DIRECTOR'S GUIDE 2011

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SERVICES

PROPERTY LAW

LITIGATION

ESTATES AND TRUSTS

FAMILY LAW

PERSONAL INJURY AND INSURANCE

CORPORATE AND COMMERCIAL LAW

EMPLOYMENT LAW

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IMPORTANT NOTE

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

The information contained herein is a summary of some of the key duties and responsibilities for Directors and officers of companies to take cognisance of in relation to the new Companies Act, 2008 ("the Act"), the Companies Amendment Bill, 2010, as well as the draft Regulations, 2011. Where appropiate we have indicated where King 111 could give amplification.

The Act was signed by the President on the 09th April 2009 and gazetted in Gazette No. 32121 (Notice No. 421). It will come into operation on a date still to be fixed by the President by proclamation in the Gazette, which may not be earlier than one year following the date on which the President assented to it, expected to be 1 April 2011.

The Companies Amendment Bill, (B40-2010) (second draft) was tabled in Parliament on 9 November 2010, and published in the Government Gazette no 33695 dated 27 October 2010. It purports to rectify certain provisions of the Act so as to ensure its improved administration, and establish a proper foundation for certain necessary Regulations.

The second draft of Regulations 2011 was published on the 29 November 2010. The Regulations provide implementation detail on certain parts of the Act.

Both the Amendment Bill and the Regulations are undergoing a public consultation process, until 31 January 2011. It is thus specifically noted that all references to the draft Regulations and the Amendment Bill in this guide are subject to change, as these are in draft format at the time of publication hereof, however the over-arching principles of good governance for directors and officers will remain as per the Act.

It is expected that the Amendment Bill and Regulations will come into effect on the general effective date of the Act. The Act should thus be read together with the Amendment Bill and Regulations when implemented.

While the Act sets out legislation that must be complied with, King 111 is a guideline of best practice. We have included a brief overview of the King 111 Code and Report.

We recommend that professional advice be sought before making any decisions based on this handbook's contents or when dealing with any matters relating thereto.

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

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

INTRODUCTION

- The Act, Amendment Bill together with the Draft Regulations completely replace the Companies Act of 1973 and Corporate Laws Amendment Act no 24 of 2006. The Close Corporations Act, 1984 will be amended as provided for in Schedule 5. Together with the King 111 Code and Report implemented on 1 March 2010 – "this is the most fundamental reform of company law for over 30 years" – *Tshediso Matona (Director General of the Department of Trade & Industry (DTI)*";

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

- The purposes of the Act and King 111 are, inter alia, to promote compliance with the Bill of Rights as provided for in the Constitution in the application of company law, to encourage transparency and high standards of corporate governance and provide for the balancing of rights and obligations of shareholders and directors.

Definitions and Abbreviations:

- 'previous Act" – Companies Act no 61, 1973
- 'Act' – Companies Act no 71, 2008
- 'Amendment Bill' – Second Draft Companies Amendment Bill, 2010
- 'Regulations" – Second Draft Regulations 2011
- 'MOI' – Memorandum of Incorporation
- 'CC's' – Close Corporations
- 'CC's Act" – Close Corporations Act, 1984
- 'Members' – Members of Close Corporations
- 'JP" – Juristic Person
- "AFS" – annual financial statements
- "AGM" – annual general meeting

Regulatory Bodies

- The Commission – the Companies Intellectual Property Commission (previously CIPRO)
- Tribunal – the Companies Tribunal
- The Panel- the Take-Over Regulation Panel
- FRSC – the Financial Reporting Standards Council

DIRECTORS, PRESCRIBED OFFICERS AND MEMBERS

1. GENERAL INFORMATION AND CATEGORIES OF COMPANIES

Categories of companies

A company can be either a for profit company or a non-profit company (NPC). Refer to Table H on page 47 for a detailed description of the different categories of companies as per the Companies Act 2008 ('the Act').

Directorships – nature

DIRECTORSHIP – NATURE
1. The directors of a company are the key people entrusted by law with the function of administering the company and are central to ensuring **good corporate governance** in the company; 2. Different types of directors:**executive & non-executive** and **alternate** directors. ***All carry the equal responsibility*** to ensure that the company complies with the law and is properly governed; 3. **Executive** directors are salaried and involved with the day to day running of the company, and **alternate** directors are appointed to act on behalf of a director when (s)he cannot personally fulfill his/her duties; 4. Many executive directors enter into a fixed term service agreement with the company, which further regulates their relationship with the company. The King 111 Report recommends that the term of these contracts should not exceed **3 years**; 5. The "Board" refers to the collective word used to designate directors when they act together as a group; 6. The director functions as both a **trustee** and a **consultant** i.e (s)he is required to have the experience, skill, time and ability necessary to carry out his/her functions effectively, & should place the interests of the company first; 7. At common law,directors owe **fiduciary duties** & obligations of **care and skill** to the company, which are similar to that of a trustee; 8. The directors are not personally liable for the debts of the company; 9. Under certain circumstances, however, the corporate identity of the company is disregarded e.g where the business is being conducted recklessly or with intent to defraud, (refer to page 26) and the persons responsible (usually a director) may become personally liable for the debts of the company (see pages 26–29).

2. DEFINITION OF DIRECTOR EXTENDED

- The definition of “director” in the Act includes a member of the Board of a company or an alternate director;
- For purposes of those sections which deal with qualification, eligibility (S69), Directors Code of Conduct (S76), Liability (S77), and Indemnity and Insurance (S78), the definition is extended to include an alternate director, prescribed officer (see definition below*), a person who is a member of a committee of the Board or the Audit Committee (irrespective of whether or not the person is also a member of the company’s board).
- The Section relating to Indemnification and Insurance also applies to a former director.
- For purposes of Section 75 (Directors personal financial interests), the definition is extended to include an alternate director, prescribed officer, person who is a member of a committee of the Board (irrespective of whether the person is also a member of the company’s board), and also a “related person” when used in reference to a director, has the meaning set out in Section 1 (see table E on page 43), but also includes a second company of which the director or a related person is also a director, or a CC of which the director or a related person is a member. Section 75 does not apply to a member of an audit committee (per Section 45 of the Amendment Bill).
- Those designated officers, as described above will therefore be subject to the same duties of care, skill and diligence and to the fiduciary duties applicable to directors, will be subject to the same standards of conduct as directors and will be held jointly and severally liable with directors. The MOI and any additional rules are also specifically binding between the company and such officers.

*Definition of Prescribed Officer:

- Draft Regulation 38 sets out the definition of a prescribed officer of a company (despite not being a director) for all purposes of the Act as follows:
  if that person:-
  (a) exercises general executive control over the management of the whole, or a significant portion, of the business and activities of the company, or
  (b) regularly participates to a material degree in the exercise of general effective control over, and management of the whole, or a significant portion, of the business and activities of the company.
- The Regulation applies to such a person irrespective of any particular title given by the company to-
  (a) an office held by that person in the company, or
  (b) a function performed by the person for the company.

3. APPOINTMENT AND DISMISSAL OF DIRECTORS

Appointment of directors and the Board (Sections 66 & 68)

- Only natural persons with legal capacity are eligible to be appointed as Directors to the Board;
- For Profit Companies (private or personal liability company): One or more directors required to be appointed;
- Public (Limited) and Non-Profit Companies: Three or more are required, in addition to the minimum number of directors that the company must have to satisfy any requirement, whether in terms of the Act or its MOI, to appoint an audit committee, or a social and ethics committee (per Section 41 of the Amendment Bill)
- The MOI may provide for a higher minimum number of directors than those required by the Act
- Section 66(4) provides that the MOI may:
  - (a)(i) provide for the appointment (or removal) of Director(s) to the Board, by any person named therein, and
  - (ii) may also provide that for a person to be an ex officio director as a consequence of that person holding some other office, title, designation or similar status;
  - (iii) the appointment or election of alternate director(s) to the company;
- Section 66(4)(b) – A profit company however (other than a SOC Ltd) must provide for the election by shareholders of at least 50% of the directors, and 50% of any alternate directors;

Election of Directors of Profit Company's

- Section 68 (1): Each director of a company [other than the first directors or a director contemplated in S66(4)(a)(i) or (ii)] – see above – must be elected by the persons entitled to exercise voting rights in such an election;
- Section 68(2) Unless the MOI provides otherwise, in any election of directors of a profit company, (a) the election is to be conducted as a series of votes each of which is on the candidacy of a single individual to fill a single vacancy with the series of votes continuing until all vacancies on the board at that time have been filled and (b) in each vote to fill a vacancy, (i) each voting right entitled to be exercised may be exercised once, and (ii) the vacancy is filled only if a majority of voting rights exercised support the candidate.
- **King 111 recommends that the majority of Directors should be non-executive directors so as to ensure that the Board operates independently and is not an extension of the day to day management of the company;**

- Prior to accepting appointment, a Director should carefully consider whether (s)he has the necessary expertise to act as a Director, given the size, nature and complexity of the company [King 111 recommends that where a director lacks experience, a detailed induction and formal mentoring and support programme should be implemented];
- Decisions of the Board shall be valid even if the number of directors is below the minimum set out by the Act or the MOI. A director may be appointed on a temporary basis.

Non-eligible and disqualified directors (Section 69)

- The Act sets out qualifications & disqualifications of Directors;
- Section 69 specifically states that a company may in its MOI impose additional grounds of ineligibility or disqualification on its directors, and set out minimum qualifications to be met by directors of that company;
- A company must not knowingly permit an ineligible or disqualified person to serve or act as a director;
- A person who becomes ineligible or disqualified while serving as a director of a company ceases to be entitled to continue to act as a director immediately, subject to Section 70(2);
- A person is ineligible if the person is-

- A juristic person;
- An unemancipated minor or under similar legal disability; or
- Does not satisfy any qualification set out in the MOI

- The Act sets out disqualifications as follows:
- **Section 69(8)(a):**
  - a person who has been declared a delinquent or a court has prohibited that person to be a director (or member of a CC) – refer to Section 4 on page 9.
- **Section 69(8)(b):**

1 an unrehabilitated insolvent
2 is prohibited in terms of any public regulation to be a director
3 any person removed from an office of trust because of misconduct involving dishonesty
4 any person convicted of offences in the Republic or elsewhere, and imprisoned without the option of a fine, or fined more than the prescribed amount, for fraud, theft, forgery, perjury or an offence involving fraud, misrepresentation or dishonesty or in connection with the promotion, formation or management of a company or under this Act, the Insolvency Act, CC's Act , Competition Act, FICA, Security Services Act, Prevention and Combating of Corruption Actitivies Act. [Draft regulation 39(3) – the prescribed minimum value of a fine upon conviction for these offences which would result in automatic disqualification as per this point 4 is R1000].

- The disqualification will end at the later of five years after the date of removal from office or the completion of any sentence imposed for the relevant offence, or at the end of one or more extensions as determined by a court;
- Note: on application, a court may exempt a person from the application of any of the provisions listed in the block above [S69(8)(b)].
- Note: Despite the disqualifications listed in 3 and 4 contained in S69(8)(b), as a consequence of a single conviction or loss of office, as the case may be, a person may still act as a director of a **private** company under certain circumstances as follows:
  - if all the issued securities of that company are held by that disqualified person alone or by –
    (a) that disqualified person, and
    (b) persons related to that disqualified person and each such person has consented in writing to that person being a director of the company.
- BUT the right of that person to be a director in terms of this subsection terminates automatically upon any **subsequent** conviction or loss of office contemplated in 3 and 4 (per Section 43 of Draft Amendment Bill).

Resignation/Dismissal/Removal of Directors (Section 71)

- Directors may resign by tendering a letter of resignation;
- The shareholders retain the right to remove directors from the Board by ordinary resolution adopted at a shareholders meeting by the persons entitled to exercise voting rights in an election of that director, provided that director has been given notice of the meeting and the resolution, and has been afforded a reasonable opportunity to make a presentation in person or through a respresentative to the meeting, before the resolution is put to vote;
- Under certain specific circumstances, the Board may remove a director without shareholder approval – Section 71(3) provides that where a director or shareholder alleges that a director is disqualified or ineligible [other than on the grounds per Section 69(8)(a)], incapacitated, or has neglected or been derelict in performance, the Board may remove that director.

King 111 and the composition of the Board:

- Paragraph 80 of Chapter 2 of the King 111 Report confirms Section 71 of the Act and states that the shareholders should bear the ultimate responsibility for the composition of the Board.
- However, in a seeming contradiction, Paragraph 79 of Chapter 2 recommends that the company's MOI should allow the Board to remove any director from the Board, including executive directors, and that shareholder approval should not be necessary for these decisions (provided this is included in the MOI).

4. PROBATION AND DELINQUENCY

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

- The director in question must be a current director of the company or within the twenty four months immediately preceding the application, was a director of the company;
- The Commission will keep a register of all those persons declared delinquent or on probation;

5. DUTIES, RESPONSIBILITIES AND RIGHTS OF DIRECTORS

Some key rights and powers of directors can be listed as follows:

5.1 RIGHTS

- to discharge their duties without interference from co-directors;
- receive reasonable notice of meetings;
- claim reimbursement for expenses incurred;
- inspect the company's accounting records, assisted by an accountant;
- take independent professional advice at the expense of the company;
- participate in the strategic management of the company and attend and vote at board meetings.

5.2 POWERS

Some of the Sections in the Act which empower directors to act are as follows:

- Section 66 – unfettered powers
  - Directors have unfettered discretion to manage the company (except to the extent that the Act or the MOI provides otherwise).
- Section 15: To make additional rules
  - Except to the extent that a company's MOI provides otherwise, the Board may make, amend or repeal any necessary or incidental rules relating to the governance of the company in respect of matters not addressed in the Act or the MOI – by publishing a

copy of its rules to the shareholders and filing a copy thereof with the Commission [Draft Regulation 16 – this must be done within 10 business days of being published]. These additional rules require shareholder approval before they may become permanent (see page 16) – Any rule which is inconsistent with the Act or MOI is void to the extent of its inconsistency.

- Section 21: To ratify Pre-Incorporation contracts
  - A person may enter into a written agreement in the name of the company that is contemplated to be incorporated but does not exist at the time – within three months of the date on which the company was incorporated, the Board may completely, partially or conditionally ratify or reject that contract. Draft Regulation 35 – the company must within five business days file a notice of the decision with the Commission and deliver a copy to each party to the contract or materially affected by the transaction.
- Section 38: To issue shares
  - The Board has the power to issue shares* – {however see page 17 re shareholder approval required for issuing shares in certain cases – Section 41}

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

- Section 129: To resolve to institute business rescue proceedings
  - The Board has the authority to resolve that the company voluntarily begin business rescue proceedings and place the company under supervision. **King 111 recommends that Directors should be aware of the practicalities of business rescue**;
  - If the board has reasonable grounds to believe that (a) the company is financially distressed and (b) there appears to be a reasonable prospect of rescuing the company;
  - Such resolution must be filed with the Commission before it is of any force or effect;
  - Refer to page 26 (reckless trading and trading under insolvent circumstances) – directors are duty bound to constantly monitor the company's financial position and ensure that appropriate action is taken to prevent insolvency.
- ***Sections 44-46: Actions of Directors relating to provision of financial assistance-provided certain conditions are met***

A Directors may authorise provision of financial assistance for the subscription of securities under certain conditions (Section 44):

- The board may authorise the company (subject to the MOI) to provide financial assistance* (see definition on next page) by way of a loan, guarantee, the provision of security or otherwise to any person for the purpose of or in connection with the subscription of any option, or any securities, issued or to be issued by the company or a related or inter-related company (see definition of related or inter-related persons in Table E on page 43) or for the purchase of any securities

of the company or a related or inter-related company, subject to the requirements set out in Table G on page 46 relating to conditions and consequences of lending financial assistance.

B <u>Loans or other financial assistance to directors (Section 45):</u>

- A company may not give direct or indirect financial assistance (i.e provide a loan to or secure a debt or obligation) to a director or prescribed officer of a company or of a related or inter-related company or CC, or to a person related to any such company, CC or director – i.e the Board may not authorise it unless it meets the requirements as set out in Table G on page 46.

C <u>Authorisation of distributions (Section 46):</u>

- No distribution may be made by the company unless it is pursuant to an existing legal obligation of the company or a court order or has been authorised by the board by resolution and immediately after giving effect to the authorisation it reasonably appears that the company would satisfy the solvency and liquidity test (see Table D on page 42), and the board resolution acknowledges that the board has applied the solvency and liquidity test and reasonably concluded that the company will satisfy that test immediately after completing the proposed distribution;
- A director of a company is liable to the extent set out in S77(3)(e)(vi) see page 29 if the director :
    - was present at the meeting when the board approved a distribution as contemplated herein or participated in the making of such a decision in terms of section 74, and failed to vote against the distribution despite knowing that the distribution was contrary to Section 46.

*{*Note: "financial assistance" in Section 44 and 45 does not include lending money in the ordinary course of business by a company whose primary business is the lending of money and additionally in re Section 45 – means an accountable advance to meet legal expenses to be incurred by the person on behalf of the company or an amount to defray the persons expenses from removal at the company's request.*}

Section 48: Share Buy Backs

- Sections 48, 46 and 77: If a director was present at a meeting when the board authorised a share buy back and failed to vote against it despite knowing that immediately thereafter the company would not satisfy the solvency and liquidity test, he/she may be jointly and severally liable for legal costs relating to court proceedings to reverse the buy back and the court may order that (a) the person from whom the shares were acquired to return the amount paid by the company and (b) the company to issue to that person an equivalent number of shares of the same class as those acquired. Thus if a director is present at a meeting or participates in the making of a decision in terms of Section 74 (directors acting other than at a meeting) and fails to vote against it, despite knowing that the acquisition is in contravention of sections 46 or 48, that director is liable for any loss, damages or costs sustained by the company as a direct or indirect consequence thereof;

- The acquisition by a company of its own shares is a distribution and must comply with Section 46 (distributions) as per on previous page.

Failure to comply with the above Sections relating to financial assistance and distributions by Directors may lead to Directors being subject to both criminal and civil liability (refer to page 29).

5.3 COMMON LAW DUTIES

Some of the common law duties of directors are:

A The fiduciary duties to:

- To act bona fide in the interests of the company;
- To exercise powers for their proper purpose;
- To exercise independent judgement in decision making;
- Not to use corporate property information or opportunities for personal profit.

B The duty to exercise care and skill

C The duty to prevent any conflict of interest

A breach of any of the above results in the director being liable to the company for any damages it sustains as a result.

- The Act incorporates many of the duties which were previously considered to be common law duties. However it does not exclude those common law duties that are not expressly amended by the Act or those that are not in conflict with it.

5.4 STATUTORY DUTIES

A **Accountability and Transparency**

A.1 Retention of records and making them available to shareholders

- Any documents, accounts, books, writing, records or other information that a company is required to keep in terms of the Act or any other public regulation must be kept in written form; or
- In a form or manner that allows the documents and information that comprise the records to be convertible into written form within a reasonable time for a period of at least **seven** years or any longer period of time specified in any other applicable public regulation;
- Section 24(3) states that every company must maintain –
  - S24(3)(a) a copy of its MOI, any rules;
  - S24(3)(b) a record of its directors including all the information required by S24(5) – see page 13 – in regard to each current director at any particular time and with respect to each past director the, which must be retained for seven years after the past director retired from the company;
  - S24(3)(c) copies of all reports presented at an annual general meeting of the company,annual financial statements and accounting records required by this Act, for a period of seven years;

- S24(3)(d) notice and minutes of shareholders meetings including resolutions adopted and documents made available by the company to the holders of securities in relation to each resolution for seven years after the date each such resolution was adopted;
- S24(3)(e) copies of any written communications sent generally by the company to all holders of any class of the company's securities for seven years after the date of the issue of the communication;
- S24(3)(f) minutes of all meetings and resolutions of directors or directors committees or the audit committee for seven years after the date of the meeting or after such resolution was adopted;

- S24(4) In addition every company must maintain a securities register or its equivalent as required by S50 in the case of a profit company, or a members register in the case of a non-profit company that has members and also the records required in terms of Section 85 (where applicable).
- Draft Regulation 22 states that a company must notify the Commission of the location or of any change in the location of any company records that are not located at its registered office;
- See Table J on page 48 for requirements if securities register and/or accounting records are kept in electronic format;

ACCESS TO INFORMATION

- Section 26 of the Act states that a person who holds or has a beneficial interest in any securities issued by a profit company or who is a member of a non-profit company has a right to inspect and copy without any charge for any such inspection or upon payment of no more than the prescribed maximum charge for any such copy, the information contained in the records of the company, as are specifically listed in Section 24(3) of the Act.
- Any other person has a right to inspect the securities register of a profit company , or the members register of a non-profit company that has members, or the register of directors upon payment of an amount not exceeding the prescribed maximum fee for any such inspection.
- Any such right of access may be exercised only in accordance with The Promotion of Access to Information Act 2000.

Draft Regulation 23 sets out in detail the information to be kept concerning directors such as addresses for service, and in the case of a company that is required to have an audit committee any professional qualifications and experience of the director, to the extent necessary to enable the company to comply with Section 94(5) and Regulation 42.

This information is over and above that information required by Section 24(5), which states that a company's record of directors must include in respect of each director, that persons full name, former names, identity number or date of birth, (if not a SA, then passport number and nationality), occupation, date of most recent election as director, name and registration number of every other company or foreign company of which the person is a director and any other prescribed information.

King 111 expands on this requirement.

A.2 Registered office

- Every company and external company must have a registered office and maintain their documents at that office and indicate such in its Notice of Incorporation; and
- file a Notice of Change of Registered Office with the Commission if the address changes from time to time (subject to the requirements of the MOI) (Refer Draft Regulation 21).

A.3 Annual returns

- **Annual returns** are required to be submitted by every category of company including external companies in the prescribed form with the prescribed fee and within within thirty business days after its incorporation anniversary date, and together with the supplementary documents as follows:
  1) companies required to have their financial statements audited must file a copy of those audited financial statements-if approved, and if not yet approved, within twenty business days after the board approves those statements;
  2) companies voluntarily choosing to have their financial statements audited can elect to file a copy of those audited or reviewed financial statements or to file a document called a Financial Accountability Supplement, which contains only the prescribed pertinent financial information of a company;
  3) all other companies must file a Financial Accountability Supplement;

A.4 Registered use of name and number

- A company or external company must ensure that its registered name and number are clearly stated in legible characters in all notices and other official publications of the company including those in electronic format, and in all bills of exchange, promissory notes, cheques and orders for money or goods, and in all letters, delivery notes, invoices, receipts and letters of credit of the company. It is an offence to mislead the public in this regard.

B **Maintaining and Keeping of Accounting Records**

It is the duty of Directors to ensure that all necessary records are kept by the company at its registered office.

Draft Regulation 25(3) sets out what is required to be included in the accounting records of a company, and can be summarised as follows:

(a) A record of the company's assets and liabilities including but not limited to:

  (i) Register of company's non-current assets;

  (ii) a record of any loan by the company to a shareholder, director, prescribed officer or employee of the company or to a person related to any of them;

  (iii) a record of any liabilities and obligations of the company;

(b) Record of any property held by the company in a fiduciary capacity or in any capacity or manner contemplated in S65(2) of the Consumer Protection Act 2008.

(c) If the company trades in goods – a record of inventory and stock in trade;

(d) Record of company's revenue and expenditure including daily records of all money received and paid out;

If such records are kept in electronic format, the provisions set out in Table J on page 48 must be complied with.

C **Provide for the proper conduct of audit or independent review**

Directors are obliged to comply with Sections 28-30 of the Act and Draft Regulations 26-29.

D **Annual financial statements and financial statements**

It is the duty of Directors to cause the financial statements or annual financial statements of the company to be made out and laid before the company. Refer to page 22 (required to approve before circulated and published).

E **Directors Report**

Section 30(3), page 22.

F **Business Rescue duties-S137**

- King 111 and Section 129 of the Act (see page 26).

G **Codified Regime of Directors Duties – Section 76**

- A codified regime of directors' duties is introduced in the Act –which operates **in addition** to existing common law duties;
- Section 76 states that a director must exercise the powers and perform the functions of director in good faith and for proper purpose, in the best interests of the company and with a degree of care, skill and diligence that may reasonably be expected of such a person. See Table C on page 41 for an expansion of Section 76;
- **King 111 recommends that the duties listed in S76 extend to members of committees (even if not a member of the board).**

H **Disclosure of Personal Financial Interests: Section 75**

- A director (including one appointed as a member of a Board Committee), is required to disclose his personal financial interest in respect of a matter to be considered at a meeting of the board (this is also applicable to a related person to him and to a prescribed officer);
- He must disclose his interest before it is considered by a meeting of the Board and recuse himself by leaving the meeting, without taking part in the discussion;
- This section does not apply to certain directors in certain circumstances (see item (f) on Table F on page 44).

I **Other Duties**

I.1 Duties in terms of the Memorandum of Incorporation

- The draft regulations provide a standard set of MOI that companies may use as a basis but may amend to meet their specific needs. The directors should familiarise themselves with the contents thereof since it will invariably impose duties, limitations and/or powers on directors.

I.2 Compliance with legislation

Additionally a director must also take note of the following:

- Industry or sector specific legislation;
- Listed companies must adhere to JSE securities exchange regulations;
- The South African Income Tax Act;
- The Labour Relations act;
- The Occupational Health and Safety Act;
- The Employment Equity Bill;
- Promotion of Access to Information Act;
- Financial Intelligence Centre Act;
- Non-binding rules, codes, standards if it would constitute good governance and practice – King 111.

I.3 Corporate governance minimum guidelines and recommendations per King 111 (see pages 35–36)

5.5 RESPONSIBILITIES – DECISION MAKING AND DELEGATION

- Shareholders do retain ultimate responsibility for the company and have the power to remove or not to re-appoint directors, however, they do delegate the day to day running of the company to directors, who in turn, appoint and supervise management;
- While many of their duties can be delegated to management, the directors retain overall responsibility over management, and have a duty to monitor management's performance;
- It is the directors' responsibility to ensure the smooth running of the company.

6. ACTIONS REQUIRING SHAREHOLDER APPROVAL

Shareholder approval is required for certain transactions carried out by Directors, including (but not limited to):

A **Section 112: Disposal of greater part of assets or undertaking**

The directors shall not have the power save by virtue of a special resolution (passed in accordance with Section 115) by the shareholders to dispose of the whole or greater part of the undertaking of the company, or the whole or greater part of the assets of the company, or implement an amalgamation or merger, or implement a scheme of arrangement.

B **Amendment of MOI**

- A company's MOI can be amended by resolution if the amendment is:
  - Proposed by the Board or by shareholders entitled to exercise at least **10%** of the voting rights that may be exercised on such a resolution and the shareholders by formal or informal **special resolution** approve the proposed amendment (this second requirement is not applicable to NPC's – that have no voting members);

{Note: the MOI may also be amended in compliance with a court order (board resolution) or in a manner contemplated in Section 36(3) and (4)}.

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

- S41(1): An issue of shares* must be approved by a **special resolution of the shareholders** of a company if they are issued to: (a) a current or future director or prescribed officer of the company, (b) person related or inter-related to the company or to a director or prescribed officer or (c) a nominee of any of the above subject to certain exceptions [Section 41(2)];
- S41(3): An issue of shares* requires approval of the shareholders by special resolution if the voting power of the class of shares that are issued or issuable as a result of the transaction** will be equal to or exceed **30%** of the voting power of all the shares of that class held by the shareholders immediately before the transaction.

{*or securities convertible into shares, or a grant of options contemplated in Section 42, or a grant of any other rights exercisable for securities*}
{***reference to "transaction" includes a series of integrated transactions*}

- Refer to page 29 on directors liability for description of consequences of transgression of this section for directors. S41(5):

D **Section 15: Shareholder approval required to make additional rule permanent.**

- A rule is binding on an interim basis **until it is put to a vote at the next general shareholders meeting** and permanently only if it has been ratified by an ordinary resolution at such meeting;
- Once ratified, the MOI (and any rules of the company) are binding between the company and the shareholder(s) and between the shareholders themselves (if more than one) and between the company and each director or prescribed officer or any other person serving the company as a member of a committee of the board.

The company's MOI can also list additional scenarios when shareholder approval will be required for Director actions. As long as the MOI is consistent with the Act, a company may tailor its MOI in such a way as to limit directors actions substantially by increasing shareholder activisim.

General Ratification by Shareholders of Directors Actions:

Section 20 (2) – (3) The shareholders may ratify by special resolution any action by a company or the directors that is inconsistent with any

limitations, restrictions or qualifications listed in the MOI of the company – (however such action cannot be ratified if it is in contravention of the Act).

- Thus the duty to act *intra* vires requires that a director must ensure that (s)he act on behalf of the company only to the extent permitted by the powers and authority conferred upon him/her by law, the company's statutes (the MOI), the shareholders, and fellow directors;
- Where a director acts ultra vires, the shareholders may ratify the transaction retrospectively by special resolution (as per above) or may elect to repudiate the action, whereupon the erring director may be held personally liable to the company for any loss suffered by the company as a result thereof;
- Refer to page 31 – remedies for shareholders [Section 20(4) and (5)].

7. RING-FENCED AND PERSONAL LIABILITY COMPANY'S – DOCTRINE OF CONSTRUCTIVE NOTICE

- Under the previous Act the public was deemed to be fully acquainted with the Memorandum and Articles of the company, and consequently any limitation of powers of the directors – in other words they are deemed to have "constructive notice" of the company's public documents.
- A party contracting with a director who acts on behalf of the company, however who does so beyond the scope of his powers (acts ultra vires), cannot therefore state that he did not have knowledge of the director's lack of authority to act or limitation.
- the company would not be bound by the contract, unless it chose to ratify it (or unless the director fraudulently did not disclose his limitation).
- On implementation of the new Act, the public will not deemed to be acquainted with or having knowledge of any provision of a company's MOI merely because it is filed with the Commission or is available for inspection at the company's office, except for the following two specific scenarios:

7.1 RING –FENCED

- – if a company's MOI includes any provision contemplated in S15(2)(b) or (c) – i.e it:
  - S15(2)(b) – contains a restrictive or procedural requirement in addition to the requirements set out in Section 16 impeding the amendment of any particular provision of the MOI, or
  - S15(2)(c) – prohibits the amendment of any particular provision of the MOI, then

- The company is required to have the word Ring-Fenced or **RF** subjoined to it's name, and its Notice of Incorporation or subsequent Notice of Amendment is required to draw attention to the relevant provision and its location in the MOI.

All persons or the public are then regarded as having notice and knowledge of such a provision in the company's MOI.

7.2 PERSONAL LIABILITY COMPANY

All persons are also regarded as having notice and knowledge of the fact that a personal liability company (incorporated) means that the directors and past directors are jointly and severally liable, together with the company, for any debts and liabilities of the company as are or were contracted during their respective periods of office.

*Pre-existing companies may thus need to identify specific conditions which may be applicable to them and if necessary register a name change (to RF) on implementation of the Act.

8. REMUNERATION

Section 66(9)

- Directors remuneration must be paid only in accordance with a **special resolution** approved by the shareholders within the previous two years [According to King 111 – this should only apply to non-executive directors];
- All companies will be required to pass such a resolution before the first remuneration is paid to directors after the Act becomes effective;
- Section 30 (4)-(6): If the Annual Financial Statements are required to be audited, they must contain extensive information about any remuneration received by a Director or prescribed officer as set out in the Act.

9. THE BOARD, COMMITTEES AND MEETINGS

Board Meetings (Section 73)

- Any director may call a board meeting at any time. A Board meeting is obligatory if called for by:
    - at least **2** of the directors; or
    - in the case of a Board with 12 or more directors, **25%** of the directors require it;
  - The MOI may specify a higher or lower number or percentage.
  - The board may determine from time to time the requirement for notice for meetings, as long as this complies with the MOI or rules and no meeting may be convened without notice to **all** the directors;

- Board meetings may be held with certain or all the directors using electronic communication (EC), as long as the EC facility employed enables all persons participating in that meeting to communicate concurrently with each other without an intermediary and to participate effectively in that meeting (and as long as the MOI allows for it);
- A majority of the directors must be present in person or by electronic communication before a vote may be called at the meeting;
- Each director has **one vote** on a matter before the board, and a majority of votes cast on a resolution is sufficient to approve that resolution, and in the case of a tied vote, the chair may cast a deciding vote if he has not previously voted. In all other instances the motion is not carried.

Board Committees (Section 72)

- The Board may appoint any number of committees to deal with matters on the board's behalf [also recommended in King 111], or may consult with or receive advice from any person;
- The Board may appoint non-directors to a Committee; (as long as they are not disqualified or ineligible);
- Such persons shall not have a vote. The Board may delegate to the Committee any of the authority of the Board;
- The creation of a committee, delegation of authority or action taken does not alone satisfy or constitute compliance by a director with the required duty of a director to the company;

Statutory Committees:

- **The Minister has by Draft Regulation 43 prescribed that a listed public company or SOC Ltd or any other company that has in any two of the previous five years scored above 750 points in terms of Regulation 26(2) or would have so scored if the Act had been in effect at that time, are obliged to have a Social and Ethics committee (confirmed by King 111).**
- See also page 23 for circumstances where audit committees are mandated in terms of the Act.

10. ACCOUNTING RECORDS, FINANCIAL STATEMENTS, FINANCIAL REPORTING STANDARDS – AUDIT AND INDEPENDENT REVIEW

- Some key provisions are as follows:

Section 28 Accounting records

- **All** companies must keep accurate and complete accounting records in one of the official languages of RSA at its registered office (a) as necessary to enable the company to satisfy all reporting requirements

applicable to it as set out in Section 28 and 29 and (b) provide for the compilation of financial statements and for the proper conduct of an audit or independent review of its annual financial statements as applicable for the particular company [Draft Regulation 25(2)];

- Draft Regulation 25(3) sets out information / documentation that should be included in the accounting records of a company (see page 14 above);
- Accounting records may be kept in electronic format, subject to certain conditions – see Table J on page 48;
- It is an offence for the company to fail to keep accurate or complete accounting records as prescribed or to keep records other than in the prescribed manner and form with an intent to deceive or mislead any person or to falsify these records or permit a person to do so. It is an offence for any person to falsify a company's accounting records.

Section 29 Financial statements

- If a company provides any financial statements (including annual financial statements) to any person for any reason, these must satisfy the requirements as set out in Section 29(1) of the Act.

Any such statements must not be false or misleading in any material respect or incomplete in any material particular. If they are in the form of a summary, these summaries must comply with prescribed requirements for summaries. Non compliance is an offence.

Financial Reporting Standards

S29(4) The Minister after consulting with the Financial Reporting Standards Council (FRSC) may make regulations prescribing the financial reporting standards or the form and content requirements for summaries. Draft Regulations 26-29 have been issued in this regard.

Section 29(6) It is an offence to prepare or be party to the preparation, approval, dissemination or publication of any financial statement (including any annual financial statements) knowing that those statements fail in a material way to comply with the requirements as listed in Section 29(1), or are materially false or misleading. The Act places increased onus and liability on preparers of financial statements [Section 214(1)(d)]

Section 30: Annual financial statements (AFS)

- All companies are required to produce annual financial statements (AFS) either internally or independently each year within **6 months** after the end of their financial year which are:
  - (a) Audited in the case of a public company or
  - (b) In the case of any other profit or non-profit company, –
    - (i) Audited if so required by the regulations*
    - (ii) Be either audited voluntarily if the company's MOI or a shareholders resolution so requires or if the company's board has so determined or independently reviewed in a manner

that satisfies the regulations made in terms of subsection 7, subject to Section 30(2A) (see below).

**Note: S30(8) inserted by the Amendment Bill: Despite Section 1 of the Auditing Profession Act, an independent review of a company's AFS required by this section does not constitute an audit within the meaning of that Act.

*The Minister has issued these Regulations based on the requirements of Section 30 – taking into account inter alia whether it is desirable in the public interest, having regard to the economic or social significance of the company as indicated by any relevant factors including –

(aa) its annual turnover

(bb) the size of its workforce

(cc) the nature and extent of its activities

S30(2A) of the Amendment Bill: Exemption of Owner-Managed Companies

Except to the extent required by any other law or agreement a private company is exempt from the requirements in this section to have its AFS audited or independently reviewed and from the requirements of subsection (3)(d) – [presentation of AFS to shareholders after they have been approved by the board] – if every person who is a holder of, or has a beneficial interest in, any securities issued by the company is also a director of the company.

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

Section 76(5)(b) states that directors of a company may rely on information provided by accountants.

Annual General Meeting Requirement

- The Act only requires a public company and SOC Ltd to call an AGM within eighteen months of its date of incorporation and thereafter within fifteen months of the date of the previous AGM to present the audited annual financial statements to the shareholders;
- The Act does not require a private company to have an AGM;
- However, the Board is required to approve the AFS, and these are required to be presented to the first shareholders meeting after they have been so approved (there is no time frame stipulated), unless exempted.

Independent Review by an Independent Accounting Professional

- Draft Regulation 26 relating to "Independent Review", states the minimum requirement for a professional person to conduct an independent review.

- An "independent accounting professional" being a person who:
  - (i) is –
    - (aa) a registered auditor in terms of the Auditing Profession Act' or
    - (bb) a member in good standing of a professional body that has been accredited in terms of Section 33 of the Auditing Profession Act; or
    - (cc) qualified to be appointed as an accounting officer of a CC in terms of Section 60 of the CC's Act; and
  - (ii) Does not have a personal financial interest in the company or a related or inter-related company; and
  - (iii) Is not a person as described in Table I on page 48;
  - (iv) Is not related to any person who falls within any of the criteria set out in clause (ii) or (iii).

11. ENHANCED ACCOUNTABILITY, AUDIT AND AUDIT COMMITTEES

- **Public companies and SOC's Ltd** (in this section referred to as "relevant companies") must also comply with additional requirements set out in Chapter 3 of the Act;
- Private companies, personal liability companies and NPC's are not required to, however the Amendment Bill provides that such companies may have to comply with these additional requirements as follows:
  - S84(1)(c)(i) – unless such company is required to comply by the Act or regulations to have its annual financial statements audited every year
  - S84(1)(c)(ii)- but otherwise only to the extent that the company's MOI so requires, as contemplated in S34(2).

Chapter 3 requires the relevant companies to:

- Appoint a company secretary;
- Appoint an auditor and establish an audit committee;
- King 111 recommends that all other companies should **voluntarily** establish an audit committee;
- Draft Regulation 43 requires relevant companies to also appoint a **Social and Ethics Committee** unless exempted (see page 25).

Company Secretary

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

Appointment & rotation of auditor (Section 90)

- Upon its incorporation and each year at its annual meeting, relevant company must appoint an auditor, who must be a **registered** auditor and acceptable to its audit committee. Section 90(1A) inserted by the Amendment Bill states that the companies voluntarily electing an audit as per S84(1)(c)(i) and (ii) – page 23 – must only appoint an auditor if the requirement to have its AFS audited applies to that company when it is incorporated, or at the AGM at which the requirement first applies to the company and at each AGM thereafter;
- The auditor must not be a director, prescribed officer, or employee or consultant of the company who was or has been engaged for more than one year in the maintenance of any of the company's financial records or the preparation of any of its financial statements or a director, officer or employee of a person performing the secretarial work for the company. Neither must the auditor be a person who, alone or with a partner or employees, habitually or regularly performs the duties of secretary or bookkeeper of the company, or is related to any such person, or a person who at any time during the five financial years immediately preceding the date of appointment was a person contemplated above;
- Any firm appointed as auditor must, in order to be a valid appointment, specify the name of the individual member of the firm who will undertake the audit and that individual must also meet the requirements of the paragraph above; and
- The same individual may not serve as the auditor or designated auditor for more than **five consecutive financial years**;
- If an individual has served as auditor or designated auditor for **two or more consecutive financial years** and then ceases to be the auditor, that individual may not be appointed again until after the expiry of at least two further financial years;
- Section 93 sets out the rights and restricted functions of auditors and cannot perform any services that would place him in a conflict of interest as determined by the Independent Regulatory Board for Auditors (IRBA) in terms of the Auditing Profession Act or any other services determined by its audit committee.

Audit committee (Section 94)

- At each AGM, a SOC Ltd, public company or one that is required only by its MOI to have an audit committee as contemplated in sections 34(2) and 84(1)(c)(ii) must elect an audit committee (i.e the shareholders and not the board of directors) **must** elect an audit committee for the following financial year (subject to certain exemptions); It must have at least three members who must also be independent non-executive **directors** of the company. [King 111 recommendation re composition of committee]. In terms of the Act, members of the audit committee must also meet the qualifications as set out in Table I on page 48;
- The audit committee is required to comply with specific statutory duties as are clearly set out in the Act in Section 94(7), in respect to each financial year for which it is appointed.

- A company must pay all expenses reasonably incurred by its audit committee including the fees of any consultant or specialist engaged by the committee to assist it with its duties (if the audit committee considers it appropriate);
- Note: If a holding company has an audit committee, the subsidiary does not require one.

Directors and Audit committees per King 111

- King 111– if differences of opinion should arise between the board and the audit committee, where the audit committee's statutory functions are concerned, the audit committee's decision will prevail.

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

- **Section 159: Confidential disclosures**
- A public company or SOC Ltd company must directly or indirectly –
    - Establish and maintain a system to receive **confidential disclosures** of any person as contemplated in Section 159 and act on them; and
    - Routinely publicise the availability of that system to directors, secretaries, other officers, employees, registered trade unions of the company, a supplier of goods or services to a company or an employee of such a supplier.

Social and Ethics (S&E) Committee (Draft Regulation 43)

- This is compulsory for relevant companies, unless:
    (a) It is a subsidiary of another company that has a social and ethics committee which will perform the functions required by the regulation on behalf of that subsidiary company, or

    (b) Has been exempted by the Tribunal on application.[Revocable exemptions for five years at a time are allowed on grounds of redundancy or no basis for public interest considering the company's activities or because the company already has a formal mechanism within its structures that substantially performs the same functions].
- The committee must comprise not less than three directors or prescribed officers of the company, at least one of whom must be a director who is not involved in the day-to-day management of the company's business, and must not have been so involved within the previous three financial years.
- A company required to have a S&E Committee is required to elect members to that Committee at each Annual General Meeting of the company.
- The board must appoint an advisory panel to the committee who represent the community and public interest having regard to the location and nature of the company's activities.
- Draft regulation 43(5) sets out the functions of the committee in detail.

12. RECKLESS TRADING AND TRADING UNDER INSOLVENT CIRCUMSTANCES

Section 22: ***"A company must not carry on its business recklessly, with gross negligence with intent to defraud any person or for any fraudulent purpose or trade under insolvent circumstances".***

Administrative consequences:-Compliance Notices:

- **Draft Regulation 19** states that if the Commission has reasonable grounds to believe that a company is engaging in reckless conduct, it may issue a show cause notice, and the person who has received such notice is required to provide information to the Commission within 20 business days of having received it, on receipt of which, the Commission can either accept the information and confirm the company's right to continue carrying on business, or issue a compliance notice;
- The Commission may only refer the matter to the National Prosecuting Authority (NPA) as an offence if it has first issued a show notice, and a compliance notice and the company has failed to comply with the compliance notice (see consequences and penalties relating to prosecution for criminal liability section on page 29);
- The Commission could alternatively institute proceedings to impose an administrative fine, but cannot do **both** in respect of any particular compliance notice;
- A Director could still be subject to significant civil liabilities for any loss, damage or cost suffered by the company as a result of a contravention of Section 22;
- Directors have a duty to initiate voluntarily Business Rescue proceedings where it seems the company will become insolvent, so as to avoid the serious consequences contemplated in this Section.

13. REMEDIES AND PROTECTION OF WHISTLE-BLOWERS

The Act introduces a new regime to protect whistle-blowers and introduces new statutory remedies and Regulatory bodies in Chapter 7. The remedies available can be summarised as follows:

1 **Right to seek specific remedies**

   a. Company names – application to Companies Tribunal or Human Rights Commission

   b. Rights of securities holders-application to Court to protect rights

   c. Directors-application to Court to declare a director delinquent or on probation (see Tables A and B which also list which stakeholders may bring such an application)

d. Relief from oppressive or prejudicial conduct – application to court by a director or shareholder for relief

2. **Voluntary resolution of disputes** – filing of complaint to Company Tribunal or Alternative Dispute Resolution Agent (accredited entity)
   - **King 111 – Directors should endeavour to resolve disputes by way of ADR so as to preserve business relationships-an emerging good governance trend.**
3. **Complaints to Commission or Take-Over Regulation Panel** – a person can file a complaint with the Panel (relating to fundamental transactions, takeovers and offers) or Commission (regarding any other matter arising in terms of the Act) who may direct that an investigator conducts an investigation.

Administrative Fines

A court, on application by the Commission or Panel may impose an administrative fine – only for the failure to comply with a compliance notice (the court could also refer the matter to the National Prosecuting Authority for prosecution of an offence in terms of Section 214(3) but may not do both in respect of any particular compliance notice).

As set out in the Act, the amount of the fine in any particular case is to be determined having regard to several factors, and may not exceed the greater of –

(a) The maximum prescribed by the Minister –Draft Regulation 163 prescribes as R1 000 000, and

(b) 10% of the respondent's turnover for the period during which the company failed to comply with the compliance notice

Protection of whistle-blowers Section 159

- Any shareholder, director, company secretary, prescribed officer, employee, a registered trade union or other representative of the employees, supplier of goods or services to the company, or employee of such a supplier – who has reasonable grounds to suspect that the company or any of its directors or employees have contravened the Act, or a law mentioned in Schedule 4 or or any statutory obligation or is engaged in conduct that has or is likely to endanger the health and safety of any individual or damage the environment or has unfairly discriminated or condoned unfair discrimination in contravention of the Consitution or Unfair Discrimination Act 2000 or has contravened any other legislation that could expose the company to an actual or contingent risk of liability or is inherently prejudicial to the interests of the company and in good faith discloses this information to the Commission, Companies Tribunal, Panel a regulatory authority, an exchange, legal adviser, a director, prescribed officer, company secretary, auditor, board or committee of the company concerned, then that person (the whistle-blower), has **qualified priviledge in respect of that disclosure and will be immune from any civil, criminal or administrative liability for that disclosure, if the conditions set out in S159 are met**;
- If a person who has made such a disclosure is subjected to express or implied threats or conduct that causes detriment to him/her by any other person, then (s)he will be entitled to compensation for damages suffered;

- ***Any provision of a company's MOI or an agreement is void to the extent it purports to limit or negate this Section 159*;**
- ***A public company and SOC Ltd MUST establish a system for confidential disclosures*.**

14. EASIER ACCESS TO REMEDIES PROVIDED BY THE ACT

- A new body, the Company Tribunal is created by the Act, and any stakeholder, including a shareholder has free recourse to lay a complaint against a Director or company with the Tribunal;
- Section 165 of the new Act allows for a general derivative notice whereby an aggrieved party, such as a shareholder, director or even a representative of a trade union to send a notice to the company to enforce its rights and to demand to protect its or the company's legal interests;
- Section 20(6)- provides a specific remedy for shareholders – each shareholder of a company has a claim for damages against any person, including a Director, who inter alia causes the company to do anything inconsistent with the Act;
- Section 218(2) – provides a general remedy to any person, stakeholder – including a shareholder to bring a civil action against a person who contravenes the Act for any loss or damages suffered by that person as a result of that contravention
- Section 81(1)(d) – gives a lot of power to minority shareholders- the section states that one or more shareholder(s) may apply to court for the winding up of a solvent company on the grounds that either:
    - the directors are deadlocked in the management of the company and the shareholders are unable to break the deadlock which is causing irreparable injury to the company or the company's business cannot be conducted to the advantage of shareholders generally as a result of the deadlock or
    - on the basis that the shareholders are deadlocked in voting power and have failed for a period that includes at least two consecutive annual general meeting dates, to elect successors to directors whose terms have expired or
    - it is otherwise just and equitable for the company to be wound up.
- Section 81(1)(e) – also provides that one or more shareholders can apply to wind up a solvent company if the directors or prescribed officers or other persons in control of the company are acting in a manner that is fraudulent, or illegal or that the company's assets are being misapplied or wasted.

Section 163-a shareholder or director may apply to court for relief if, inter alia,

S163(1)(c) – the powers of a director or prescribed officer or a person related to the company are being exercised in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of the applicant.

[Schedule 5, Item 7(5)]

- In addition the right of a person to seek a remedy in terms of the new Act will apply in respect of conduct pertaining to a pre-existing company which occurred prior to the effective date, (i.e retrospectively) if that person did not institute proceedings before the effective date. [Schedule 5, Item 7(7)]

15. LIABILITY OF DIRECTORS

The Act sets out the circumstances in which a Director can be held liable for loss, damages or costs of the company, incur civil liability to shareholders and third parties and/or criminal sanctions.

CRIMINAL LIABILITY

- The Act aims to de-criminalise sanctions where possible and rather to enforce company law administratively via the appropriate bodies listed on pages 26–28;
- There are very few remaining offences – only those arising out of a refusal to respond to a summons, to give evidence and perjury;
- In addition, in order to improve corporate accountability, the Act (Section 216) states that it will be an offence, punishable by a fine or up to ten years imprisonment (or both) for a director to:

  <u>(Section 213):</u>

  commit a breach of confidence or

  <u>(Section 214): False statements, reckless conduct and non-compliance</u>

  (1)(a) who is party to the falsification of any accounting records of a company or

  (1)b) with a fraudulent purpose knowingly provided false or misleading information or

  (1)(c) was knowingly a party to an act or omission by a business calculated to defraud a creditor or employee of the company, or a holder of the company's securities or with another fraudulent purpose, or

  (1)(d) is a party to the preparation, approval, dissemination or publication of a prospectus or a written statement contemplated in Section 101, that contains an untrue statement as defined and described in Section 95.

  Section 214(3) it is an offence to fail to satisfy a compliance notice issued in terms of this Act, however should an administrative fine have been imposed by a court in respect of the non-compliance, then no person can also be prosecuted for such an offence.

Section 214(4) [inserted by the Amendment Bill] states that a person who contravenes Section 99(1) to (9) re general restrictions on offers to the public- and if that person is a company, every director or prescribed officer of the company who knowingly was a party to the contravention is (a) guilty of an offence and (b) liable to any other person for any losses sustained as a consequence of that contravention.

- Such offences may also lead to directors also incurring civil liability;
- All other offences – fine or imprisonment up to twelve months (or both); such as:

Misleading or non-use of Name: (Section 32)

- If any document does not contain the name and number and a court concludes that another person was reasonably misled by the exclusion of these details, it may make an appropriate order allocating any liability to or among any of the company's incorporators, shareholders or directors (to the extent that it is just and equitable to do so in the circumstances).

CODIFIED LIABILITY OF DIRECTORS & OFFICERS: Section 77

A director, is liabile generally for:

- a breach of a fiduciary duty;
- for losses, damages or cost resulting from breach of Sections 75, 76(2), 76(3)(a) or (b) (relating to non-disclosure of personal financial interests, misusing the position as director to gain personal advantage, or not acting in good faith and for proper purpose or in the best interests of the company);
- delict – breach of a duty as per S76(3)(a), or a duty as per MOI;
- {refer to page 5 liability in terms of Section 76 extended to members of committees even if not a director on the board};

Section 77(3) sets out specific liabilities as follows:

- S77(3)(a) – for acting in the name of the company despite knowing he did not have the authority to do so;
- S77(3)(b) – acquiescing to carrying on of company's business despite knowing that it was being conducted contra to Section 22 (reckless and insolvent trading);
- S77(3)(c) – party to an act or omission by the company despite knowing that it was calculated to defraud a creditor, employee or shareholder;
- S77(3)(d) for signing or consenting to the publication of any financial statements that were false or misleading in a material respect or a prospectus which contained an untrue statement;
- S77(3)(e) for being present at a meeting or for knowingly consenting to or failing to vote against
  - (i) the issue of unauthorised shares, which had not been authorised;
  - (ii) the issuing of authorised securities despite knowing that such issue was inconsistent with Section 41;
  - (iii) for granting unauthorised options;

(iv) the provision of financial assistance to any person contemplated in S44 for the acquisition of securities of the company despite knowing that the provision was inconsistent with S44 or the company's MOI;

(v) the provision of financial assistance to a director for a purpose contemplated in S45 despite knowing that the provision of financial assistance was inconsistent with that section or the company's MOI;

(vi) a resolution approving a distribution despite knowing that the distribution was contrary to S46

(vii) the acquisition by the company of any of its shares or the shares of its holding company despite knowing that the acquisition was contrary to S46 or 48;

(viii) an allotment by the company despite knowing that the allotment was contrary to any provision of Chapter 4 of the Act.

Sections 20 and 218 of the Act enable shareholders to sue directors/officers for civil damages, or any losses suffered by them as follows:

- **Section 20 (4):**
- This section allows one or more shareholders, directors or prescribed officers or trade union representing employees of the company may apply to the High Court for an appropriate order to restrain a company from doing anything inconsistent with the Act, or that is inconsistent with any of the limits, restrictions or qualifications of the MOI, (without prejudice to any rights to damages of a third party who obtained such rights in good faith and did not have actual knowledge of the limit, restriction or qualification);
- Each shareholder may have a claim for damages (a personal claim) against any person including a director who intentionally, fraudulently or due to gross negligence causes the company to do anything inconsistent with the Act, or any limitation, restriction or qualification in terms the MOI (unless the action has been ratified by shareholders). (Note: An action may not be ratified if it is in contravention of the Act).
- **Section 218 Civil actions:**
- A shareholder (and any other stakeholder) can also have a claim against the directors or any person who contravenes the Act for damages for any loss or damaged suffered as a result of that contravention – i.e the action does not need to be fraudulent or carried out with gross negligence for a valid claim in terms of this Section.

The liability that is incurred is joint and several with any other person who may be held liable for the same act. Any person with a claim can thus bring it against all the Directors or any one particular Director.

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

[Note: If a company is a personal liability company the directors and past directors are jointly and severally liable together with the company for any debts and liabilities of the company as are or where contracted during their respective periods of office [Section 19(3)].

The Act does however provide some form of relief to Directors – by way of Indemnity and Insurance for Directors (see next section).

In addition – in terms of the Act a possible defence is open to a Director who asserts that he/she had no financial conflict, was reasonably informed and made a rational business decision in the circumstances – known as "the business judgement rule" See second half of Table C on page 41.

16. INDEMNIFICATION AND DIRECTORS' INSURANCE

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

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

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

The provisions of this section are in addition to any common law consistent with the section;

A company may,if authorised in its MOI:

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

(b) directly or indirectly indemnify the director for expenses as per (a) above irrespective of whether it has advanced those expenses if the proceedings are (i) abandoned or exculpate the director or (ii) arise in respect of any liability for which the company may indemnify the director,

However the company may not so indemnify the director if:

(i) the director has had proceedings instituted against him/her regarding Sections 77(3)(a) to (c) [see para above i.e for circumstances where liability arose as a result of the directors failure to act in good faith and for a proper purpose or in the best interests of the company or with the degree of care, skill and diligence required] or for (ii) willful misconduct or breach of trust (unless (s)he has been exculpated);

A company may not indirectly or directly pay any fine that may be imposed on the director convicted of an offence in terms of national legislation, subject to subsection 3A, (Amendment Bill) which states that this will not apply to a private or personal liability company if

(a) a single individual is the sole shareholder and sole director of that company or

(b) two or more related individuals are the only shareholders of that company and there are no directors of the company other than one or more of those individuals.

Section 78(7): Directors' Insurance:

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

17. TRANSITIONAL PERIOD AND DUTIES OF DIRECTORS

[Schedule 5, Item 4 of the Act]

THE MOI

- A pre-existing company may file within two years of the general effective date of the new Act (without charge) an amendment to its MOI to harmonise it with the Act, in other words, there will be a two year "grace period" for all pre-existing companies to harmonise themselves with the Act.
- The following provisions of the new Act however, will apply **immediately** as from the effective date to all pre-existing companies {irrespective of what is stated in the company's MOI}, in other words no "grace" period is afforded to company's in regard to the following:
  - (a) the duties, conduct and liability of directors will apply to every director (and prescribed officer)
  - (b) the rights of shareholders to receive any notice or have access to any information will apply. [Even minority shareholders have the right to be notified of a shareholders meeting and to attend and participate therein].
  - (c) meetings of shareholders or directors and adoption of resolutions apply
  - (d) Chapter 5 (fundamental transactions/take-overs) will apply except to the extent exempted by or in terms of Chapter 5

18. MEMBERS OF CLOSE CORPORATIONS (CC'S) AND CORPORATE GOVERNANCE

On implementation of the Companies Act 2008, the Close Corporations Act 69 of 1984 (CC's Act) will be amended as provided for in Schedules 3 and 5 of the Act.

Some of the effects of these amendments are that:

- Existing CC's at the date of implementation of the Act will continue to exist indefinitely, or until such time as their members may determine that it is in their interest to convert to a company.
- No new CC's will be able to be registered, and no company converted to a CC, as of the effective date of the Act.

Conversion of CC to Company

- From the date of operation of the Act, existing CC's may convert to a company by filing a **Notice of Conversion**; together with
  - (a) a written statement of consent approving the conversion of the CC signed by members of the CC holding in aggregate at least 75% of the members' interest in the CC
  - (b) a MOI consistent with the requirements of the Act
  - (c) the prescribed filing fee (it is proposed that for the first three years after implementation of the Act, if the CC retains its same name, there will be a Nil filing fee).

  to the Commission; (Draft Regulation 18);
- Every member of a converted CC is entitled to become a shareholder of the company, but the shares to be held in the company by the shareholders individually need not necessarily be in proportion to the members' interests as stated in the founding statement of the CC.

Financial Statements and accounting records of CC's

- The same requirements as per Section 28, 29, 30 (see Section 10 on page 20) apply to CC's;
- The CC may also voluntarily make the enhanced accountability and transparency provisions of Chapter 3 applicable;

Management of CC's & disqualified members

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

Business Rescue and winding up of CC's

- Chapter 6 will also apply to CC's (Business Rescue)

Transparency and accountability of CC's

- Section 10 of the CC's Act is amended by the insertion of the following:
  - Any Regulations made by the Minister in terms of Section 29(4) and (5) and 30(7) of the Companies Act 2008 will apply equally to a CC;
  - Section 62 of the CC's Act is amended to include – Section 34(2) of the Companies Act apply to a CC, and Chapter 3 also applies to CC's where it has voluntarily determined to take action contemplated in Section 34(3) of the Companies Act.

Reckless or Fraudulent Trading-Section 64 of the CC's Act

- If at any time the business of the CC is being carried on
  - recklessly, with gross negligence; or

- with the intent to defraud any person, a court may declare any person who is party to the carrying on of the business in such manner, liable for all or any of the debts of the CC.

This Section has been amended by Schedule 3 of the Companies Act – every person who is knowingly a party to the carrying on of the business in any such manner, shall be guilty of an offence.

Sections 3(1), 11, 16, 22(2) and (4), 41, 47(7), 49(5), 55 and 58(4) of the CC's Act are repealed-Schedule 3.

In regard to CC's that continue to exist after the implementation of the Companies Act, and which do not convert to a private company, the remaining (existing and un-amended) provisions of the CC's Act will apply.

19. A BRIEF OVERVIEW OF KING 111

- The King 111 report and code of Governance came into effect on 1 March 2010;
- It is not a legislated document but rather a statement of principles of "best practice" – it does not have legal force;
- However, as certain aspects of governance are legislated (Companies Act 2008, and the Public Finance Management Act) the use of instructive language is relevant i.e where the Code uses the word "must" – this indicates a legal requirement, and "should" indicates that an application of the principle will result in good governance (voluntary) and "may" indicates areas where the King Committee has recommended certain practices for consideration;
- As far as the JSE Securities Exchange South Africa (JSE) is concerned, listed companies must adhere to the King Report recommendations or indicate the extent to which they have deviated from them;
- The Code recommends that all entities should by way of explanation make a positive statement about how the principles have been applied or not – which disclosure will allow stakeholders (including shareholders) to comment on and challenge the Board on the quality of its governance – an "apply or explain" theory;
- Although the Code is not legally enforceable, Directors (and other office bearers) should view it as a valuable guide to good corporate governance so as to ensure compliance with their statutory duties as set out in the Act;
- King 111 applies to **all** entities regardless of the manner and form of incorporation or establishment and whether in the public, private sectors or non-profit sectors (unlike King 1 and 11).

20. KEY ASPECTS OF KING 111

1. *Effective leadership*
    - Good governance is effectively about effective leadership – characterised by the ethical values of responsibility, accountability, fairness and transparency and based on the moral duties that find expression in the concept of Ubuntu.
2. *Sustainability*
    - The primary moral and economic imperative of the 21st century;
    - A company should develop a strategy to include accounting for sustainability issues and reporting these to stakeholders.
3. *Corporate citizenship*
    - The company is a person and should operate in a sustainable manner-the company should be seen as a responsible "citizen" –involving social, environmental and economic issues-respect for human rights, effective management of stakeholder relationships, resource management with an eye on future needs, and ensuring a positive impact on the community within which it operates.

Emerging governance trends incorporated in the Report are Alternative Dispute Resolution (Principle 8.6), Risk based internal audit (Principle 7), Shareholders and remuneration (Principle 2.25), Evaluation of board and director performance (Principle 2.22),

New issues in the Report are IT Governance (Principle 5), and Business Rescue (Principle 2.15).

The King Code and Report is divided into 9 Principles (Chapters), as follows:

- Ethical leadership and corporate citizenship;
- Boards and Directors;
- Audit Committees;
- The governance of risk;
- The governance of information technology (IT);
- Compliance with laws, rules, codes and standards;
- Risk-based Internal audit;
- Governing stakeholder relationships (Alternative Dispute Resolution);
- Integrated reporting and disclosure.

THE BOARD OF DIRECTORS (According To King 111)

Operation of the Board

Responsibilities

- responsible for corporate governance and has two main functions: to determine the companies strategic direction and responsibility for control of the company;

- ensure management actively cultivates a culture of ethical conduct and sets the values to which the company will adhere – values to be incorporated into a code of conduct;
- to consider the legitimate interests and expectations of the company's stakeholders in its deliberations, decisions and actions, and to communicate relevant matters to all stakeholders via press releases, to appreciate that stakeholders' perceptions affect a company's reputation;
- ensure that disputes are resolved as effectively, efficiently and expeditiously as possible, and adopt a formal ADR process for internal and external disputes;
- to ensure that the company is seen to be a responsible corporate citizen;
- to ensure that the company has an effective and independent audit committee (where applicable);
- to be responsible for information technology (IT governance) – to be vested in the board in much the same way as risk governance is. The board has the duty and responsibility (as part of their duty of care) to ensure that the company's IT systems and information integrity are protected, maintained and continually assessed (and subject to risk management);
- ensure that the company complies with applicable laws and regulations and considers adherence to non-binding rules, codes and standards – and ensure that each individual director has a working understanding of the relevant laws, rules, codes and standards of the company and its business, delegate to management the implementation of effective compliance framework and processes;
- ensure that there is an effective risk-based internal audit-monitor effectiveness of company's system of internal control and risk management;
- Integrated reporting and disclosure – ensure the integrity of the company's integrated report – a holistic and integrated representation of the company's performance in terms of both its finances and its sustainability;
- A formal process of assurance with regard to sustainability reporting should be established-i.e reporting not only from a financial perspective but also from an ethical, social and environmental perspective – the well known "triple bottom line" method of reporting. King 111 takes this concept further and introduces the concept of the **integrated** report – whereby companies publish an integrated report focusing equally on financial, governance, strategy and sustainability issues – providing an overall picture of the company and a "true" value of it economically;
- act in the best interests of the company;
- consider business rescue proceedings as soon as the company is financially distressed;
- review of management goals and plans;

- responsible for the governance of risk through formal processes and that risk assessments are performed on a continual basis, and that continual risk monitoring is being done by management.

Appointments

- Board appointments-formal and transparent, shareholders ultimately responsible for the composition of the board;
- Appointment of the CEO-being an Executive Director – not a member of any audit, remuneration or nomination committee;
- The positions of CEO and Chairman should be seperated.

Rights

- Receive all reports timeously;
- Access to independent consultants;
- Unrestricted access to company information.

Functions

- The majority of directors to be non-executive, who are also independent-minimum of two Executive Directors – [being the CEO and director responsible for finance];
- The non-executive directors should have sufficient experience and skill (which must be determined before their appointment);
- Director development through induction and on-going training programmes;
- Assisted by a company secretary (compulsory for SOC (Ltd)'s and public companies);
- Performance assessments – evaluation of board, its committees and individual directors (including Chairman) annually;
- Delegation of certain functions to well structured committees without abdicating its own responsibilities.

Remuneration

- Director's remuneration to be transparent and fair;
- Companies should disclose the remuneration of each individual director and certain senior executives (the three most highly paid senior employees who are not directors) giving details of base pay, bonuses, share-based payments, granting of options or rights, restraint payments and all other benefits (including present values of existing future awards);
- Shareholders to approve the company's remuneration policy.

Table A

PROBATIONARY DIRECTORS
A court may make an order placing a person under probation if: a) while serving as a director (s)he (i) improperly supported a resolution despite the inability of the company to satisfy the solvency & liquidity test (ii) acted in a manner inconsistent with the duties of a director (iii) acted in a manner or supported the company in an action contemplated in section 163 (oppressive or predjudicial conduct or abuse of separate juristic personality of company) OR b) within a period of **10 years** after the effective date, (s)he had been a director of more than 1 company or managing member of more than 1 CC and 2 or more of such companies or CC's (concurrently, sequentially or unrelated) which failed to fully pay all of its creditors or meet any of its obligations (except under a business rescue plan or a compromise with creditors) during the time (s)he was a Director or member
an order made re (a) & (b) above shall be made subject to the court's being satisfied that certain circumstances existed to justify the declaration
an order made re (a) & (b) above may be subject to any conditions the court considers appropriate including limiting the application of the declaration to one or more category of company & subsists for five years from the date of the order
a person on probation may apply to court to set aside the order at any time more than two years after it was made
a court may order as a condition applicable to the declaration that the person be supervised by a mentor in any future participation as a director/member of CC while the order remains in force or be limited to serving as a director of a private company or a company of which that person is sole shareholder

Table B

DELINQUENT DIRECTORS
A court may make an order declaring a person a delinquent director if: a) (s)he consented to serve as a director or acted as director while ineligible or disqualified as contemplated in Section 69 UNLESS (s)he was acting as per a court order or unless all the shares are held solely by him (or persons related to him), all of whom having consented to the appointment b) while under a court order of probation, acted as a director in a manner contravening that order
an order made re (a) & (b) above is unconditional & subsists for the lifetime of the person declared delinquent
c) while a director, grossly abused that position, took personal advantage of information, contrary to Section 76, intentionally or by gross negligence inflicted harm on the company, acted in a manner amounting to gross negligence, willful misconduct, breach of trust, or acted in a manner as set out in Section 77(3)(a)(b) or (c) ref page 30 d) has repeatedly been subject to a compliance notice or similar enforcement mechanism for similar conduct i.t.o any legislation e) has at least twice been personally convicted of an offence or subjected to an administrative fine or similar penalty in terms of any legislation f) within a period of five years was a director of one or more companies or participated in the control of a juristic person subject to administrative fines and (s)he was a director of each such company at the time of the contravention and the court is satisfied that the declaration of delinquency is justified having regard to the nature of the contraventions
an order made re (c) – (f) above may be subject to any conditions the court considers appropriate & subsists for seven years from the date of the order
a person declared delinquent i.t.o (b) to (f) may apply to court to suspend the order & substitute an order of probation at any time more than three years after the order or to set aside the order at any time more than two years years after it was so suspended
a court may order as a condition applicable to the declaration that the person undertake a designated program of remedial education relevant to the conduct of a director &/or do community service &/ or pay compensation to any person adversely affected by his/her conduct as a director/member

Note: all references to director apply equally to members of CC's who are participating in the management thereof in this section dealing with probation and delinquency, and all references to a company applies equally to CC's

Table C

CODIFIED REGIME OF DIRECTORS DUTIES

Section 76(2): CONFLICT OF INTEREST

(2)(a) a director must not use the position of director or any other info obtained while acting in such capacity (i) to gain advantage for himself or any other person other than the company or a wholly owned subsidiary of the company or (ii) knowingly cause harm to the company or its subsidiary, and (b) must communicate to the board at the earliest any information that comes to his attention unless the director (i) reasonably believes the information is immaterial to the company or generally available to the public or known to other directors or (ii) is bound not to disclose the information by legal or ethical obligation of confidentiality.

Section 76(3): DEGREE OF CARE & SKILL & GOOD FAITH

S76(3)(a) a director is required to act in good faith and for proper purpose and S76(3)(b) in the best interests of the company; S76(3)(c) each director is subject to a duty to exercise a **degree of care, skill & diligence** that would reasonably be expected of a person with general knowledge skill & experience reasonably expected of that person when carrying out the functions of a director;

> the director’s judgement as to whether an action or decision is in the best interests of the company is reasonable (i) if the director has taken diligent steps to become informed about the subject matter of the decision (ii) either does not have a material personal financial interest in the subject matter of the decision (and had no reasonable basis to know that any related person had a personal financial interest in the matter)(and it is a decision that a reasonable person in a similar position could hold in comparable circumstances) and the director has complied with Section 75 (disclosure of financial interests-see above) and (iii) the director made a decision or supported the decision of a committee and had a rational basis for believing that the decision was in the best interests of the company;

> in discharging any duty contemplated in this section the director is entitled to rely on the performance by any of the persons to whom the board may have delegated formally or informally duties to perform one or more of the board’s functions that are delegable under law, prepared or presented by any of the following persons: one or more employees of the company whom the director reasonably believes to be reliable and competent, legal counsel, accountants or professional persons, a committee of the board of which the director is not a member and is entitled to rely on any information, opinions, recommendations, reports or statements including financial statements and other financial data presented or prepared by any of these persons.

Table D

SOLVENCY AND LIQUIDITY TEST
Section 4(1): a company satisfies the solvency and liquidity test at a particular time if, considering all reasonably foreseeable financial circumstances of the company at that time – a) the assets of the company or, in the case of a holding company, the consolidated assets of the company as fairly valued, equal or exceed the liabilities of the company, or in the case of a holding company the consolidated liabilities of the company, as fairly valued, and b) it appears that the company will be able to pay its debts as they become due in the course of business for a period of – (i) twelve months after the date on which the test is considered; or (ii) in the case of a distribution contemplated in para (a) of the definition of 'distribution' in section 1, twelve months following that distribution.
Section 4(2): for the purposes contemplated in (1) a) any financial information to be considered concerning the company must be based on – (i) accounting records which satisfy requirements of S28 (ii) financial statements which satisfy requirments of S29 b) subject to para (c) the board or any other person applying the solvency and liquidity test to a company must (i) consider a fair valuation of the company's assets & liabilities including any reasonably foreseeable contingent assets & liabilities irrespective of whether or not arising as a result of the proposed distribution and (ii) may consider any other valuation of the company's assets & liabilities that is reasonable in the circumstances and c) unless the MOI provides otherwise, when applying the test in re of a distribution contemplated in para (a) of the definition of 'distribution' in S1 a person is not to include as a liability any amount that would be required if the company were to be liquidated at the time of the distribution to satisfy the preferential rights upon liquidation of shareholders whose preferential rights on liquidation are superior to the preferential rights on liquidation of those receiving the distribution.

Table E

RELATED AND INTER-RELATED PERSONS AND CONTROL
Section 2(1)(a): an individual is related to another individual if (i) they are married or live together in a relationship similar to marriage (ii) are seperated by no more than two degrees of natural or adopted consanguinity or affinity
Section 2(1)(b): an individual is related to a juristic person if the individual directly or indirectly controls the juristic person (as determined in accordance with subsection (2) – see below*
Section 2(1)(c): a juristic person is related to another juristic person if (i) either of them directly or indirectly controls the other or the business of the other – see below* (ii) either is a subsidiary of the other or (iii) a person directly or indirectly controls each of them or the business of each of them – see below*
** **control**: a person controls a juristic person (JP) or its business if* *a) in the case of a JP that is a company, (i) that JP is a subsidiary of that 1st person (ii) that 1st person together with any related or inter-related person is (aa)directly or indirectly able to exercise or control the exercise of a majority of voting rights associated with the securities of that company whether pursuant to a shareholder agreement or otherwise, (bb)or has the right to appoint directors or control the appointment or election of directors of that company who control the majority of votes at a meeting of the Board* *b) in the case of a JP that is a CC, the 1st person owns the majority of members interest or controls/has right to control majority of members votes* *c) in the case of a JP that is a trust, the 1st person has the ability to control the majority of votes of trustees or appoint majority of trustees or appoint or change the majority of beneficiaries* *d) that 1st person has the ability to materially influence the policy of the JP in a manner comparable to a person who in ordinary commercial practice, would be able to exercise an element of control referred to in (a), (b) or (c).*
Definition of "inter-related" – per Section 1(1)(q) of the Draft Amendment Bill: when used in respect of three or more persons, means persons who are related to one another in a linked series of relationships, such that two of the persons are related in a manner contemplated in Section 2(1) and one of them is related to the third in any such manner, and so forth in an unbroken series.

Table F

LENIENCY RE GOVERNANCE FOR CERTAIN COMPANIES – (S57)

A for Profit company (other than SOC)

> has only only one shareholder)

S57(2)(a) that shareholder may exercise any or all of the voting rights pertaining to that company on any matter at any time without notice or compliance with any other internal formalities except to the extent the company's MOI provides otherwise and

a) less onerous reporting requirements
b) no notice requirements (simplified decision making)
c) S59-65 do not apply to the governance of the company (re shareholders meetings-notice, conduct, quorum, resolutions) ie no need for compliance with internal formalities

> where there is only one director who is also the sole shareholder

d) the disqualifications listed in S69(8)(b)(iii) & (iv) –a person may still act as a director under certain circumstances – see page 8
e) no notice requirements for board meeting
f) S75(2)(b): requirement for disclosure of directors personal financial interest does not apply if one person holds all the beneficial interests of all of the issued securities of the company and is the only director of that company(however where the only director of a company does not hold all the securities, (s)he may only enter into a contract in which he/she or a related person has a personal financial interest after obtaining an ordinary resolution of shareholders).

Section 78(3) – *as amended by the Amendment Bill* – ***Payment of fine for director***

Subject to Subsection (3A)- A company may not indirectly or directly pay any fine that may be imposed on the director or a director of a related company who has been convicted of an offence in terms of national legislation.

S78(3A) – inserted by Amendment Bill

Subsection (3 (above) does not apply to a private or personal liability company if

(a) a single individual is the sole shareholder and sole director of that company or
(b) two or more related individuals are the only shareholders of that company and there are no directors of the company other than one or more of those individuals

> where there is only one director in a profit company (not a SOC)

Section 57(3(a) – That director may exercise any power or perform any function of the board at any time without notice or compliance with any other internal formalities except to the extent that the company's MOI provides otherwise and

Sections 71(3)-(7), S73,S74 not applicable to the governance of that company ie (i) may enter a contract in which (s)he or a related person has a personal financial interest after obtaining an ordinary resolution of shareholders.

& where every director is also a shareholder of a particular company [other than a SOC]

g) no notice or other internal formalities re referral by Board for shareholders decisions unless the MOI provides otherwise (Section 57(4)(a)
h) when acting in capacity as shareholders, no need to comply with S73-78 relating to meetings, duties, obligations, standards of conduct, liabilities & indemnification of directors
i) flexibility re disqualification: if disqualified, can still be a director under certain circumstances [Section 69(8)(b) – refer to page 8]
j) S30(2A) – exempted from audit or independent review of FS or AFS (unless voluntarily decides to do so) – see page 22 above
k) diminished need to seek shareholder approval for certain board actions

Table G

CONDITIONS FOR LENDING FINANCIAL ASSISTANCE
Despite any provision in a Company's MOI to the contrary, the board may not authorise financial assistance unless: a) the particular provision of financial assistance is – (i) pursuant to an employee share scheme that satisfies the requirements of Section 97; or (II) pursuant to a special resolution of the shareholders adopted in the previous two YEARS which approved such assistance for the specific recipient or generally for a category of potential recipients & the specific recipient falls within that category and b) the board is satisfied that – (i) immediately after giving the financial assistance, the company would be in compliance with the solvency & liquidity test, and (ii) the terms under which the financial assistance is proposed to be given are fair and reasonable to the company
CONSEQUENCES OF LENDING FINANCIAL ASSISTANCE CONTRARY TO PROVISIONS OF THE ACT
Any resolution by the Board or agreement to provide financial assistance that is inconsistent with Section 44 OR Section 45 or any prohibition, restriction or requirement in the company's MOI is VOID and any director who voted in favour of such a resolution or approved an agreement providing the assistance is liable to the extent set out in section 77(3(e)(iv) in re Section 44 and Section 77(3)(e)(v) in re Section 45 – if the director (a) was present at the meeting when the board approved the resolution or agreement, or participated in the making of such a decision in terms of section 74; and (b) failed to vote against the resolution or agreement despite knowing that the provision of financial assistance was inconsistent with this section or a prohibition, condition or requirement contemplated in the MOI.

Table H

CATEGORISATION OF COMPANIES	
FOR PROFIT	a) state owned company (SOC Ltd);
	b) a private company [(Pty) Ltd] if: (i) its not a state owned company (ii) its Memorandum of Incorporation (MOI) (aa) prohibits it offering any of its securities to the public & (bb) restricts the transferability of its securities, **{note: no limit on no. of shareholders (previously was limit of 50) & a share no longer has a nominal or par value.}**
	c) a personal liability company (Incorporated or Inc) if (i) it meets the criteria for a private company; (ii) its MOI states that it is a personal liability company {i.e that the directors & past directors are jointly & severally liable together with the company, for the debts & liabilities of the company that were contracted during their respective terms of office} **{note: these are the old Section 53(b) companies}**
	(d) a public company, (Ltd) in any other case **{note: min number of incorporators is reduced from 7 to 1}**
NOT FOR PROFIT	Name to be followed by suffix "NPC" , {previously Section 21 Companies} {Incorporated for a public benefit or an object relating to one or more cultural or social activities, or communal or group interests}. {Can be incorporated with or without members}

External Company means a foreign company (for profit or not for profit) that is carrying on business or non-profit activities within the RSA, subject to Section 23(2), i.e the company does business in the RSA while remaining primarily regulated by its country of origin or registration.

Draft Regulation 20- sets out requirements for registration at the Commission.

Domesticated Company means a foreign company whose registration has been transferred to the RSA in terms of Section 13(5) to (9). It is regulated as if it had been incorporated in the RSA.

Table I

REQUIREMENTS TO QUALIFY AS MEMBER OF AUDIT COMMITTEE AND INDEPENDENT ACCOUNTING PROFESSIONAL
Draft regulation 26(c) relating to independent accounting professional requirements, Section 94 relating to audit committee member requirements – such persons in order to qualify as such (together with other listed qualifications particular to each Section): must not be: (aa) involved in the day to day management of the company's business nor have been so involved at any time during the previous three financial years (Draft Reg 26(c)) and one financial year (Section 94); (bb) a prescribed officer or full time executive employee of the company or another related or inter-related company or have been such an officer or employee at any time during the previous three financial years or (cc) a material supplier or customer of the company such that a reasonable and informed third party would conclude in the circumstances that the integrity, impartiality or objectivity of that professional is compromised by that relationship. Note: the requirement per (cc) does not apply to an independent accounting professional [Draft Regulation 26(c)], but does apply to a member of an audit committee.

Table J

DRAFT REGULATIONS – REQUIREMENTS FOR DOCUMENTS TO BE HELD IN ELECTRONIC FORMAT
Draft regulation 32(5) If a company keeps its securities register in electronic form it must provide adequate precautions against loss of the records as a result of damage or failure of the media on which the records are kept and ensure that these records are capable of being retrieved to a readable and printable form Draft regulation 25(6) if a company keeps any of its accounting records in electronic form the company must provide similar precautions as described above