

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

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

131. Insolvency of a company

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

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

132. Company resolution to begin business rescue

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

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

133. Objections to company resolution

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

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

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

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

134. Court order to begin business rescue proceedings

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

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

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

135. Duration of business rescue proceedings

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

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

136. General moratorium on legal proceedings against company

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

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

137. Protection of property interests

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

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

138. Post-commencement finance

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

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

139. Effect of business rescue on suppliers and employees

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

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

140. Effect on shareholders and directors

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

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

Part B – Supervisor’s functions and Terms of Appointment

141. Qualifications of supervisors

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

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

142. Removal and replacement of supervisor

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

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

143. Powers and duties of supervisors

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

144. Investigation of the affairs of the company

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

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

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

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

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

146. Remuneration of supervisor

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

Part C – Rights of Affected Persons During Business Rescue

147. Rights of employees

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

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

148. Participation by creditors

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

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

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

149. Participation by shareholders

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

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

150. First meeting of creditors

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

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

151. First meeting of employees representatives

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

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

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

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

Part D – Development and Approval of Business Rescue Plan

153. Proposal of a business rescue plan

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

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

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

154. Meeting to determine future of company

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

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

155. Consideration of the business rescue plan

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

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

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

156. Failure to adopt business rescue plan

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

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

157. Discharge of debts and claims

- (1) A business rescue plan may provide that, if it is implemented in accordance with its terms and conditions, a creditor who has acceded to the discharge of the whole or part of a debt owing to them will lose the right to enforce the relevant debt or part of it.
- (2) Creditors and other holders of voting interests who have not participated in the business rescue proceedings are not entitled to enforce any debt that arose before those proceedings began, unless the business rescue plan is not approved, or not implemented.

Chapter 7 - Remedies and Enforcement

Part A – General Principles

158. Alternative procedures for addressing complaints or securing rights

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

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

159. Extended standing to apply for remedies

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

- (a) the person directly;

-
- (b) a person acting on behalf of another person who cannot act in their own name;
 - (c) a person acting as a member of, or in the interest of, a group or class of persons;
 - (d) a person acting in the public interest; or
 - (e) an association acting in the interest of its members.
- (2) The Commission or the Takeover Regulation Panel, acting on its own motion and in its absolute discretion, may –
- (a) commence any proceedings in a court in the name of a person who, when filing a complaint with the Commission or Panel, as the case may be, in respect of the matter giving rise to those proceedings, also made a written request that the Commission or Panel do so; or
 - (b) apply for leave to intervene in any court proceedings arising in terms of this Act, in order to represent any interest that would not otherwise be adequately represented in those proceedings.
- (3) For greater certainty, nothing in this section creates a right of any person to commence any legal proceedings contemplated in section 165 (1), other than –
- (a) on behalf of a person entitled to make a demand in terms of section 165 (2); and
 - (b) in the manner set out in section 165.

160. Remedies to promote the purpose of the Act

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

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

161. Protection for whistle-blowers

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

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

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

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

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

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

Part B – Rights to seek specific remedies

162. Application to declare or protect shareholders' rights

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

163. Application to declare director delinquent or under probation

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

(b) any of the circumstances contemplated in subsection (2), or subsections (4) and (5), apply.

(2) The Court may make an order declaring a person to be a delinquent director if the person -

(a) consented to serve as a director, or acted in any manner contemplated in section 89 (1), while disqualified in terms of section 89, unless the person was acting –

(i) as a director as contemplated in section 89 (8); or

(ii) under the protection of a court order contemplated in section 89 (10);

(b) while under a court order of probation in terms of this section, acted as a director in a manner that contravened that order;

(c) while a director, -

(i) grossly abused the position of director;

(ii) took personal advantage of information or an opportunity, contrary to section 92;

(iii) intentionally, or by gross negligence, inflicted harm upon the company;

(iv) acted in a manner -

(aa) that amounted to gross negligence, wilful misconduct or breach of trust; or

(bb) contemplated in section 93 (2);

(d) has repeatedly been personally subject to a compliance notice for substantially similar contraventions of this Act;

(e) has at least twice been personally subject to an administrative fine for failure to carry out the requirements of a compliance notice in terms of this Act; or

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

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

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

(ii) be limited to serving as a director of a closely held company.

- (10) The Commission must establish and maintain in the prescribed manner a public registry of persons who are subject to an order of a court in terms of this section.

164. Relief from oppressive or prejudicial conduct

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

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

165. Dissenting shareholders' appraisal rights

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

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

(c) the company revokes the adopted resolution that gave rise to the shareholder's rights under this section.

(9) If any of the events contemplated in subsection (8)(a) to (c) occur, all of the shareholder's rights in respect of the shares are re-instated without interruption.

(10) Within 5 business days after the later of -

(a) the day on which the action approved by the resolution is effective;

(b) the last day for the receipt of demands in terms of subsection (6)(a); or

(c) the day the company received a demand as contemplated in subsection (6)(b), if applicable

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

(11) Every offer made under subsection (10) -

(a) in respect of shares of the same class or series must be on the same terms; and

(b) lapses if it has not been accepted within 30 business days after it was made.

(12) If a shareholder accepts an offer made under subsection (11) –

(a) the shareholder must either –

(i) in the case of shares evidenced by certificates, tender the relevant share certificates to the company or the company's transfer agent; or

(ii) in the case of uncertificated shares, take the steps required in terms of section 57 to transfer those shares to the company or the company's transfer agent; and

(b) the company -

-
- (i) must pay that shareholder the agreed amount within ten business days after the shareholder accepted the offer and tendered the share certificates, subject to subparagraph (ii); or
 - (ii) may apply to the Court for an order deferring the obligation to pay to the shareholder the amount contemplated in subparagraph (i), solely on the grounds that if all such amounts were to be paid as required, the company would not satisfy the solvency and liquidity test.

 - (13) A shareholder who has made a demand in terms of subsections (4) to (7) may apply to the Court to determine a fair value in respect of the shares that were the subject of that demand, and an order requiring the company to pay the shareholder the fair value so determined, if the company –
 - (a) has failed to make an offer under subsection (10); or
 - (b) has made an offer that the shareholder considers to be inadequate, and that offer has not lapsed.

 - (14) On an application to the court under subsection (12)(b)(ii), or (13) -
 - (a) all dissenting shareholders who have not accepted an offer from the company as at the date of the application, must be joined as parties and are bound by the decision of the court;
 - (b) the company must notify each affected dissenting shareholder of the date, place and consequences of the application and of their right to participate in the court proceedings; and
 - (c) the court -
 - (i) may determine whether any other person is a dissenting shareholder who should be joined as a party;
 - (ii) must determine a fair value in respect of the shares of all dissenting shareholders;
 - (iii) in its discretion may -

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

166. Derivative actions

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

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

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

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

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

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

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

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

Part C – Voluntary resolution of disputes

167. Alternative dispute resolution

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

168. Dispute resolution may result in consent order

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

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

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

169. Initiating a complaint to Commission

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

in the prescribed manner and form, alleging that a person has acted in a manner inconsistent with this Act, or that the complainant's rights under this Act, or under a company's Memorandum of Incorporation or rules, have been infringed.

- (2) A complaint may be initiated directly by the Commission, or the Takeover Regulation Panel, as the case may be, on its own motion or on the request of another regulatory authority.
- (3) The Minister may direct the Commission or the Takeover Regulation Panel, to investigate -
 - (a) an alleged contravention of this Act; or
 - (b) other specified circumstances,as contemplated in section 191 (b).

170. Investigation by Commission or Takeover Regulation Panel

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

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

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

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

171. Outcome of investigation

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

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

172. Issuance of compliance notices

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

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

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

173. Objection to notices

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

174. Consent orders

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

175. Referral of complaints to court

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

176. Administrative fines

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

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

Part E – Powers to support investigations and inspections

177. Summons

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

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

178. Authority to enter and search under warrant

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

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

179. Powers to enter and search

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

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

180. Conduct of entry and search

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

- (8) Before using force in terms of subsection (7), a police officer must audibly demand admission and must announce the purpose of the entry, unless it is reasonable to believe that doing so may induce someone to destroy or dispose of an article or document that is the object of the search.

- (9) The Commission may compensate anyone who suffers damage because of a forced entry during a search when no one responsible for the premises was present.

Part F – Companies Ombud Arbitration Procedures

181. Arbitration hearings before Ombud

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

182. Right to participate in hearing

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

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

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

183. Powers of Ombud arbitration hearing

The Ombud may-

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

184. Rules of procedure

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

185. Witnesses

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

- (3) The Ombud may order a person to answer any question, or to produce any article or document, even if it is self-incriminating to do so.

- (4) Section 177 (5) applies equally to evidence given by a witness in terms of this section.

Chapter 8 - Regulatory Agencies and Administration of the Act

Part A - Companies and Intellectual Property Commission

186. Establishment of Companies and Intellectual Property Commission

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

187. Commission objectives

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

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

188. Functions of Companies and Intellectual Property Commission

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

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

information in those registers efficiently and effectively available to the public, and to other organs of state;

- (b) register and de-register companies, directors, business names and intellectual property rights, in accordance with relevant legislation; and
- (c) perform any related functions assigned to it by legislation, or reasonably necessary to carry out its assigned registry functions.

(5) Subject to the provisions of subsection (6), any person, on payment of the prescribed fee, may-

- (a) inspect a document filed under this Act; or
- (b) obtain a certificate from the Commissioner as to the contents or part of the contents of any document that -
 - (i) has been filed under this Act in respect of any company; and
 - (ii) is open to inspection; or
- (c) obtain a copy of or extract from any document contemplated in paragraph (b);
- (d) through any electronic medium approved by the Commission -
 - (i) inspect, or obtain a copy of or extract from, any document contemplated in paragraph (b) that has been converted into electronic format, or
 - (ii) obtain a certificate from the Commissioner as to the contents or part of the contents of any document in the registry in respect of a company.

(6) The Commissioner -

- (a) must waive any prescribed registry fee contemplated in subsection (5) if the Commissioner is satisfied -
 - (i) that an inspection, certificate, copy or extract is required on behalf of a foreign government accredited to the Republic; and

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

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

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

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

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

190. Appointment of the Commissioner

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

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

191. Minister may direct policy and require investigation

The Minister -

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

192. Establishment of Advisory Committees

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

193. Constitution of Committees

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

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

Part B - The Companies Ombud

194. Establishment of Companies Ombud

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

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

195. Appointment of the Companies Ombud

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

196. Functions of the Companies Ombud

The Companies Ombud is responsible -

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

Part C – Takeover Regulation Panel

197. Establishment of Takeover Regulation Panel

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

198. Composition of the Takeover Regulation Panel

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

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

199. Chairperson and Deputy Chairpersons

- (1) The Minister may designate -

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

200. Meetings of the Takeover Regulation Panel

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

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

201. Executive of the Takeover Regulation Panel

- (1) The Takeover Regulation Panel may appoint -

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

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

- (2) The Executive Director may -

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

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

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

202. Functions of the Takeover Regulation Panel

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

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

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

203. The Takeover Special Committee

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

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

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

Part C – Financial Reporting Standards Council**204. Composition of Council**

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

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

205. Functions of Financial Reporting Standards Council

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

Part E – Administrative Provisions Applicable to Agencies

206. Qualifications for membership

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

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

207. Conflicting interests of agency members

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

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

(e) divulge any information referred to in paragraph (d) to any third party, except as required as part of that person's official functions as The Companies Ombud or a member of the Takeover Regulation Panel, or the Financial Reporting Standards Council.

(3) If, at any time, it appears to The Companies Ombud or a member of the Takeover Regulation Panel, or the Financial Reporting Standards Council that a matter being considered at a meeting concerns an interest of that member referred to in subsection (2)(b), that member must—

(a) immediately and fully disclose the nature of that interest to the meeting; and

(b) withdraw from the meeting to allow the remaining members to discuss the matter and determine whether the member should be prohibited from participating in any further proceedings concerning that matter.

(4) The disclosure by a person in terms of subsection (3)(a), and the decision by The Companies Ombud, the Takeover Regulation Panel, or the Financial Reporting Standards Council in terms of subsection (3)(b), must be expressly recorded in the minutes of the meeting in question.

(5) Proceedings of The Companies Ombud, the Takeover Regulation Panel, or the Financial Reporting Standards Council, and any decisions taken by a majority of the members present and entitled to participate in those decisions, are valid despite the fact that—

(a) a member failed to disclose an interest as required by subsection (3); or

(b) a member who had such an interest attended those proceedings, participated in them in any way, or directly or indirectly influenced those proceedings.

208. Resignation, removal from office and vacancies

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

209. Conflicting interests

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

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

210. Appointment of inspectors and investigators

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

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

211. Finances

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

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

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

212. Reviews and reports to Minister

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

213. Confidential information

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

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

Chapter 9 - Offences, Miscellaneous Matters and General Provisions

Part A – Offences and Penalties

214. Breach of confidence

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

215. Reckless conduct and non-compliance

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

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

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

216. Hindering administration of Act

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

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

217. Penalties

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

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

218. Magistrate's Court jurisdiction to impose penalties

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

Part B – Miscellaneous matters

219. Civil actions

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

220. Limited time for initiating complaints

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

221. Serving documents

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

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

222. Proof of facts

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

223. Substantial Compliance

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

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

224. State Liability

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

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

Part C – Regulations, Consequential matters and Commencement**225. Regulations**

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

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

226. Consequential amendments, repeal of laws and transitional arrangements

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

227. Short title and commencement

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

SCHEDULE 1

Forms of Memorandum of Incorporation

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

SCHEDULE 2**Members and Directors of Not For Profit Companies****1. Incorporators of a not for profit company**

The incorporators of a not for profit company are its -

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

2. Members

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

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

3. Directors

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

SCHEDULE 2 : Members and Directors of Not For Profit Companies

Section 3

SCHEDULE 3

Public Offerings of Shares and other Securities

1. Interpretation

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

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

2. Rights offers

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

SCHEDULE 3 : Public Offerings of Shares and other Securities**Section 3**

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

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

(c) the prescribed fee.

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

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

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

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

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

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

3. General requirements for a prospectus

(1) Every prospectus issued must -

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

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

4. Contracts and translations thereof to be attached to prospectus

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

5. Where the issue is underwritten

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

SCHEDULE 3 : Public Offerings of Shares and other Securities

Section 6

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

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

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

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

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

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

7. Registration of prospectus

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

PART 2

A prospectus must -

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

8. Name, address and incorporation

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

9. Directors and management

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

10. Auditor

The name and address of the auditor of the company.

11. Attorney, banker, stockbroker, trustee and underwriter

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

12. Secretary

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

13. History, state of affairs and prospects of company

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

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

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

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

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

14. Purpose of the offer

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

15. Share capital of the company

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

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

16. Loans

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

- (vii) the value of that security and the method of valuation;
- (viii) if the loan is unsecured, the reasons therefor; and
- (ix) if the loan was made to another company, the names and addresses of the directors of that company.

17. Options or preferential rights in respect of shares

- (1) The substance of any agreement or proposed agreement whereby any option or preferential right of any kind was or is proposed to be given to any person to subscribe for any shares of the company or its subsidiary, giving the number and description of any such shares, including, in regard to the option or right, particulars of-
 - (a) the period during which it is exercisable;
 - (b) the price to be paid for shares subscribed for under it;
 - (c) the consideration given or to be given for it;
 - (d) the names and addresses of the persons to whom it was given, other than to existing shareholders as such or to employees under a bona fide staff option scheme;
 - (e) if given to existing shareholders as such, material particulars thereof; and
 - (f) any other material fact or circumstance concerning the granting of such option or right.
- (2) For the purpose of this Item, “subscribing for shares” includes acquiring them from a person to whom they were allotted, or were agreed to be allotted, with a view to that person offering them for sale.

18. Shares issued or to be issued otherwise than for cash

The number of shares that, within the preceding two years, were issued or were agreed to be issued by the company or its subsidiary to any person, otherwise than for cash, and the consideration for which those shares were issued or were agreed to be issued, and the value of the property, if any, acquired or to be acquired.

19. Property acquired or to be acquired

- (1) Particulars of any immovable property or other property of the nature of fixed assets purchased or acquired by the company or its subsidiary or proposed to be purchased or acquired, the purchase price of which is to be defrayed in whole or in part out of the proceeds of the issue, or is to be or was within the preceding two years paid in whole or in part in securities of the company or its subsidiary, or out of the funds of the company or its subsidiary, whether in cash or shares, or the purchase or acquisition of which has not been completed at the date of the prospectus, and the nature of the title or interest therein acquired or to be acquired by the company or its subsidiary.
- (2) Details of the consideration given, or to be given, for the acquisition of any such property, specifying the value payable for goodwill, if any.
- (3) The names and addresses of the vendors and the consideration received or to be received by each.
- (4) Brief particulars of any transaction relating to the property completed within the preceding two years in which any vendor of the property to the company or its subsidiary or any person who is or was at the time of the transaction a promoter or a director or proposed director of the company had any interest, direct or indirect: Provided that where the vendors or any of them are a partnership, the members of the partnership shall not be treated as separate vendors.
- (5) Particulars of the price at which any such property which is immovable property or an option over immovable property was purchased or sold within three years prior to the date of the prospectus where any promoter or director had any interest, directly or

indirectly, in such transaction or where any promoter or director was a member of a partnership, syndicate or other association of persons which had such an interest, with the dates of any such purchases and sales and the names of any such promoter or director, and the nature and extent of his interest; for the purposes of this subparagraph, shares of a company, the major asset of which is immovable property, shall be deemed to be immovable property.

20. Amounts paid or payable to promoters

The amount paid within the preceding two years or proposed to be paid to any promoter, or to any partnership, syndicate or other association of which that promoter is or was a member, and the consideration for that payment, and any other benefit given to the promoter, partnership, syndicate or other association within the same period or proposed to be given, and the consideration for the giving of that benefit, and the promoter's name and address.

21. Commissions paid or payable in respect of underwriting

The amount, if any, or the nature and extent of any consideration, paid within the preceding two years, or payable as commission to any person (including commission so paid or payable to any sub-underwriter who is a promoter or director or officer of the company) for subscribing or agreeing to subscribe, or procuring or agreeing to procure subscriptions for any shares of the company, the name, occupation and address of each such person, particulars of the amounts underwritten or sub-underwritten by each and the rate of the commission payable for such underwriting or sub-underwriting contract with such person; and if such person is a company, the names of the directors of such company and the nature and extent of any interest, direct or indirect, in such company of any promoter, director or officer of the company in respect of which the prospectus is issued.

22. Preliminary expenses and issue expenses

The amount or estimated amount of preliminary expenses, if incurred within two years of the date of the prospectus, and the persons by whom any of those expenses were paid or are

payable, and the amount or estimated amount of the expenses of the issue and the persons by whom any of those expenses were paid or are payable.

23. Material contracts

- (1) The dates and the nature of, and the parties to, every material contract entered into by the company or its subsidiary, not being a contract entered into in the ordinary course of the business carried on or proposed to be carried on by the company or its subsidiary or a contract entered into more than two years before the date of the prospectus, and a reasonable time and place at which any such contract or a copy thereof may be inspected.
- (2) A brief summary of existing contracts or proposed contracts, either written or oral, relating to the directors' and managerial remuneration, royalties, and secretarial and technical fees payable by the company and its subsidiary.

24. Interest of directors and promoters

- (1) Full particulars of the nature and extent of any material interest, direct or indirect, of every director or promoter in the promotion of the company and in any property proposed to be acquired by the company out of the proceeds of the issue, and where the interest of such director or promoter consists in being a member of a partnership, company, syndicate or other association of persons, the nature and extent of the interest of such partnership, company, syndicate or other association, and the nature and extent of such director's or promoter's interest in the partnership, company, syndicate or other association.
- (2) Full particulars of the nature and extent of any material interest, direct or indirect, of every director or promoter in the property acquired or proposed to be acquired by the company or its subsidiary during the three years preceding the date of the prospectus.
- (3) A statement of all sums paid or agreed to be paid within the three years preceding the date of the prospectus to any director or to any company in which he is beneficially interested or of which he is a director, or to any partnership, syndicate or other

association of which he is a member, in cash or shares or otherwise, by any person either to induce him to become or to qualify him as a director, or otherwise for services rendered by him or by the company, partnership, syndicate or other association in connection with the promotion or formation of the company.

25. Particulars of the offer

- (1) Particulars of the shares offered, including-
 - (a) the class of shares;
 - (b) the number of shares offered;
 - (c) the issue price; and
 - (d) other conditions of the offer.

- (2) Particulars of the debentures offered, including-
 - (a) the class of debentures;
 - (b) the conditions of the debentures;
 - (c) if the debentures are secured, particulars of the security, specifying the property comprising the security and the nature of the title to the property; and
 - (d) other conditions of the offer.

26. Time and date of the opening and of the closing of the offer

The time and date of the opening and of the closing of the subscription lists or of the offer.

27. Issue price

- (1) The amount payable by way of premium, if any, on each share which is to be issued or was issued in the five years preceding the date of the prospectus, stating the dates

of issue, the reasons for any such premium, and, where some shares were or are to be issued at a premium and other shares at par or at a lower premium, also the reasons for the differentiation, and how any such premium was or is to be dealt with.

- (2) If no par value shares are to be issued or were issued within five years preceding the date of the prospectus, the dates of issue, the price at which they are to be or were issued, and the reasons for any differentiation.

28. Minimum subscription

- (1) The minimum amount which, in the opinion of the directors, must be raised by the issue of the shares in order to provide the sums, or, if any part thereof is to be defrayed in any other manner, the balance of the sums required to be provided, in respect of each of the following matters:
 - (a) The purchase price of any property purchased or to be purchased which is to be defrayed in whole or in part out of the proceeds of the issue;
 - (b) any preliminary expenses payable by the company, and any commission payable to any person in consideration of his agreeing to subscribe for, or of his procuring or agreeing to procure subscriptions for, any shares of the company;
 - (c) the repayment of any moneys borrowed by the company and its subsidiary in respect of any of the foregoing matters;
 - (d) working capital, stating the specific purposes for which it is to be used and the estimated amount required for each such purpose;
 - (e) any other expenditure, stating the nature and purposes thereof and the estimated amount in each case; and
 - (f) the amounts to be provided in respect of the matters aforesaid otherwise than out of the proceeds of the issue, and the sources from which those amounts are to be provided.

29. Statement as to adequacy of capital

A statement that in the opinion of the directors the issued capital of the company (including the amount to be raised in pursuance of this offer) is adequate for the purposes of the business of the company and of its subsidiary, and if they are of the opinion that it is inadequate, the extent of the inadequacy and the manner in which and the sources from which the company and its subsidiary are or are to be financed.

30. Statement as to listing on stock exchange

A statement as to whether or not an application has been made for a listing of the shares offered and, if so, the name of the relevant exchange.

31. Requirements for prospectus of mining company

- (1) A report by an expert containing information appropriate to the subject matter of the prospectus and including, if applicable-
 - (a) a statement describing briefly the geological characteristics of the occurrence;
 - (b) details of previous operations and production relevant to the workability and pay ability of the proposed mining operations;
 - (c) survey, drilling and borehole results;
 - (d) ore reserves;
 - (e) an interpretation of the information available with reference to the viability of the project.
- (2) Material information not otherwise required by this Schedule relating to the mineral rights, or any other right to mine, mining title, including any Government mining lease, and immovable property available for the mine, including, if applicable-
 - (a) whether the aforesaid is owned by the company, or in process of transfer or is under option or lease;

SCHEDULE 3 : Public Offerings of Shares and other Securities

Section 32

- (b) the name of the farm on and district in which each is situated;
 - (c) the area of each;
 - (d) the aggregate price or other consideration for which they were or are to be acquired;
 - (e) relevant details of any option as aforesaid.
- (3) A statement by the directors of the plans for reaching the production stage or for increasing output, including information regarding-
- (a) shaft sinking and development;
 - (b) capital expenditure for each material stage of development.

32. Report by auditor of company

- (1) A report by the auditor of the company with respect to-
- (a) profits or losses and assets and liabilities, in accordance with subparagraph (2) or (3) of this paragraph, as the case requires; and
 - (b) the rates of the dividends, if any, paid by the company in respect of each class of shares of the company in respect of each of the five financial years immediately preceding the issue of the prospectus, giving particulars of each such class of shares on which such dividends were paid and particulars of the cases in which no dividends were paid in respect of any class of shares in respect of any of those years, and, if no annual financial statements were made out in respect of any part of the period of five years ending on a date three months before the issue of the prospectus, a statement of that fact.
- (2) If the company has no subsidiary, the report -
- (a) in regard to profits or losses, must deal with the profits or losses of the company in respect of each of the five financial years immediately preceding the issue of the prospectus; and

-
- (b) in regard to assets and liabilities, must deal with the assets and liabilities of the company at the last date to which the annual financial statements of the company were made out.
- (3) If the company has a subsidiary, the report -
- (a) in regard to profits or losses, must deal separately with the company's profits or losses as provided by subparagraph (2), and in addition, deal-
- (i) as a whole with the combined profits or losses of all subsidiaries, as far as they concern members of the company; or
- (ii) individually with the profits or losses of each subsidiary, so far as they concern members of the company; or
- (iii) as a whole with the consolidated profits or losses of the company and (so far as concerns members of the company) of all subsidiaries; and
- (b) in regard to assets and liabilities, must deal separately with the company's assets and liabilities as provided by subparagraph (2) and, in addition, deal-
- (i) as a whole with the combined assets and liabilities of all subsidiaries, indicating the interests therein of members other than the company; or
- (ii) individually with the assets and liabilities of each subsidiary, indicating the interests therein of members other than the company; or
- (iii) as a whole with the consolidated assets and liabilities of the company and all subsidiaries, indicating the interests therein of members other than the company;
- (c) if a subsidiary incurred losses, must state the amounts of such losses and the manner in which provision was made therefor.
- (4) The auditor be satisfied, as far as reasonably practicable, that, except as stated in the report-

- (a) the debtors and creditors do not include any accounts other than trade accounts;
- (b) the provisions for doubtful debts are adequate;
- (c) adequate provision has been made for obsolete, damaged or defective goods, and for supplies purchased at prices in excess of current market prices;
- (d) intercompany profits in the group have been eliminated;
- (e) there have been no material changes in the assets and liabilities of the company and of any subsidiary since the date of the last annual financial statements.

33. Report by auditor where business undertaking to be acquired

If the proceeds, or any part of the proceeds, of the issue of the shares or any other funds are to be applied directly or indirectly in the purchase of any business undertaking, a report made by an auditor named in the prospectus on-

- (a) the profits or losses of the business undertaking in respect of each of the five financial years preceding the date of the prospectus; and
- (b) the assets and liabilities of the business undertaking at the last date to which the financial statements of the business undertaking were made out.

34. Report by auditor where body corporate will become a subsidiary

- (1) If the proceeds or any part of the proceeds of the issue of the shares are to be applied, directly or indirectly, in any manner resulting in the acquisition by the company or its subsidiary of shares of any other body corporate by reason of which or of anything to be done in consequence thereof or in connection therewith, that body corporate will become a subsidiary of the company, a report made by an auditor named in the prospectus on-

-
- (a) the profits or losses of the other body corporate in respect of each of the five financial years preceding the date of the prospectus; and
 - (b) the assets and liabilities of the other body corporate at the last date to which the annual financial statements of the body corporate were made out.
- (2) The report must-
- (a) indicate how the profits or losses of the other body corporate dealt with by the report would, in respect of the shares to be acquired, have concerned members of the company and what allowance would have fallen to be made, in respect of assets and liabilities so dealt with, for holders of other shares, if the company had at all material times held the shares to be acquired; and
 - (b) where the other body corporate has a subsidiary, or, had it been a company in terms of the Act, would have had a subsidiary, deal with the profits or losses and the assets and liabilities of the body corporate and its subsidiary and such other body corporate as would have been its subsidiary if it had been a company in terms of the Act, in the manner provided by paragraph 25 (3) in relation to the company and its subsidiary.

35. Auditor not qualified to make reports

A report by an auditor required by this Schedule must not be made by any auditor who is a director, officer or employee or a partner of or in the employment of a director, officer or employee of the company or of the company's subsidiary or holding company or of any other subsidiary of the holding company.

36. Qualification in respect of references to period of five years

If in the case of a company which has been carrying on business, or of a business undertaking which has been carried on, for less than five years, the annual financial statements of the company or business undertaking have only been made out in respect of four years, three years, two years, or one year, this Part of this Schedule shall have effect as

if references to four years, three years, two years or one year, as the case may be, were substituted for references to five years.

37. Adjustment of figures in reports

Any report required by this Part of this Schedule shall either indicate by way of note any adjustments as regards the figures of any profits or losses or assets and liabilities dealt with by the report which appear to the persons making the report necessary or shall make these adjustments and indicate that adjustments have been made.

38. Report by directors as to material changes

A report by the directors of the company setting out any material change in the assets or liabilities of the company or any subsidiary which may have taken place between the last date to which the annual financial statements of the company or any subsidiary, as the case may be, were made out, and the date of the prospectus.

SCHEDULE 4

Consequential Amendments

Any required consequential amendments will be drafted after the public consultation process has been completed.

SCHEDULE 5 : Legislation to be enforced by Commission

Section 38

SCHEDULE 5

Legislation to be enforced by Commission

As contemplated in section 188, the Commission will be responsible for the enforcement of various Acts, which will be listed in this Schedule.

SCHEDULE 6**Transitional Arrangements****1. Interpretation**

- (1) In this Schedule—
 - (a) "effective date" means the date on which this Act, or any relevant provision of it, came into operation in terms of section 227;
 - (b) "general effective date" means the date on which section 1 of this Act came into operation;
 - (c) "previous Act" means the Companies Act, 1973 (Act No. 61 of 1973).
- (2) A reference in this Schedule—
 - (a) to a section by number, is a reference to the corresponding section of—
 - (i) the previous Act, if the number is followed by the words "of the previous Act"; or
 - (ii) this Act, in any other case; or
 - (b) to an item or a sub-item by number is a reference to the corresponding item or sub item of this Schedule.
- (3) Despite any other provision of this Act –
 - (a) the Minister, by notice in the Gazette, may determine a date on which the Companies and Intellectual Property Commission may assume the exercise of any particular function or power assigned to it in terms of this Act; and
 - (b) until a date determined by the Minister in terms of paragraph (a) –

SCHEDULE 6 : Transitional Arrangements

Section 2

- (i) the Commission may not perform that particular function or exercise that particular power; and
- (ii) the Minister has the authority to, and bears the responsibility of, exercising any such function or performing any such power assigned by this Act to the Commission.

2. Delayed repeal of Close Corporations Act

- (1) Despite section 227, the President may not bring section 226 (1)(b) into operation until –
 - (a) a date at least 10 years after the general effective date of this Act; and
 - (b) the Minister has reported to Parliament in the manner required by sub-item (2).
- (2) No earlier than 8 years after the general effective date of this Act, the Minister must report to Parliament on the implementation of this Act, the utility of continuing the dual system of incorporation of companies under this Act and the Close Corporations Act, and the advisability at that time of the repeal of the Close Corporations Act.
- (3) If section 226 (1)(b) has not been brought into operation within 12 years after the general effective date of this Act, it is deemed to have been repealed.
- (4) Until the earlier of the effective date of section 226 (1)(b), or the date on which that provision is deemed to have been repealed in terms of sub-item (3), –
 - (a) Section 27 of the Close Corporations Act, 1984 (Act 69 of 1984) is suspended, as if its repeal had been brought into operation on the general effective date; and
 - (b) Part IX of the Close Corporations Act, 1984 (Act 69 of 1984) must be administered in connection with -
 - (i) the provisions of the previous Act referred to in Item 6, until the date determined in terms of Item 6 (3); and

- (ii) thereafter, in accordance with the legislation contemplated in Item 6 (3).

3. Pending filings

- (1) Any matter filed with the Registrar under the Companies Act, 1973 (Act No. 61 of 1973), and not fully addressed immediately before the effective date, must be concluded by the Registrar in terms of that Act, despite its repeal.
- (2) A company that is incorporated and registered in terms of sub-item (1) is deemed to -
 - (a) have been registered in terms of the Companies Act, 1973 (Act No. 61 of 1973); and
 - (b) be a pre-existing company for all purposes of this Act.

4. Continuation of pre-existing companies

- (1) As of the effective date, every pre-existing company that was --
 - (a) incorporated in terms of the Companies Act, 1973 (Act No. 61 of 1973); or
 - (b) recognised as an “existing company” in terms of the Companies Act, 1973 (Act No. 61 of 1973)continues to exist as a company, as if it had been incorporated and registered in terms of this Act, with the same name and registration number previously assigned to it.
- (2) The asset value, turnover and number of employees of a company contemplated in this Item during any period, up to three years, that the company existed before the general effective date of this Act are each to be regarded when applying the thresholds contemplated in section 9 (1)(b) for the purpose of determining whether that company is a public interest company.

5. Conversion of close corporations

- (1) A juristic person incorporated in terms of the Close Corporations Act, 1984, irrespective whether it was a pre-existing company, or was incorporated after the general effective date -
 - (a) must file a Notice of Conversion in the prescribed manner and form, within one year after the later of -
 - (i) the general effective date; or
 - (ii) the date on which that juristic person first satisfies any of the criteria of a public interest company, set out in section 9 (1)(b); or
 - (b) may file a Notice of Conversion in the prescribed manner and form, at any time.
- (2) A Notice of Conversion must be accompanied by –
 - (a) a certified copy of a special resolution approving the conversion of the close corporation;
 - (b) either a new Memorandum of Incorporation, or an amendment to the company's Memorandum of Incorporation, consistent with the requirements of this Act, in either case;
 - (c) a statement of the paid-up share capital, if any for an amount not greater than the excess of the fair value of the assets to be acquired by the company, over the liabilities to be assumed by the company by reason of the conversion: Provided that the company may treat any portion of such excess not reflected as paid-up share capital, as distributable reserves; and
 - (d) a statement by the close corporation's accounting officer, based on the performance of the officer's duties under the Close Corporations Act, 1984, that the officer is not aware of any contravention of that Act by the close corporation or its members or of any circumstances that may render the

members of the close corporation together with the close corporation jointly and severally liable for the corporation's debts; and

- (e) the prescribed filing fee.
- (3) Section 16, read with the changes required by the context, applies with respect to the filing of a Notice of Conversion, as if it were a Notice of Incorporation in terms of this Act.
 - (4) If, upon the coming into operation of section 226 (1)(b), there remain any companies that were incorporated under the Close Corporations Act, 1984 at any time, and that have not converted in terms of this Item –
 - (a) each such company is deemed to have filed a Notice of Conversion on the effective date of section 226 (1)(b); and
 - (b) The provisions of Item 4, and Item 6, read with the changes required by the context, apply to each such company as from the effective date of section 226 (1)(b).
 - (5) The Commissioner must cancel the registration of each close corporation in terms of the Close Corporations Act, 1984 upon its conversion in terms of this Item.
 - (6) Every member of a close corporation converted under this Item is entitled to become a shareholder of the company resulting from that conversion, but the shares or the nominal value of the shares to be held in the company by the members individually need not necessarily be in proportion to the members' interests as stated in the founding statement of the close corporation concerned
 - (7) The Commissioner must give notice in the Gazette of the conversion of a close corporation into a company.
 - (8) On the registration of a company converted from a close corporation, all the assets, liabilities, rights and obligations of the corporation vest in the company.
 - (9) Any legal proceedings instituted before the registration by or against the corporation, may be continued by or against the company, and any other thing done by or in

respect of the corporation, is deemed to have been done by or in respect of the company.

- (10) Despite the conversion of a close corporation, the juristic person that existed as a close corporation before the conversion continues to exist as a juristic person, but in the form of a company.

6. Continued application of Companies Act, 1973 to winding up and liquidation

- (1) Despite the repeal of the Companies Act, 1973, until the date determined in terms of sub-item (3), Chapter 14 of that Act, other than sections 343 to 346 and 348 to 353, continue to apply with respect to the winding up and liquidation of companies under this Act, as if that Act had not been repealed, subject to sub-item (2).
- (2) If there is a conflict between a provision of the Companies Act, 1973 that continues to apply in terms of sub-item (1), and a provision of this Act, the provision of this Act prevails.
- (3) The Minister, by notice in the Gazette, may -
- (a) determine a date on which this Item ceases to have effect, but no such notice may be given until the Minister is satisfied that alternative legislation has been brought into force adequately providing for the winding up and liquidation of insolvent companies; and
 - (b) prescribe ancillary rules as may be necessary to provide for the efficient transition from the provisions of the repealed Act, to the provisions of the alternative legislation contemplated in paragraph (a).

7. Memorandum of Incorporation and Rules

- (1) Every pre-existing company incorporated in terms of section 21 of the Companies Act, 1973 (Act No. 61 of 1973) is deemed to have amended its Memorandum of Incorporation as of the effective date to expressly state that it is a not for profit company.

-
- (2) At any time within two years immediately following the general effective date, a company contemplated in Item 4 may file, without charge -
 - (a) an amendment to its Memorandum of Incorporation to bring it in harmony with this Act; and
 - (b) if necessary, a notice of name change and copy of a special resolution contemplated in section 21 (1), to alter its name to meet the requirements of this Act.
 - (3) During the period of two years immediately following the general effective date, if there is a conflict between a provision of this Act, and a provision of a company's Memorandum of Incorporation, the latter provision prevails, except to the extent that this Schedule provides otherwise.
 - (4) Despite Chapter 7, during the two year period referred to in sub-item (3), until a company contemplated in Item 4 has filed an amendment contemplated in sub-item (1), neither the Commission nor the Takeover Regulation Panel may issue a compliance notice to that company with respect to conduct that is inconsistent with the company's Memorandum of Incorporation.
 - (5) If a company contemplated in Item 4 had adopted any binding provisions, under whatever style or title, comparable in purpose and effect to the rules of a company contemplated in section 14 (5), those provisions continue to have the same force and effect -
 - (a) as of the general effective date, for a period of two years, or until changed by the company; and
 - (b) after the two year period, to the extent that they are consistent with this Act.

8. Pre-incorporation contracts

Section 18 does not apply with respect to a pre-existing company.

9. Company finance and governance

- (1) A person holding office as a director, secretary or auditor of a pre-existing company immediately before the effective date, continues to hold that office as of the effective date, subject to the company's Memorandum of Incorporation, and this Act.
- (2) A person contemplated in sub-item (1) who is disqualified by this Act from being a director, secretary or auditor, is deemed to have resigned that office as of the effective date.
- (3) A vacancy in the office of director, secretary or auditor of a pre-existing company as of the effective date is to filled in accordance with this Act.
- (4) Despite anything to the contrary in a company's Memorandum of Incorporation, the provisions of this Act respecting -
 - (a) the duties, conduct and liability of directors apply to every director of a pre-existing company as of the effective date;
 - (b) rights in terms of this Act of shareholders to receive any notice or have access to any information apply as from the effective date to every pre-existing company;
 - (c) meetings of shareholders or directors, and adoption of resolutions apply as from the effective date to every pre-existing company; and
 - (d) the matters set out in Chapter 5 apply as from the effective date to every pre-existing company.
- (5) Approval of any distribution, financial assistance, insider share issues, or options, are subject to this Act, even if any such action had been approved by a company's shareholders before the effective date, despite anything to the contrary in the company's Memorandum of Incorporation.
- (6) A right of any person to seek a remedy in terms of this Act applies with respect to conduct pertaining to a pre-existing company and occurring before the effective date,

unless the person had commenced proceedings in a court in respect of the same conduct before the effective date.

- (7) Despite section 37 (1) –
- (a) any shares of a pre-existing company that have been issued with a nominal or par value, and are held by a shareholder immediately before the effective date, continue to have the nominal or par value assigned to them when issued; and
 - (b) section 51 (6) does not apply with respect to any shares contemplated in paragraph (a).
- (8) We need to consider an appropriate transition rule relating to offerings and prospectus outstanding at the effective date.

10. Company names and name reservations

- (1) Any reservation of a name by the Registrar in terms of the Companies Act, 1973 that was in effect immediately before the effective date, is deemed to be a reservation in terms of section 20 of this Act, as of the effective date, subject to sub-item (2).
- (2) If the Commissioner believes that a reserved name contemplated in sub-item (1) does not satisfy the requirements of section 19 –
 - (a) the Commissioner must notify the person for whose use the name was reserved, inviting the person to request the reservation of a substitute name that does satisfy the requirements of this Act; and
 - (b) the person concerned may file a request contemplated in paragraph (a), at no charge, any time within 120 days after the date of the Commissioner's notice.

11. Preservation and continuation of court proceedings and orders

- (1) Any proceedings in any court in terms of the previous Act immediately before the effective date are continued in terms of that Act, as if it had not been repealed.

- (2) Any order of a court in terms of the previous Act, and in force immediately before the effective date, continues to have the same force and effect as if that Act had not been repealed, subject to any further order of the court.

12. General preservation of regulations, rights, duties, notices and other instruments

- (1) Any right or entitlement enjoyed by, or obligation imposed on, any person in terms of any provision of the previous Act, that had not been spent or fulfilled immediately before the effective date is a valid right or entitlement of, or obligation imposed on, that person in terms of any comparable provision of this Act, as from the date that the right, entitlement or obligation first arose, subject to the provisions of this Act.
- (2) A notice given by any person to another person in terms of any provision of a previous Act must be considered as notice given in terms of any comparable provision of this Act, as from the date that the notice was given under the previous Act.
- (3) A document that, before the effective date, had been served in accordance with a previous Act must be regarded as having been satisfactorily served for any comparable purpose of this Act.
- (4) An order given by an inspector, in terms of any provision of a previous Act, and in effect immediately before the effective date, continues in effect, subject to the provisions of this Act.

13. Transition of regulatory agencies

- (1) The person who occupied the post of CEO of the Companies and Intellectual Property Registration Office immediately before the general effective date, must be regarded as having been appointed on the general effective date as the Commissioner in terms of section 190, for a term to be determined by the Minister.
- (2) A person in the employ of the Companies and Intellectual Property Registration Office or the Office of Companies and Intellectual Property Enforcement in the Department becomes an employee of the Commission on the effective date.

- (3) The transfer of departmental employees to the Commission must be effected in accordance with -
 - (a) section 197 of the Labour Relations Act, 1995 (Act No. 66 of 1995); and
 - (b) any collective agreement reached between the State and the trade union parties of the Departmental Chamber of the Public Service Bargaining Council before the effective date.
- (4) A person mentioned in sub-item (2) remains subject to any decisions, proceedings, rulings and directions applicable to that person immediately before the effective date, and any proceedings against such a person, that were pending immediately before the effective date, must be disposed of as if this Act had not been enacted.
- (5) Any person transferred in terms of sub-item (3) -
 - (a) remains a member of the Government Employees' Pension Fund mentioned in section 2 of the Government Employees' Pension Law, 1996; and
 - (b) is entitled to pension and retirement benefits as if that person were in service in a post classified in a division of the public service mentioned in section 8(1)(a)(i) of the Public Service Act.
- (6) As of the general effective date—
 - (a) all movable assets of the state which were used by or which were at the disposal of the Companies and Intellectual Property Registration Office and the Office of Company and Intellectual Property Enforcement in the Department immediately before the effective date, except those assets excluded by the Minister, become the property of the Commission;
 - (b) all contractual rights, obligations and liabilities of the Company and Intellectual Property Registration Office are vested in the Commission;
 - (c) all financial, administrative and other records of the Company and Intellectual Property Registration Office, including all documents in the possession of the

Department immediately before the effective date, must be transferred to the Commission; and

- (d) the assets and liabilities of the Securities Regulation Panel established by section 440B of the Companies Act, 1973 are transferred to and are assets and liabilities, respectively, of the Takeover Regulation Panel.
- (7) On the general effective date, the person, if any, holding office immediately before that date, as a member, Chairperson, deputy chairperson or Executive Director of the Securities Regulation Panel appointed in terms of the Companies Act, 1973, is deemed to have been appointed as a member, Chairperson, deputy chairperson or Executive Director, respectively of the Takeover Regulation Panel in terms of this Act.
- (8) The registers of companies, names, and delinquent directors, respectively, as maintained by the Companies and Intellectual Property Registration Office in terms of the previous Act are each continued as the register of companies, names, and directors, respectively, required to be established by the Companies and Intellectual Property Commission in terms of this Act.

14. Continued investigation and enforcement of previous Acts

- (1) Despite the repeal of the previous Acts -
 - (a) any investigation by the Minister or the Registrar in terms of the previous Act and pending immediately before the effective date, may be continued by the Commission;
 - (b) any investigation or other matter being considered by the Securities Regulation Panel in terms of the previous Act and pending immediately before the effective date, may be continued by the Takeover Regulation Panel; and
 - (c) for a period of three years after the effective date—
 - (i) the Commission may exercise any power of the Registrar, or the Takeover Regulation Panel may exercise any power of the Securities

Regulation Panel, in terms of the previous Act to investigate and prosecute any breach of that Act that occurred during the period of three years immediately before the effective date, subject to sub-item (2); and

(ii) a court may make any order that could have been made in the circumstances by a court under that Act.

(2) In exercising authority under subsection (1), the Commission or Takeover Regulation Panel, respectively, must conduct the investigation or other matter in accordance with the previous Act.

15. Regulations

On the effective date, and for a period of 60 business days after the effective date, the Minister may make any regulation contemplated in the Act without meeting the procedural requirements set out in section 225 or elsewhere in this Act, provided the Minister has published such proposed regulations in the Gazette for comment for at least 30 business days.