and entitled to participate in those decisions, are valid despite the fact that—

(a) a member failed to disclose an interest as required by subsection (3); or

(b) a member who had such an interest attended those proceedings, participated in them in any way, or directly or indirectly influenced those proceedings.

Resignation, removal from office and vacancies

207. (1) A member of the Companies Tribunal or the Council may resign by giving to the Minister—

(a) one month written notice; or

(b) less than one month written notice, with the approval of the Minister.

(2) A member of the Panel may resign by giving written notice jointly to the Minister and the relevant entity responsible for the designation of that member, if any.

(3) The Minister, after taking the steps required by subsection (4), may remove a member of the Companies Tribunal, Panel or Council only if that member has—

(a) become disqualified in terms of section 205(2);

(b) acted contrary to section 206(2);

(c) failed to disclose an interest or withdraw from a meeting as required by section 206(3); or

(d) neglected to properly perform the functions of their office.

(4) Before removing a person from office in terms of subsection (3), the Minister must afford the person an opportunity to state a case in defence of their position.

Conflicting interests of employees

208. The Commissioner, and each other employee of the Commission, and the Executive Director, and each other employee of the Panel and members and employees of the Council, must not—

(a) engage in any activity that may undermine the integrity of the Commission or Panel, as the case may be;

(b) participate in any investigation, hearing, or decision concerning a matter in respect of which that person has a personal financial interest;

(c) make private use of, or profit from, any confidential information obtained as a result of performing that person's official functions in the Commission or panel; or

(d) divulge any information referred to in paragraph *(c)* to any third party, except as required as part of that person's official functions within the Commission or panel.

Appointment of inspectors

209. (1) The Commissioner and the Executive Director—

(a) may each appoint any suitable employee of the Commission or Panel, as the case may be, or any other suitable person employed by the State, as an inspector; and

(b) must issue each inspector with a certificate in the prescribed form stating that the person has been appointed as an inspector in terms of this Act.

(2) When an inspector performs any function of an inspector in terms of this Act, the inspector—

(a) must be in possession of a certificate of appointment issued to that inspector in terms of subsection (1); and

(b) must show that certificate to any person who—

(i) is affected by the inspector's actions in terms of this Act; and

(ii) requests to see the certificate; and

(c) has the powers—

(i) set out in Part E of Chapter 7; and

(ii) of a peace officer as defined in section 1 of the Criminal Procedure Act, 1977 (Act No. 51 of 1977), and may exercise the powers conferred on a peace officer by law.

(3) The Commissioner and Executive Director may each appoint or contract with any suitably qualified person to assist the Commission, or the Panel, as the case may be, in carrying out its functions, including, but not limited to, conducting research, audits, inquiries or other investigations on behalf of the Commission or Panel, as the case may be, but a person appointed in terms of this subsection is not an inspector within the meaning of this Act.

(4) The Minister, with the concurrence of the Minister of Finance, may determine the remuneration to be paid to a person appointed in terms of this section, if that person is not in the full-time service of the Commission or Panel, as the case may be.

Finances

210. (1) The Commission, the Companies Tribunal and the Panel, are each financed from—

(a) money appropriated by Parliament;

(b) any fees payable in terms of this Act;

(c) income derived from their respective investment and deposit of surplus money in terms of subsection (2); and

(d) other money accruing from any source.

(2) The financial year of each of the Commission, the Companies Tribunal, and the Panel is the period of 12 months beginning 1 April each year, and ending on the following 31 March, except that, in each case, the first financial year—

(a) begins on the date that the section of this Act establishing that entity came into operation; and

(b) ends on the next following 31 March.

(3) The Commissioner or Executive Director, as the case may be, in consultation with the Minister and with the concurrence of the Minister of Finance, may determine the remuneration, allowances, benefits, and conditions of appointment of each employee of the Commission or Panel, as the case may be.

Reviews and reports to Minister

211. (1) At least once every five years, the Minister must conduct an audit review of the exercise of the functions and powers of the Commission, the Companies Tribunal, the Panel and the Council.

(2) In addition to any other reporting requirement set out in this Act, the Commission, Tribunal, Council and Panel must each report to the Minister at least once every year on its activities, as required by the Public Finance Management Act, 1999 (Act No. 1 of 1999).

(3) As soon as practicable after receiving a report of a review contemplated in subsection (1), or after receiving a report contemplated in subsection (2), the Minister must table it in Parliament.

Confidential information

212. (1) When submitting information to the Commission, the Panel, the Companies Tribunal, the Council, or an inspector or investigator appointed in terms of this Act, a person may claim that all or part of that information is confidential.

(2) Any claim contemplated in subsection (1) must be supported by a written statement explaining why the information is confidential.

(3) The Commission, Panel, Companies Tribunal, Council, inspector or investigator, as the case may be, must—

(a) consider a claim made in terms of subsection (1); and

(b) as soon as practicable, make a decision on the confidentiality of the information and access to that information, and provide written reasons for that decision.

(4) Section 172, read with the changes required by the context, applies to a decision in terms of subsection (3).

(5) When making any ruling, decision or order in terms of this Act, the Commission, the Panel, the Companies Tribunal or the Council may take confidential information into account.

(6) If any reasons for a decision in terms of this Act would reveal any confidential information, the Commission, the Panel, the Companies Tribunal or the Council, as the case may be, must provide a copy of the proposed reasons to the party claiming confidentiality at least five business days before publishing those reasons.

(7) Within five business days after receiving a copy of proposed reasons in terms of subsection (6), a party may apply to a court for an appropriate order to protect the confidentiality of the relevant information.

CHAPTER 9

OFFENCES, MISCELLANEOUS MATTERS AND GENERAL PROVISIONS

Part A

Offences and penalties

Breach of confidence

213. (1) It is an offence to disclose any confidential information concerning the affairs of any person obtained—

(a) in carrying out any function in terms of this Act; or

(b) as a result of initiating a complaint, or participating in any proceedings in terms of this Act.

(2) Subsection (1) does not apply to information disclosed—

(a) as contemplated in section 206(2)*(e)*(i) or (ii) or 212(5) to (7);

(b) for the purpose of the proper administration or enforcement of this Act;

(c) for the purpose of the administration of justice;

(d) at the request of the Commission, the Panel, an inspector or investigator, the Companies Tribunal, or a court entitled to receive the information; or

(e) when required to do so by any court or under any law.

False statements, reckless conduct and non-compliance

214. (1) A person is guilty of an offence if the person—

(a) is a party to the falsification of any accounting records of a company;

(b) with a fraudulent purpose, knowingly provided false or misleading information in any circumstances in which this Act requires the person to provide information or give notice to another person;

(c) was knowingly a party to—

(i) conduct prohibited by section 22(1); or

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

(d) is a party to the preparation, approval, dissemination or publication of—

(i) financial statements or summaries, to the extent set out in section 29(6);

(ii) a prospectus, or a written statement contemplated in section 101, that contained an 'untrue statement' as defined and described in section 95.

(2) For the purposes of subsection (1)*(d)*, a person is a party to the preparation of a document contemplated in that subsection if—

(a) the document includes or is otherwise based on a scheme, structure or form of words or numbers devised, prepared or recommended by that person; and

(b) the scheme, structure or form of words is of such a nature that the person knew, or ought reasonably to have known, that its inclusion or other use in connection with the preparation of the document would cause it to be false or misleading.

(3) It is an offence to fail to satisfy a compliance notice issued in terms of this Act, but no person may be prosecuted for such an offence in respect of a particular compliance notice if the Commission or Panel, as the case may be, has applied to a court in terms of section 171(7)*(a)* for the imposition of an administrative fine in respect of that person's failure to comply with that notice.

Hindering administration of Act

215. (1) It is an offence to hinder, obstruct or improperly attempt to influence the Commission, the Panel, the Companies Tribunal, an inspector or investigator, or a court when any of them is exercising a power or performing a duty delegated, conferred or imposed by this Act.

(2) A person commits an offence who—

(a) does anything calculated to improperly influence—

(i) the Commission, the Panel, the Companies Tribunal, an inspector or investigator concerning any matter connected with an investigation; or

(ii) the Companies Tribunal in any matter before it;

(b) anticipates any findings of the Commission, the Panel, the Companies Tribunal, an inspector or investigator in a way that is calculated to improperly influence the proceedings or findings;

(c) does anything in connection with an investigation or hearing that would have been contempt of court if the proceedings had occurred in a court of law;

(d) refuses to attend when summoned, or after attending, refuses to answer any question or produce any document as required by the summons, other than as contemplated in section 176)*(a)*;

(e) knowingly provides false information to the Commission, the Panel, the Companies Tribunal, an inspector or investigator;

(f) improperly frustrates or impedes the execution of a warrant to enter and search, or attempts to do so;

(g) acts contrary to or in excess of a warrant to enter and search; and

(h) without authority, but claiming to have authority in terms of section 177—

(i) enters or searches premises; or

(ii) attaches or removes an article or document.

Penalties

216. Any person convicted of an offence in terms of this Act, is liable—

(a) in the case of a contravention of section 213(1) or 214(1), to a fine or to imprisonment for a period not exceeding 10 years, or to both a fine and imprisonment; or

(b) in any other case, to a fine or to imprisonment for a period not exceeding 12 months, or to both a fine and imprisonment.

Magistrate's Court jurisdiction to impose penalties

217. Despite anything to the contrary contained in any other law, a Magistrate's Court has jurisdiction to impose any penalty provided for in section 216.

Part B

Miscellaneous matters

Civil actions

218. (1) Nothing in this Act renders void an agreement, resolution or provision of an agreement, resolution, Memorandum of Incorporation or rules of a company that is prohibited, void, voidable or may be declared unlawful in terms of this Act, unless a court declares that agreement, resolution or provision to be void.

(2) Any person who contravenes any provision of this Act is liable to any other person for any loss or damage suffered by that person as a result of that contravention.

(3) The provisions of this section do not affect the right to any remedy that a person may otherwise have.

Limited time for initiating complaints

219. (1) A complaint in terms of this Act may not be initiated by, or made to, the Commission or the Panel, more than three years after—

(a) the act or omission that is the cause of the complaint; or

(b) in the case of a course of conduct or continuing practice, the date that the conduct or practice ceased.

(2) A complaint may not be prosecuted in terms of this Act against any person that is, or has been, a respondent in proceedings under another section of this Act relating substantially to the same conduct.

Serving documents

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

(a) delivered to that person; or

(b) sent by registered mail to that person's last known address.

Proof of facts

221. (1) In any proceedings in terms of this Act, if it is proved that a false statement, entry or record or false information appears in or on a book, document, plan, drawing or computer storage medium, the person who kept that item must be presumed to have made the statement, entry, record or information, unless the contrary is proved.

(2) A statement, entry or record, or information, in or on any book, document, plan, drawing or computer storage medium is admissible in evidence as an admission of the facts in or on it by the person who appears to have made, entered, recorded or stored it unless it is proved that that person did not make, enter, record or store it.

State liability

222. The State, the Commission, the Commissioner, the Companies Tribunal, the Panel, an inspector, or any state employee or similar person having duties to perform under this Act, is not liable for any loss sustained by or damage caused to any person as

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

Part C

Regulations, consequential matters and commencement

Regulations

223. (1) The Minister—

(a) may make any regulations expressly authorised or contemplated elsewhere in this Act, in accordance with subsection (2);

(b) in consultation with the Commission, and by notice in the *Gazette*, may make regulations for matters relating to the functions of the Commission, including—

(i) forms;
(ii) time periods;
(iii) information required;
(iv) additional definitions applicable to those regulations;
(v) filing fees;
(vi) access to confidential information;
(vii) manner and form of participation in Commission procedures; and
(viii) forms of Memorandum of Incorporation and requirements concerning the offering of securities;

(c) in consultation with the Chairperson of the Panel, and by notice in the *Gazette*, may make—

(i) regulations for matters relating to the functions of the panel, respectively; and
(ii) rules for the conduct of matters before the Panel; and

(d) may make regulations regarding—

(i) any forms required to be used for the purposes of this Act; and
(ii) in general, any ancillary or incidental matter that is necessary for the proper implementation and administration of this Act.

(2) Before making any regulations in terms of this Act, the Minister must publish the proposed regulations for public comment, subject to subsection (3).

(3) In the case of regulations prescribing financial reporting standards as contemplated in section 29(4)*(a)*, the provisions of subsection (2) do not apply.

(4) A regulation in terms of this Act must be made by notice in the *Gazette*.

Consequential amendments, repeal of laws and transitional arrangements

224. (1) The Companies Act, 1973 (Act No. 61 of 1973), is hereby repealed, subject to subsection (3).

(2) The laws referred to in Schedule 3 are hereby amended in the manner set out in that Schedule.

(3) The repeal of the Companies Act, 1973 (Act No. 61 of 1973), does not affect the transitional arrangements, which are set out in Schedule 5.

Short title and commencement

225. This Act is called the Companies Act, 2008, and comes into operation on a date fixed by the President by proclamation in the *Gazette,* which may not be earlier than one year following the date on which the President assented to this Act.

SCHEDULE 1

Provisions concerning non-profit companies

Objects and policies

1. (1) The Memorandum of Incorporation of a non-profit company must—

(a) set out at least one object of the company, and each such object must be either—

(i) a public benefit object; or

(ii) an object relating to one or more cultural or social activities, or communal or group interests; and

(b) be consistent with the principles set out in subitems (2) to (9).

(2) A non-profit company—

(a) must apply all of its assets and income, however derived, to advance its stated objects, as set out in its Memorandum of Incorporation; and

(b) subject to paragraph *(a)*, may—

(i) acquire and hold securities issued by a profit company; or

(ii) directly or indirectly, alone or with any other person, carry on any business, trade or undertaking consistent with or ancillary to its stated objects.

(3) A non-profit company must not, directly or indirectly, pay any portion of its income or transfer any of its assets, regardless whether the income or asset was derived, to any person who is or was an incorporator of the company, or who is a member or director, or person appointing a director, of the company, except—

(a) as reasonable—

(i) remuneration for goods delivered or services rendered to, or at the direction of, the company; or

(ii) payment of, or reimbursement for, expenses incurred to advance a stated object of the company;

(b) as a payment of an amount due and payable by the company in terms of a *bona fide* agreement between the company and that person or another;

(c) as a payment in respect of any rights of that person, to the extent that such rights are administered by the company in order to advance a stated object of the company; or

(d) in respect of any legal obligation binding on the company.

(4) Despite any provision in any law or agreement to the contrary, upon the winding-up or dissolution of a non-profit company—

(a) no past or present member or director of that company, or person appointing a director of that company, is entitled to any part of the net value of the company after its obligations and liabilities have been satisfied; and

(b) the entire net value of the company must be distributed to one or more non-profit companies, external non-profit companies carrying on activities within the Republic, voluntary associations or non-profit trusts—

(i) having objects similar to its main object; and

(ii) as determined—

(aa) in terms of the company's Memorandum of Incorporation;

(bb) by its members, if any, or its directors, at or immediately before the time of its dissolution; or

(cc) by the court, if the Memorandum of Incorporation, or the members or directors fail to make such a determination.

(5) The Commission may apply to the court, on behalf of a non-profit company, for a determination contemplated in subitem (4)*(b)*(ii)*(cc)* if the non-profit company has—

(a) no remaining members or directors; and

(b) failed to—

(i) make a determination contemplated in subitem (4)*(b)*(ii)*(bb)*; or

(ii) apply to the court for such a determination.

(6) Incorporation as a non-profit company in terms of this Act, or registration as an external non-profit company in terms of this Act, and compliance by either with the provisions of this Act does not necessarily qualify that non-profit company, or external non-profit company, for any particular status, category, classification or treatment in terms of the Income Tax Act, 1962 (Act No. 58 of 1962), or any other legislation, except to the extent that any such legislation provides otherwise.

(7) Each voting member of a non-profit company has at least one vote.

(8) The vote of each member of a non-profit company is of equal value to the vote of each other voting member on any matter to be determined by vote of the members, except to the extent that the company's Memorandum of Incorporation provides otherwise.

(9) If a non-profit company has members, the requirement in section 24(4) to maintain a securities register must be read as requiring the company to maintain a membership register.

Fundamental transactions

2. (1) A non-profit company may not—

(a) amalgamate or merge with, or convert to, a profit company; or

(b) dispose of any part of its assets, undertaking or business to a profit company, other than for fair value, except to the extent that such a disposition of an asset occurs in the ordinary course of the activities of the non-profit company.

(2) If a non-profit company has voting members, any proposal to—

(a) dispose of all or the greater party of its assets or undertaking; or

(b) amalgamate or merge with another non-profit company,

must be submitted to the voting members for approval, in a manner comparable to that required of profit companies in accordance with sections 112 and 113, respectively.

(3) Sections 115 and 116, read with the changes required by the context, apply with respect to the approval of a proposal contemplated in subitem (2).

Incorporators of non-profit company

3. The incorporators of a non-profit company are its—

(a) first directors; and

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

Members

4. (1) A non-profit company is not required to have members, but its Memorandum of Incorporation may provide for it to do so.

(2) If the Memorandum of Incorporation of a non-profit company provides for the company to have members, it—

(a) must not restrict or regulate, or provide for any restriction or regulation of, that membership in any manner that amounts to unfair discrimination in terms of section 9 of the Constitution;

(b) must not presume the membership of any person, regard a person to be a member, or provide for the automatic or *ex officio* membership of any person, on any basis other than life-time membership awarded to a person—

(i) for service to the company or to the public benefit objects set out in the company's Memorandum of Incorporation; and

(ii) with that person's consent;

(c) may allow for membership to be held by juristic persons, including profit companies;

(d) may provide for no more than two classes of members, that is voting and non-voting members, respectively; and

(e) must set out—

(i) the qualifications for membership;

(ii) the process for applying for membership;

(iii) any initial or periodic cost of membership in any class;

(iv) the rights and obligations, if any, of membership in any class; and

(v) the grounds on which membership may, or will, be suspended or lost.

Directors

5. (1) If a non-profit company has members, the Memorandum of Incorporation must—

(a) set out the basis on which the members choose the directors of the company; and

(b) if any directors are to be elected by the voting members, provide for the election each year of at least one-third of those elected directors.

(2) If a non-profit company has no members, the Memorandum of Incorporation must set out the basis on which directors are to be appointed by its board, or other persons.

(3) A non-profit company must not provide a loan to, secure a debt or obligation of, or otherwise provide direct or indirect financial assistance to, a director of the company or of a related or inter-related company, or to a person related to any such director.

(4) Subitem (3) does not prohibit a transaction if it—

(a) is in the ordinary course of the company's business and for fair value;

(b) constitutes an accountable advance to meet—

(i) legal expenses in relation to a matter concerning the company; or

(ii) anticipated expenses to be incurred by the person on behalf of the company;

(c) is to defray the person's expenses for removal at the company's request; or

(d) is in terms of an employee benefit scheme generally available to all employees or a specific class of employees.

SCHEDULE 2

CONVERSION OF CLOSE CORPORATIONS TO COMPANIES

Notice of conversion of close corporation

1. (1) A close corporation may file a notice of conversion in the prescribed manner and form, at any time.

(2) A notice of conversion must be accompanied by—

(a) a certified copy of a special resolution approving the conversion of the close corporation;

(b) either a new Memorandum of Incorporation, or an amendment to the company's Memorandum of Incorporation, consistent with the requirements of this Act, in either case; and

(c) the prescribed filing fee.

(3) Section 14, read with the changes required by the context, applies with respect to the filing of a notice of conversion, as if it were a Notice of Incorporation in terms of this Act.

(4) Upon conversion of a close corporation in terms of this Schedule the Commission must—

(a) cancel the registration of that close corporation in terms of the Close Corporations Act, 1984 (Act No. 69 of 1984);

(b) give notice in the *Gazette* of the conversion of a close corporation into a company; and

(c) enable the Registrar of Deeds to effect the necessary changes resulting from conversions and name changes.

Effect of conversion on legal status

2. (1) Every member of a close corporation converted under this Schedule is entitled to become a shareholder of the company resulting from that conversion, but the shares to be held in the company by the shareholders individually need not necessarily be in proportion to the members' interests as stated in the founding statement of the close corporation concerned.

(2) On the registration of a company converted from a close corporation—

(a) the juristic person that existed as a close corporation before the conversion continues to exist as a juristic person, but in the form of a company;

(b) all the assets, liabilities, rights and obligations of the close corporation vest in the company;

(c) any legal proceedings instituted before the registration by or against the corporation, may be continued by or against the company, and any other thing done by or in respect of the close corporation, is deemed to have been done by or in respect of the company;

(d) any enforcement measures that could have been commenced with respect to the close corporation in terms of the Close Corporations Act, 1984 (Act No. 69 of 1984), for conduct occurring before the date of registration, may be brought against the company on the same basis, as if the conversion had not occurred; and

(e) any liability of a member of the corporation for the corporation's debts, that had arisen in terms of the Close Corporations Act, 1984 (Act No. 69 of 1984), and existed immediately before the date of registration, survives the conversion and continues as a liability of that person, as if the conversion had not occurred.

SCHEDULE 3

AMENDMENT OF LAWS

A: Close Corporations Act, 1984

Act No. and Year	Short title	Extent of amendment or repeal
1. Amendments to definitions of Close Corporations Act		
Act No. 69 of 1984	Close Corporations Act, 1984	**Amendment of section 1 of Act 69 of 1984, as amended by section 1 of Act 38 of 1986, section 1 of Act 26 of 1997, section 1 of Act 22 of 2001 and section 57 of Act 24 of 2006** 1. Section 1 of the Close Corporations Act is hereby amended by— *(a)* the insertion before the definition of **"Companies Act"** of the following definition: " **'Commission'** means the Companies and Intellectual Property Commission, established by section 185 of the Companies Act;"; *(b)* the substitution for the definition of **"Companies Act"** of the following definition: " **'Companies Act'** means the Companies Act, **[1973 (Act No. 61 of 1973)]** 2008;"; *(c)* the substitution for the definition of **'company'** of the following definition: " **'company' [means a company as defined in]** has the meaning set out in section 1 of the Companies Act;"; *(d)* the substitution for the definition of **"director"** of the following definition: " **'director'**, in relation to a company, **[means a director as defined]** has the meaning set out in section 1 **[(1)]** of the Companies Act;"; *(e)* the substitution for the definition of **"holding company"** of the following definition: " **'holding company'**, in relation to a company, **[means a holding company as defined]** has the meaning set out in section 1 **[(1)]** of the Companies Act;"; *(f)* the substitution for paragraph *(b)* of the definition of **"officer"** of the following paragraph: "*(b)* a company, means **[an]** a prescribed officer as defined in section 1 **[(1)]** of the Companies Act;"; *(g)* the substitution for the definition of **'Registrar'** of the following definition: " **'Registrar'** means the **[Registrar of Close Corporations referred to in section 4]** Commissioner, appointed in terms of section 189 of the Companies Act;"; *(h)* the substitution for the definition of **'Registration Office'** of the following definition: " **'Registration Office'** means the **[Close Corporations Registration Office referred to in section 3]** office of the Commission;";

Act No. and Year	Short title	Extent of amendment or repeal
		(i) the substitution for the definition of **'subsidiary'** of the following definition: " **'subsidiary'**, in relation to a company, **[means a subsidiary as defined in section 1(1)]** has the meaning determined in accordance with section 3 of the Companies Act."; and *(j)* the substitution for the definition of **"this Act"** of the following definition: " **'this Act'** includes the regulations, and any regulations made in terms of the Companies Act, to the extent that they apply to this Act.".
2. Limitation of period to incorporate close corporations or convert companies		
		Amendment of section 2 of Act 69 of 1984 (1) Section 2 of the Close Corporations Act is hereby amended by the substitution for subsection (1) of the following subsection:
		"(1) **[Any]** At any time before section 13 of the Companies Act comes into operation, any one or more persons, not exceeding ten, who qualify for membership of a close corporation in terms of this Act, may form a close corporation and secure its incorporation by complying with the requirements of this Act in respect of the registration of its founding statement referred to in section 12.".
		Amendment of section 13 of Act 69 of 1984 (2) Section 13 of the Close Corporations Act is hereby substituted for the following section: **"Registration of founding statement** **13.** If a founding statement referred to in section 12 complying with the requirements of this Act is lodged with the Registrar in the manner prescribed at any time before section 13 of the Companies Act comes into operation, and if the business to be carried on by the corporation is lawful, the Registrar shall upon payment of the prescribed fee register such statement in his or her registers and shall give notice of the registration in the prescribed manner.".
		Repeal of section 27 of Act 69 of 1984 (3) Section 27 of the Close Corporations Act is hereby repealed with effect from the date on which Schedule 2 of the Companies Act comes into operation.

Act No. and Year	Short title	Extent of amendment or repeal
3. Legal status of close corporations		
		Amendment of section 2 of Act 69 of 1984 (1) Section 2 of the Close Corporations Act is hereby amended by the substitution for subsection (2) of the following subsection: "(2) A corporation formed in accordance with the provisions of this Act is on registration in terms of those provisions a juristic person and continues, subject to the provisions of this Act, to exist as a juristic person notwithstanding changes in its membership, or its conversion to a company in terms of Schedule 2 of the Companies Act, until it is **[in terms of this Act]** deregistered or dissolved— *(a)* in terms of this Act; or *(b)* in terms of the Companies Act, in the case of a juristic person that has been converted to a company.".
4. Names of corporations		
		Amendment of section 19 of Act 69 of 1984, as substituted by section 5 of Act 26 of 1997 (1) Section 19 of the Close Corporations Act is hereby amended by the substitution of the following section: "**Undesirable names and reservation of names** **19.** (1) **[No founding statement containing a name for a corporation to be incorporated and no amended founding statement containing a new name for a corporation shall be registered if the name is in the opinion of the Registrar undesirable]** Part A of Chapter 2 of the Companies Act, read with the changes required by the context, applies to a corporation and to an applicant for name reservation in terms of subsection (2), but— *(a)* a reference in any of those provisions to a company must be regarded as a reference to a corporation for the purposes of this Act; and *(b)* the application of section 11(4) of the Companies Act to a corporation is subject to the provisions of section 22(1) of this Act. (2) Any person who intends to form a corporation or any corporation which intends to change its name **[shall]** may apply to the Registrar for the reservation of a name, on the prescribed form and on payment of the prescribed fee **[, apply to the Registrar for the reservation of a name: Provided that a company being converted into a corporation in terms of this Act shall not be required to so reserve its name if the name remains identical]**.";

Act No. and Year	Short title	Extent of amendment or repeal
		Amendment of section 20 of Act 69 of 1984, as inserted by section 3 of Act 81 of 1992 and substituted by section 8 of Act 22 of 2001 (2) Section 20 of the Close Corporations Act is hereby amended by the substitution of the following subsection: "**[Order to change name]** Objections to names **20.** Sections 14(4), 16(8), and 160 of the Companies Act, each read with the changes required by the context, apply to a corporation or with respect to a reserved name, or an application to reserve a name in terms of section 19(2), but a reference in any of those provisions to a company must be regarded as a reference to a corporation for the purposes of this Act.".
		Amendment of section 22 of Act 69 of 1984, as amended by section 6 of Act 26 of 1997 (3) Section 22(2) and (4) of the Close Corporations Act is hereby repealed.
		Amendment of section 23 of Act 69 of 1984, as amended by section 5 of Act 81 of 1992, section 8 of Act 26 of 1997 and section 9 of Act 22 of 2001 (4) The Close Corporations Act is hereby amended by the substitution for section 23 of the following section: "**Use and publication of names** **23.** Section 32 of the Companies Act, read with the changes required by the context, applies to a corporation, but a reference in that section to a company must be regarded as a reference to a corporation for the purposes of this Act.".
		Repeal of section 41 of Act 69 of 1984 (5) Section 41 of the Close Corporations Act is hereby repealed.
5. Transparency and accountability of close corporations		
		Amendment of section 10 of Act 69 of 1984, as amended by section 2 of Act 38 of 1986 and section 4 of Act 22 of 2001 and substituted by section 20 of Act 16 of 2003 (1) Section 10 of the Close Corporations Act is hereby amended by the insertion of the following subsection after subsection (2):

Act No. and Year	Short title	Extent of amendment or repeal
		''(3) Regulations made by the Minister in terms of section 29(4) and (5), and 30(7) of the Companies Act apply to a corporation as if those regulations had been made in terms of this Act, but any reference in those regulations to a company must be read as a reference to a corporation.''.
		Amendment of section 47 of Act 69 of 1984, as amended by section 11 of Act 26 of 1997, section 13 of Act 22 of 2001 and substituted by section 36 of Act 12 of 2004 (2) Section 47 of the Close Corporations Act is amended by— *(a)* the repeal of subparagraphs (ii) and (iii) of paragraph *(b)* of subsection(1); *(b)* the substitution for paragraph *(c)* of subsection (1) the following paragraph: ''*(c)* any person who is **[subject to any order of a court under]** disqualified from being a director of a company in terms of section 69(8) to (11) of the Companies Act, subject to subsection (1B) **[disqualifying him or her from being a director of a company]**.''; and *(c)* the insertion of the following subsections after subsection *(a)*: ''(1A) A person who has been placed under probation by a court in terms of section 162 of the Companies Act or subsection (1C), must not participate in the management of the business of a corporation, except to the extent permitted in the order of probation. (1B) Despite being disqualified in terms of section 69(8)*(b)* of the Companies Act, read with subsection (1)*(c)*, a person may participate in the management of a corporation if 100% of the members' interest in the corporation is held by— *(a)* that person; or *(b)* that person and other persons, all of whom are related to that disqualified person, and each such person has consented in writing to that disqualified person participating in the management of the corporation. (1C) Section 162 of the Companies Act, read with the changes required by the context, applies to a corporation, but a reference in that section to— *(a)* a company must be regarded as referring to a company or a corporation; or *(b)* a director, must be regarded as referring to a director of a company, or a member participating in the management of a corporation.''.

Act No. and Year	Short title	Extent of amendment or repeal
		Repeal of section 55 of Act 69 of 1984 (3) Section 55 of the Close Corporations Act is hereby repealed.
		Amendment of section 58 of Act 69 of 1984, as substituted by section 12 of Act 38 of 1986 and amended by section 4 of Act 64 of 1988 (4) Section 58 of the Close Corporations Act is hereby amended by— *(a)* the substitution for subsection (1) of the following subsection: "(1) The members of a corporation shall within **[nine]** six months after the end of every financial year of the corporation cause annual financial statements in respect of that financial year to be made out in one of the official languages of the Republic. *(b)* the insertion, of the following subsection after subsection (2), "(2A) Section 30(2)*(b)*, and (3) to (6) of the Companies Act, read with the changes required by the context, apply to a corporation that is required by the regulations made in terms of section 30(7) of the Companies Act, to have its annual financial statements audited.
		Amendment of section 62 of Act 69 of 1984, as amended by section 13 of Act 38 of 1986 and section 4 of Act 17 of 1990 (5) Section 62 of the Close Corporations Act is hereby amended by the insertion of the following section after section 62: **"Application of accountability provisions of Companies Act** **62A.** (1) Section 34(2) of the Companies Act, read with the changes required by the context, apply to a corporation. (2) Chapter 3 of the Companies Act, read with the changes required by the context— *(a)* applies to a corporation that has voluntarily determined to take any action contemplated in section 34(2) of the Companies Act; and *(b)* prevails over any conflicting provision of this Act, with respect to a corporation contemplated in paragraph *(a)*.".

Act No. and Year	Short title	Extent of amendment or repeal
6. Rescue of financially distressed close corporations		
		Amendment of section 66 of Act 69 of 1984, as substituted by section 16 of Act 26 of 1997 (1) Section 66 of the Close Corporations Act is hereby amended by the insertion of the following subsection after subsection (1): "(1A) The provisions of Chapter 6 of the Companies Act, read with the changes required by the context, apply to a corporation, but any reference in that Chapter to— *(a)* a company must be regarded as a reference to a corporation; or *(b)* a shareholder of a company, or the holder of securities issued by a company, must be read as a reference to a member of a corporation.".
7. Dissolution of corporations		
		Amendment of section 66 of Act 69 of 1984, as substituted by section 16 of Act 26 of 1997 (1) Section 66 of the Close Corporations Act is hereby amended by the substitution for subsection (1) of the following subsection: "(1) The **[provisions]** laws mentioned or contemplated in item 9 of Schedule 5 of the Companies Act, **[which relate to the winding-up of a company, including the regulations made thereunder, (except sections 311, 312, 313, 337, 338, 344, 345, 346(2), 347(3), 349, 364, 365(2), 367 to 370, inclusive, 377, 387, 389, 390, 395 to 399, inclusive, 400(1)*(b)*, 401, 402, 417, 418, 419(4), 421, 423 and 424),]** read with the changes required by the context, **[shall]** apply **[*mutatis mutandis* and in so far as they can be applied]** to the liquidation of a corporation in respect of any matter not specifically provided for in this Part or in any other provision of this Act.".
		Amendment of section 67 of Act 69 of 1984 (2) Section 67 of the Close Corporations Act is hereby substituted for the following section— "**Dissolution of corporations** **67.** (1) Part G of Chapter 2 of the Companies Act, read with the changes required by the context, applies to a solvent corporation. (2) This Part of this Act must be administered in accordance with the laws mentioned or contemplated in item 9 of Schedule 5 of the Companies Act.".

Act No. and Year	Short title	Extent of amendment or repeal
		Repeal of 68 of Act 69 of 1984 **(3)** Section 68 of the Close Corporations Act is hereby repealed.
8. Deregistration of corporations		
		Amendment of section 26 of Act 69 of 1984, as amended by section 6 of Act 38 of 1986, section 14 of Act of 22 of 2001, section 9 of Act 39 of 2002 and section 62 of Act 24 of 2001 (1) Section 26 of the Close Corporations Act is hereby, substituted for the following section: "**Deregistration** **26.** Sections 81(1)*(f)*, 81(3), 82(3) to (4), and 83 of the Companies Act, each read with the changes required by the context, apply with respect to the deregistration of a corporation, but a reference in any of those provisions to a company must be regarded as a reference to a corporation for the purposes of this Act.".
		Repeal of section 3(1) of Act 69 of 1984 (2) Section 3(1) of the Close Corporations Act is hereby repealed.
		Amendment of section 4 of Act 69 of 1984 (3) Section 4 of the Close Corporations Act is hereby amended by— *(a)* the substitution for subsection (1) of the following subsection: "(1) **[The Minister shall, subject to the laws governing the public service, appoint a Registrar of Close Corporations, who shall]** The Commission— *(a)* may exercise the powers and must perform the duties assigned to the Registrar by this Act; and *(b)* **[subject to the directions of the Minister, be]** is responsible for the administration of the Registration Office."; *(b)* the repeal of subsection (2); and *(c)* the substitution for subsection (3) of the following subsection: "(3) The **[Registrar] Commission may delegate any of the powers and entrust any of the duties [assigned to him or her by this Act]** of the Registrar to any officer or employee in the **[public service]** Commission.".

Act No. and Year	Short title	Extent of amendment or repeal
		Repeal of sections 11 and 16 of Act 69 of 1984 (4) Sections 11 and 16(3) of the Close Corporations Act are hereby repealed.
		Repeal of sections 47(7), 49(5) and 58(4) of Act 69 of 1984 (5) Sections 47(2), 49(5) and 58(4) of the Close Corporations Act are hereby repealed.
		Amendment of section 64 of Act 69 of 1984 (6) Section 64 of the Close Corporations Act is hereby amended by the substitution for subsection (2) of the following subsection: ''(2) **[Without prejudice to any other criminal liability incurred where]** If any business of a corporation is carried on in any manner contemplated in subsection (1), every person who is knowingly a party to the carrying on of the business in any such manner, shall be guilty of an offence.''.
		Amendment of section 82 of Act 69 of 1984 (7) Section 82 of the Close Corporations Act is hereby substituted for the following section: ''**Application of Companies Act to enforcement of Act** **82.** Parts D, E, and F of Chapter 7, and Part A of Chapter 9 of the Companies Act, read with the changes required by the context, apply with respect to any alleged contravention of this Act or contravention of any provision of the Companies Act to the extent the provision applies to a corporation or its members.''.

B: Consequential Amendments to certain other Acts listed in Schedule 4

No. and year	Short Title	Extent of amendment or repeal
Act No. 62 of 1977	Registration of Copyright in Cinematograph films Act, 1977	**Amendment of section 1 of Act 62 of 1977** 1. Section 1 of the Registration of Copyright in Cinematograph Films Act, 1977, is hereby amended by— *(a)* the insertion after the definition of **"assignment"** of the following definition: " **'Commission'** means the Companies and Intellectual Property Commission, established by section 185 of the Companies Act, 2008"; *(b)* by the substitution for the definition of **"legal practitioner"** of the following definition: " **'legal practitioner'** means an attorney of the **[Supreme]** High Court of South Africa or an advocate of such Court duly instructed by an attorney or patent agent to appear before the Registrar **[or his deputy]**; *(c)* by the substitution for the definition of **"Registrar"** of the following definition: " **'Registrar'** means the **[Registrar of Copyright appointed under this Act]** Commissioner appointed in terms of section 189 of the Companies Act, 2008;"; *(d)* by the substitution for the definition of **"registration office"** for the following definition: " **'registration office'** means the **[registration office for copyright in cinematograph films referred to in section 2]** office of the Commission; **Repeal of section 2 of Act 62 of 1977** 2. Section 2 of the Registration of Copyright in Cinematograph Films Act, 1977, is hereby repealed. **Amendment of section 3 of Act 62 of 1977** 3. Section 3 of the Registration of Copyright in Cinematograph Films Act, 1977, is hereby amended by the substitution for subsections (1) and (2) of the following subsections: "(1) The Commission may exercise the powers and must perform the duties assigned to the registrar by this Act and is responsible for the administration of the registration office. (2) The **[Registrar]** Commission may delegate any of the powers and entrust any of the duties assigned to **[him]** the registrar by this Act, to any officer or employee in the **[public service]** Commission**.**

No. and year	Short Title	Extent of amendment or repeal
Act No. 57 of 1978	Patents Act, 1978	**Amendment of section 2 of Act 57 of 1978, as amended by section 1 of Act 76 of 1988, section 1 of Act 49 of 1996, section 27 of Act 38 of 1997 and section 1 of Act 20 of 2005** 1. Section 2 of the Patents Act, 1993, is hereby amended by— *(a)* the insertion after the definition of **"application in a convention country"** of the following definition: " **'Commission'** means the Companies and Intellectual Property Commission, established by section 185 of the Companies Act, 2008"; *(b)* by the substitution for the definition of **"patent office"** of the following definition: " **'patent office'** means the **[patent office established in terms of section 5]** office of the Commission; and *(c)* by the substitution for the definition of **"registrar"** of the following definition: " **'registrar'** means the **[registrar of patents appointed under section 7]** Commissioner, appointed in terms of section 189 of the Companies Act, 2008;"; **Repeal of section 5 of Act 57 of 1978** 2. Section 5 of the Patents Act, 1978, is hereby repealed. **Amendment of section 7 of Act 57 of 1978** 3. Section 7 of the Patents Act, 1978, is hereby amended by— *(a)* the substitution for subsection (1) of the following subsection: "(1) The **[Minister shall, subject to the laws governing the public service, appoint a registrar of patents, who shall]** Commission— *(a)* may exercise the powers and must perform the duties conferred or imposed upon the registrar by this Act; and *(b)* **[and who shall, subject to the directions of the Minister, have the chief control]** is responsible for the administration of the patent office. *(b)* by the repeal of subsection (2); *(c)* by the substitution for subsection (3) of the following subsection: "(3) The Commission may delegate any of the powers and entrust any of the duties assigned to the registrar by this Act, to any officer or employee in the Commission."

No. and year	Short Title	Extent of amendment or repeal
Act No. 98 of 1978	Copyright Act, 1978	**Amendment of section 1 of Act 98 of 1978, as amended by section 1 of Act 56 of 1980, section 1 of Act 66 of 1983, section 1 of Act 52 of 1984, section 1 of Act 13 of 1988, section 1 of Act 125 of 1992, section 50 of Act 38 of 1997 and section 1 of Act 9 of 2002** 1. Section 1 of the Copyright Act, 1978, is hereby amended by the substitution for the definition of **"Registrar"** of the following definition: " **'Registrar'** means the **[Registrar of Copyright, who shall be the person appointed as Registrar of Patents under section 7 of the Patents Act, 1978]** Commissioner appointed in terms of section 189 of the Companies Act, 2008;".
Act No. 59 of 1980	Share Blocks Control Act, 1980	**Amendment of section 1 of Act 59 of 1980** 1. Section 1 of the Share Blocks Control Act, 1980, is hereby amended by— *(a)* the substitution for the definition of **"Companies Act"** of the following definition: " **'Companies Act'** means the Companies Act, **[1973 (Act No. 61 of 1973)]** 2008;"; and *(b)* the insertion after the definition of **purchaser'** of the following definition: " **'Registrar'** means the Commissioner, appointed in terms of section 189 of the Companies Act;".
Act No. 194 of 1993	Trade Marks Act, 1993	**Amendment of section 2 of Act 194 of 1993** 1. Section 2 of the Trade Marks Act, 1993, is hereby amended by— *(a)* the insertion after the definition of **"collective trade mark"** of the following definition: " **'Commission'** means the Companies and Intellectual Property Commission, established by section 185 of the Companies Act, 2008"; *(b)* the substitution for the definition of **"registrar"** of the following definition: **'registrar'** means the **[registrar of trade marks appointed or deemed to have been appointed under section 6]** Commissioner, appointed in terms of section 189 of the Companies Act, 2008;"; and *(c)* the insertion after the definition of **"trade mark"** of the following definition: " **'trade marks office'** means the office of the Commission;". **Repeal of section 5 of Act 194 of 1993** 2. Section 5 of the Trade Marks Act, 1993, is hereby repealed.

No. and year	Short Title	Extent of amendment or repeal
		Amendment of section 6 of Act 194 of 1993 3. Section 6 of the Trade Marks Act, 1993, is hereby amended by— *(a)* the substitution for subsection (1) of the following subsection: "(1) The Commission— *(a)* may exercise the powers and must perform the duties conferred or imposed upon the registrar by this Act; and *(b)* is responsible for the administration of the trade marks office.". *(b)* the repeal of subsections (2) and (4).
Act No. 195 of 1993	Designs Act, 1993	**Amendment of section 1 of Act 195 of 1993 as amended by section 69 of Act 38 of 1997** 1. Section 1 of the Designs Act, 1993, is hereby amended by— *(a)* the insertion after the definition of **"article"** of the following definition: " **'Commission'** means the Companies and Intellectual Property Commission, established by section 185 of the Companies Act, 2008;"; *(b)* the substitution for the definition of **"designs office"** of the following definition: " **'designs office'** means the **[designs office referred to in section 4]** office of the Commission; *(c)* by the substitution for the definition of **"registrar"** of the following definition: " **'registrar'** means the **[registrar of designs appointed or deemed to have been appointed under section 6]** Commissioner, appointed in terms of section 189 of the Companies Act, 2008;"; **Repeal of section 4 of Act 195 of 1993** 2. Section 4 of the Designs Act, 1993, is hereby repealed. **Amendment of section 6 of Act 195 of 1993** **3. Section 6 of the Designs Act, 1993 is hereby amended by—** *(a)* the substitution for subsection (1) of the following subsection: "(1) The **[Minister shall, subject to the laws governing the public service, appoint a registrar of designs, who shall]** Commission— *(a)* may exercise the powers and must perform the duties conferred or imposed upon the registrar by this Act; and *(b)* **[and who shall, subject to the directions of the Minister, have the chief control]** is responsible for the administration of the designs office.

No. and year	Short Title	Extent of amendment or repeal
		(b) by the repeal of subsections (2) and (3); *(c)* by the substitution for subsection (4) of the following subsection: "(4) The Commission may delegate any of the powers and entrust any of the duties assigned to the registrar by this Act, to any officer or employee in the Commission."
Act No. 14 of 2005	Co-operatives Act, 2005	**Amendment of section 1 of Act 14 of 2005** 1. Section 1 of the Co-operatives Act, 2005, is hereby amended by— *(a)* the insertion after the definition of **'agricultural co-operative'** of the following definitions: " **'Commission'** means the Companies and Intellectual Property Commission, established by section 185 of the Companies Act; **'Companies Act'** means the Companies Act, 2008; *(b)* the deletion of the definitions of **"deputy registrar"** and **"Director-General"**; and *(c)* by the substitution for the definition of **"registrar"** of the following definition: " **'registrar'** means the **[Registrar of Co-operatives]** Commissioner, appointed in terms of section 189 of the Companies Act;".
		Amendment of section 78 of Act 14 of 2005 1. Section 78 of the Co-operatives Act, 2008, is hereby amended by— *(a)* by the substitution for subsection (1) of the following subsection: "(1) The **[Minister]** Commission— *(a)* **[must appoint an officer in the public service as the Registrar of Co-operatives, with the authority to]** may exercise the powers and must perform the functions conferred on the registrar by or in terms of this Act; *(b)* the repeal of subsection (1)*(b)* and *(c)*; *(c)* the substitution for subsection (2) of the following subsection: "(2) The **[registrar]** Commission may, from time to time, delegate any power conferred on **[him or her]** the registrar by or under this Act to any officer or employee in the **[public service]** Commission.

SCHEDULE 4

LEGISLATION TO BE ENFORCED BY COMMISSION

As contemplated in section 188, the Commission is responsible for the administration and enforcement of the following Acts:

Close Corporations Act, 1984 (Act No. 69 of 1984)
Share Blocks Control Act, 1980 (Act No. 59 of 1980)
Co-operatives Act, 2005 (Act No. 14 of 2005)
Copyright Act, 1978 (Act No. 98 of 1978)
Performers Protection Act, 1967 (Act No. 11 of 1967)
Registration of Copyright in Cinematograph Films Act, 1977 (Act No. 62 of 1977)
Counterfeit Goods Act, 1977 (Act No. 37 of 1997)
Designs Act, 1993 (Act No. 195 of 1993)
Merchandise Marks Act, 1941 (Act No. 17 of 1941)
Patents Act, 1978 (Act No. 57 of 1978)
Trade Marks Act, 1993 (Act No. 194 of 1993)
Unauthorised Use of Emblems Act, 1961 (Act No. 37 of 1961)
''Vlaglied'' Copyright Act, 1974 (Act No. 9 of 1974)
Protection of Businesses Act, 1987 (Act No. 99 of 1978)

SCHEDULE 5

TRANSITIONAL ARRANGEMENTS

Interpretation

1. (1) In this Schedule—

(a) **"general effective date"** means the date on which section 1 of this Act came into operation; and

(b) **"previous Act"** means the Companies Act, 1973 (Act No. 61 of 1973).

(2) A reference in this Schedule—

(a) to a section by number, is a reference to the corresponding section of—

(i) the previous Act, if the number is followed by the words ''of the previous Act''; or

(ii) this Act, in any other case; or

(b) to an item or a subitem by number is a reference to the corresponding item or subitem of this Schedule.

(3) Despite any other provision of this Act—

(a) the Minister, by notice in the *Gazette*, may determine a date on which the Commission may assume the exercise of any particular function or power assigned to it in terms of this Act; and

(b) until a date determined by the Minister in terms of paragraph *(a)*—

(i) the Commission may not perform that particular function or exercise that particular power; and

(ii) the Minister has the authority to, and bears the responsibility of, exercising any such function or performing any such power assigned by this Act to the Commission.

Continuation of pre-existing companies

2. As of the general effective date, every pre-existing company that was, immediately before that date,—

(a) incorporated or registered in terms of the Companies Act, 1973 (Act No. 61 of 1973); or

(b) recognised as an ''existing company'' in terms of the Companies Act, 1973 (Act No. 61 of 1973),

continues to exist as a company, as if it had been incorporated and registered in terms of this Act, with the same name and registration number previously assigned to it, subject to item 4.

Pending filings

3. (1) Any matter filed with the Registrar under the Companies Act, 1973 (Act No. 61 of 1973), before the effective date and not fully addressed at that time, must be concluded by the Registrar in terms of that Act, despite its repeal.

(2) Any conversion of a company to a close corporation in terms of section 27 of the Close Corporations Act 1984 (Act No. 69 of 1984), filed with the Registrar before the effective date and not fully addressed at that time must be concluded by the Registrar in terms of that Act, despite the repeal of that section.

(3) A company that is incorporated and registered in terms of subitem (1) is regarded to—

(a) have been registered in terms of the previous Act; and

(b) be a pre-existing company for all purposes of this Act.

Memorandum of Incorporation and Rules

4. (1) Every pre-existing company—

(a) incorporated in terms of section 21 of the previous Act is deemed to have amended its Memorandum of Incorporation as of the general effective date to expressly state that it is a non-profit company, and to have changed its name in so far as required to comply with section 11(3)*(b)*;

(b) the Articles of which imposed personal liability on its directors or past directors, as contemplated in section 53*(c)* of the previous Act, is deemed to have amended its Memorandum of Incorporation as of the general effective date to expressly state that it is a personal liability company, and to have changed its name in so far as required to comply with section 11(3)*(b)*;

(c) registered in terms of the previous Act, and falling within the definition of a state-owned company in terms of this Act, is deemed to have amended its Memorandum of Incorporation as of the general effective date to have changed its name in so far as required to comply with section 11(3)*(b)*; or

(d) limited by guarantee, other than in terms of section 21 of the previous Act—

(i) may file a notice within 20 business days after the general effective date electing to become a profit company, as from the general effective date, and to change its name in so far as required to comply with section 11(3)*(b)*; or

(ii) if it fails to file a notice in terms of subparagraph (i), is deemed to have amended its Memorandum of Incorporation as of the general effective date to expressly state that it is a non-profit company, and have changed its name in so far as required to comply with section 11(3)*(b)*.

(2) At any time within two years immediately following the general effective date, a pre-existing company may file, without charge—

(a) an amendment to its Memorandum of Incorporation to bring it in harmony with this Act; and

(b) if necessary, a notice of name change and copy of a special resolution contemplated in section 16, to alter its name to meet the requirements of this Act.

(3) If, before the general effective date, a pre-existing company had adopted any binding provisions, under whatever style or title, comparable in purpose and effect to the rules of a company contemplated in section 15(3), those provisions continue to have the same force and effect—

(a) as of the general effective date, for a period of two years, or until changed by the company; and

(b) after the two year period, to the extent that they are consistent with this Act.

(4) During the period of two years immediately following the general effective date—

(a) if there is a conflict between a provision of this Act, and a provision of a preexisting company's Memorandum of Incorporation, the latter provision prevails, except to the extent that this Schedule provides otherwise; and

(b) despite Chapter 7, until a pre-existing company has filed an amendment contemplated in subitem (2), neither the Commission nor the Panel may issue a compliance notice to that company with respect to conduct that is—

(i) inconsistent with this Act; but

(ii) consistent with that company's Memorandum of Incorporation.

Pre-incorporation contracts

5. Section 21 does not apply with respect to a pre-existing company.

Par value of shares, treasury shares, capital accounts and share certificates

6. (1) Section 35(2) does not apply to a bank, as defined in the Banks Act, 1993 (Act No. 124 of 1993), until a date declared by the Minister, after consulting the member of the Cabinet responsible for national financial matters.

(2) Despite section 35(2) any shares of a pre-existing company that have been issued with a nominal or par value, and are held by a shareholder immediately before the effective date, continue to have the nominal or par value assigned to them when issued, subject to any regulations made in terms of subitem (3).

(3) The Minister, in consultation with the member of the Cabinet responsible for national financial matters, must make regulations, to take effect as of the general effective date, providing for the transitional status and conversion of any nominal or par value shares, treasury shares, and capital accounts of a pre-existing company, but any such regulations must—

(a) preserve the rights of shares holders associated with such shares, as at the effective date, to the extent doing so is compatible with the purposes of this item; or

(b) provide for the company to compensate its shareholders for the loss of any such rights.

(4) A failure of any share certificate issued by a pre-existing company to satisfy the requirements of section 51(1) to (4)—

(a) is not a contravention of that section; and

(b) does not invalidate that share certificate.

Company finance and governance

7. (1) A person holding office as a director, prescribed officer, company secretary or auditor of a preexisting company immediately before the effective date, continues to

hold that office as from the effective date, subject to the company's Memorandum of Incorporation, and this Act.

(2) A person contemplated in subitem (1) who, in terms of this Act, is ineligible to be, or disqualified from being a director, company secretary or auditor, is regarded to have resigned that office as from the effective date.

(3) As from the general effective date, a pre-existing company is deemed to have a number of vacancies on the board equal to the difference between—

(a) the minimum number of directors required by or in terms of this Act; and

(b) the actual number of directors of that pre-existing company immediately before the general effective date, if that number is less than the minimum referred to in paragraph *(a)*.

(4) A vacancy in the office of director, company secretary or auditor of a pre-existing company as from the effective date, irrespective whether arising by operation of subitem (2) or (3), or otherwise, is to be filled in accordance with this Act.

(5) Despite anything to the contrary in a company's Memorandum of Incorporation, the provisions of this Act respecting—

(a) the duties, conduct and liability of directors apply to every director of a pre-existing company as from the effective date;

(b) rights in terms of this Act of shareholders to receive any notice or have access to any information apply as from the effective date to every pre-existing company;

(c) meetings of shareholders or directors, and adoption of resolutions apply as from the effective date to every pre-existing company; and

(d) Chapter 5 applies as from the effective date to every pre-existing company, except to the extent it is exempted by or in terms of that Chapter.

(6) Approval of any distribution, financial assistance, insider share issues, or options, are subject to this Act, even if any such action had been approved by a company's shareholders before the effective date, despite anything to the contrary in the company's Memorandum of Incorporation.

(7) A right of any person to seek a remedy in terms of this Act applies with respect to conduct pertaining to a pre-existing company and occurring before the effective date, unless the person had commenced proceedings in a court in respect of the same conduct before the effective date.

(8) A pre-existing company is not in contravention of this Act by reason only of a failure to—

(a) maintain any record for the duration required by section 24(1), if—

(i) the company disposed of that record before the effective date; and

(ii) at the time the company disposed of the record it was not required, by or in terms of any public regulation, to continue to maintain that record; or

(b) include in its notice of incorporation in terms of the previous Act a prominent statement comparable to that required by section 13(3) of this Act.

(9) A provision of the Memorandum of Incorporation of a pre-existing company comparable to a provision contemplated in section 15(2) has the same validity after the effective date that it had immediately before that date, despite any failure of the company to have drawn attention to that provision in the manner required by section 13(3).

(10) Section 19(4) applies to any provision of the Memorandum of Incorporation of a pre-existing company that is comparable to a provision contemplated in section 15(2), from the time that the company files a notice of that provision.

Company names and name reservations

8. (1) Any reservation by the Registrar of a name in terms of section 42 of the previous Act that was in effect immediately before the effective date, is regarded as having been

a reservation in terms of section 12 of this Act, as from the effective date, subject to subitem (2).

(2) If the Commission believes that a reserved name contemplated in subitem (1) does not satisfy the requirements of section 11—

(a) the Commission must notify the person for whose use the name was reserved, inviting the person to request the reservation of a substitute name that does satisfy the requirements of this Act; and

(b) the person concerned may file a request contemplated in paragraph *(a)*, at no charge, any time within 120 business days after the date of the Commission's notice.

(3) Any registration by the Registrar of—

(a) a translation or shortened form of a name, in terms of section 43 of the previous Act that was in effect immediately before the effective date, is deemed to be a registration of that name, as if it had been registered as a name of the company concerned in terms of this Act; or

(b) a defensive name, in terms of section 43 of the previous Act that was in effect immediately before the effective date must be regarded as if it had been reserved in terms of section 12 of this Act, as from the effective date, but any such reservation of a name expires on the earlier of—

(i) the date the name is used by a company incorporated by the person for who the name has been reserved; or

(ii) the second anniversary of the general effective date.

Continued application of previous Act to winding-up and liquidation

9. (1) Despite the repeal of the previous Act, until the date determined in terms of subitem (4), Chapter 14 of that Act continues to apply with respect to the winding- up and liquidation of companies under this Act, as if that Act had not been repealed subject to subitems (2) and (3).

(2) Despite subitem (1), sections 343, 344, 346, and 348 to 353 do not apply to the winding-up of a solvent company, except to the extent necessary to give full effect to the provisions of Part G of Chapter 2.

(3) If there is a conflict between a provision of the previous Act that continues to apply in terms of subitem (1), and a provision of Part G of Chapter 2 of this Act with respect to a solvent company, the provision of this Act prevails.

(4) The Minister, by notice in the *Gazette*, may—

(a) determine a date on which this item ceases to have effect, but no such notice may be given until the Minister is satisfied that alternative legislation has been brought into force adequately providing for the winding-up and liquidation of insolvent companies; and

(b) prescribe ancillary rules as may be necessary to provide for the efficient transition from the provisions of the repealed Act, to the provisions of the alternative legislation contemplated in paragraph *(a)*.

Preservation and continuation of court proceedings and orders

10. (1) Any proceedings in any court in terms of the previous Act immediately before the effective date are continued in terms of that Act, as if it had not been repealed.

(2) Any order of a court in terms of the previous Act, and in force immediately before the effective date, continues to have the same force and effect as if that Act had not been repealed, subject to any further order of the court.

General preservation of regulations, rights, duties, notices and other instruments

11. (1) Any right or entitlement enjoyed by, or obligation imposed on, any person in terms of any provision of the previous Act, that had not been spent or fulfilled immediately before the effective date is a valid right or entitlement of, or obligation imposed on, that person in terms of any comparable provision of this Act, as from the date that the right, entitlement or obligation first arose, subject to the provisions of this Act.

(2) A notice given by any person to another person in terms of any provision of the previous Act must be considered as notice given in terms of any comparable provision of this Act, as from the date that the notice was given under the previous Act.

(3) A document that, before the effective date, had been served in accordance with the previous Act must be regarded as having been satisfactorily served for any comparable purpose of this Act.

(4) An order given by an inspector, in terms of any provision of the previous Act, and in effect immediately before the effective date, continues in effect, subject to the provisions of this Act.

Transition of regulatory agencies

12. (1) The person who occupied the post of chief executive officer of the Companies and Intellectual Property Registration Office immediately before the general effective date, must be regarded as having been appointed on the general effective date as the Commissioner in terms of section 189, for a term to be determined by the Minister.

(2) A person in the employ of the Companies and Intellectual Property Registration Office or the Office of Companies and Intellectual Property Enforcement in the Department of Trade and Industry becomes an employee of the Commission on the effective date.

(3) The transfer of departmental employees to the Commission must be effected in accordance with—

(a) section 197 of the Labour Relations Act, 1995 (Act No. 66 of 1995); and

(b) any collective agreement reached between the State and the trade union parties of the Departmental Chamber of the Public Service Bargaining Council before the effective date.

(4) A person referred to in subitem (2) remains subject to any decisions, proceedings, rulings and directions applicable to that person immediately before the effective date, and any proceedings against such a person, that were pending immediately before the effective date, must be disposed of as if this Act had not been enacted.

(5) Any person transferred in terms of subitems (2) and (3)—

(a) remains a member of the Government Employees' Pension Fund mentioned in section 2 of the Government Employees' Pension Law, 1996 (Act No. 21 of 1996); and

(b) is entitled to pension and retirement benefits as if that person were in service in a post classified in a division of the public service mentioned in section 8(1)*(a)*(i) of the Public Service Act, 1994 (Proclamation No. 103 of 1994).

(6) As of the general effective date—

(a) all movable assets of the state which were used by or which were at the disposal of the Companies and Intellectual Property Registration Office and the Office of Company and Intellectual Property Enforcement in the Department immediately before the effective date, except those assets excluded by the Minister, become the property of the Commission;

(b) all contractual rights, obligations and liabilities of the Company and Intellectual Property Registration Office are vested in the Commission;

(c) all financial, administrative and other records of the Company and Intellectual Property Registration Office, including all relevant documents in the possession of that office immediately before the effective date, are transferred to the Commission; and

(d) the assets and liabilities of the Securities Regulation Panel established by section 440B of the Companies Act, 1973, are transferred to and are assets and liabilities, respectively, of the Panel.

(7) Subject to subitem (8), on the general effective date—

(a) the person, if any, holding office immediately before that date, as a member, chairperson, deputy chairperson or Executive Director of the Securities Regulation Panel appointed in terms of the Companies Act, 1973, is regarded to have been appointed as a member, chairperson, deputy chairperson or Executive Director, respectively of the Panel in terms of this Act;

(b) any person in the employ of the Securities Regulation Panel becomes an employee of the Panel;

(c) the terms and conditions of office or employment of a person contemplated in this subitem are identical to the terms and conditions of office or employment subsisting between that person and the Securities Regulation Panel immediately before the general effective date, subject to any further determination by the Panel in the exercise of its authority set out in sections 200(1), 200(2)*(b)* and 210(3); and

(d) any person contemplated in this subitem who, as an employee or office holder of the Securities Regulation Panel immediately before the general effective date, had any rights to participate in, or vested rights in terms of, any pension scheme or medical scheme, retains those rights, subject to any further determination by the Panel in the exercise of its authority set out in sections 200(1), 200(2)*(b)* and 210(3).

(8) If, after the general effective date, a person referred to in subitem (7)*(c)* or *(d)*—

(a) resigns from an office in, or terminates that person's employment by, the Panel; and

(b) is subsequently appointed to an office within, or re-employed by, the Panel, sections 200(1), 200(2)*(b)* and 210(3) apply with respect to that person as if the person were being so appointed or employed by the Panel for the first time.

(9) The registers of companies, external companies, reserved names, and delinquent directors, respectively, as maintained by the Companies and Intellectual Property Registration Office in terms of the previous Act are each continued as the register of companies, external companies, reserved names, and directors, respectively, required to be established by the Commission in terms of this Act.

Continued investigation and enforcement of previous Act

13. (1) Despite the repeal of the previous Act—

(a) any investigation by the Minister or the Registrar in terms of the previous Act and pending immediately before the effective date, may be continued by the Commission;

(b) any investigation or other matter being considered by the Securities Regulation Panel in terms of the previous Act and pending immediately before the effective date, may be continued by the Panel; and

(c) for a period of three years after the effective date—

(i) the Commission may exercise any power of the Registrar, or the Panel may exercise any power of the Securities Regulation Panel, in terms of the previous Act to investigate and prosecute any breach of that Act that occurred during the period of three years immediately before the effective date, subject to subitem (2); and

(ii) a court may make any order that could have been made in the circumstances by a court under that Act.

(2) In exercising authority under subsection (1), the Commission or Panel, respectively, must conduct the investigation or other matter in accordance with the previous Act.

Regulations

14. On the effective date, and for a period of 60 business days after the effective date, the Minister may make any regulation contemplated in this Act without meeting the procedural requirements set out in section 223 or elsewhere in this Act, provided the Minister has published those proposed regulations in the *Gazette* for comment for at least 30 business days.