

12 October 2010

## Companies Act Comparing the old and the new



### Getting ready

The Department of Trade and Industry indicated that the Companies Act will be implemented from 1 April 2011. In order to assist with the preparation for the implementation of the provisions of the new Companies Act, please find below a high level comparison between some of the key administrative and financial reporting issues as regulated by the 1973 Companies Act and the 2008 Companies Act respectively.

## Companies Act, 1973

## Companies Act, 2008

### Regulatory agencies

Companies and Intellectual Property Registration Office  
Securities Regulation Panel  
Financial Reporting Investigations Panel (never established)  
Financial Reporting Standards Council (never established)

Companies and Intellectual Property Commission  
Companies Tribunal  
Takeover Regulation Panel  
Financial Reporting Standards Council

### Formation of companies

#### Required documents:

- Memorandum of association
- Articles of association

Name reservation compulsory  
Detailed administrative process for incorporation and registration

#### Required documents

- Memorandum of incorporation (MOI)
- Rules of a company (optional)

Name reservation (optional)  
Simplified registration process – submission of Notice of Incorporation and copy of Memorandum of Incorporation

## Types of companies

Section 19

- Company with share capital
- Company limited by guarantee

Section 8

- Profit company
- Non-profit company

## Categories of companies

Section 19, 1(6)

- Public company
- Private company
- Section 53(b) private company (memorandum states that directors & past directors are jointly and severally liable with company for debts and liabilities)
- Section 21 companies (associations not for gain)
  
- Widely held companies (any company which:
  - allows for the unrestricted transfer of its shares in its articles
  - is permitted by its articles to offer shares to the public or
  - decides by special resolution to be a Widely held company, and
  - any subsidiary of a Widely held company)
- Limited interest companies (companies other than widely held)

Section 8

- Profit companies
- Private company
  - a company that is not a state owned company, and its Memorandum of Incorporation prohibits it from offering any of its securities to the public, and restricts the transferability of its securities
- Personal liability company
  - the company and the directors are jointly and severally liable for any debts and liabilities of the company
- State-owned company
  - an enterprise, registered as a company, which falls within the meaning of 'state owned enterprise' in terms of the Public Finance Management Act, or is owned by a municipality
- Public company
  - a company that is not a state owned company, private company or personal liability company)
- Non-profit companies

## Number of members required

Section 32

- Incorporation
  - Company with share capital
    - Public company - minimum 7 persons
    - Private company - minimum 1 person
  - Company limited by guarantee - minimum of 7 persons
- Members
  - Public company - minimum 7 members
  - Private company - maximum 50 members

Section 13

- Incorporation
  - 1 person may incorporate a profit company, and 3 or more persons may incorporate a non-profit company
- Members
  - Public company, private company and personal liability company - minimum 1 member
  - State-owned company – no requirement for minimum number of members
  - Non-profit companies - no requirement, unless provided for in Memorandum of Incorporation

## Company names

Section 49

Company name to be followed by:  
Public company – “Ltd”  
Company limited by guarantee – “(Limited by Guarantee)”  
Private company – “(Pty) Ltd”  
Organised profession – “Inc.”  
Section 21 company – “Association incorporated under section 21”

Section 11

A company name may be predominantly in any official language and must end with the relevant English expression, being:  
Personal liability company - the word “Incorporated” or its abbreviation “Inc.”  
Private company - the expression “Proprietary Limited” or its abbreviation, “(Pty) Ltd.”  
Public company - the word “Limited” or its abbreviation, “Ltd.”  
State owned company - the expression “SOC Ltd.”  
Non-profit company - the expression “NPC”

<b>Number of directors</b>	
Section 208	Section 66
<ul style="list-style-type: none"> <li>Public company - minimum 2</li> <li>Private company - minimum 1</li> </ul>	<ul style="list-style-type: none"> <li>Public company - minimum 3</li> <li>Private company - minimum 1</li> <li>Personal Liability company - minimum 1</li> <li>Non-profit company - minimum 3</li> </ul>
<b>Disclosure of remuneration</b>	
Section 297	Section 30
<p>Disclosure of remuneration (emoluments and pensions) of executive directors and non-executive directors.</p> <p>Disclosure is required in aggregate (not on an individual basis)</p>	<p>Disclosure in the annual financial statements in respect of directors AND prescribed officers on an individual basis of:</p> <ul style="list-style-type: none"> <li>the remuneration as defined by the Act</li> <li>pensions</li> <li>the amount of any compensation paid in respect of loss of office</li> <li>the number and class of any securities issued to a director or person holding any prescribed office in the company</li> <li>details of service contracts of current directors and individuals who hold any prescribed office in the company.</li> </ul>
<b>Financial assistance for subscription of securities</b>	
Section 38	Section 44
<p>Special resolution</p> <p>Solvency and liquidity requirements</p>	<p>The requirements for the approval of financial assistance are as follows:</p> <ul style="list-style-type: none"> <li>the provision of financial assistance must be pursuant to an employee share scheme, or</li> <li>the provision of financial assistance must have been approved by special resolution within the previous two years, and</li> <li>the company's board of directors must be satisfied that: <ul style="list-style-type: none"> <li>the company would satisfy the solvency and liquidity test immediately after the transaction, and</li> <li>the terms upon which such assistance is given are fair and reasonable to the company</li> </ul> </li> </ul>
<b>Financial assistance to directors and prescribed officers</b>	
Section 226	Section 45
<p>Special resolution or prior consent of all members</p>	<ul style="list-style-type: none"> <li>Financial assistance must be pursuant to an employee share scheme, or</li> <li>Shareholders must have approved such financial assistance by special resolution (within the past 2 years), and <ul style="list-style-type: none"> <li>The company's board of directors must be satisfied that after the transaction, the company will remain solvent and liquid, and</li> <li>The board to inform all shareholders and trade unions representing employees whenever it decides to provide financial assistance</li> </ul> </li> </ul>
<b>Shares</b>	
Section 74	Schedule 5
Par value (with share premium where applicable)	Par value shares abolished – no more share premium account

No par value (stated capital) No shares issued (limited by guarantee)	Regulations prescribe the transitional process to convert par value shares for existing companies
<b>Distributions to shareholders</b>	
Section 90	Section 46
Authorisation by articles Solvency and liquidity requirements.	Resolution by the board Solvency and liquidity test Resolution to approve distribution must specifically acknowledge application and compliance with the solvency and liquidity test  If distribution is not completed within 120 days of the board resolution, a renewed application of the solvency and liquidity test is required
<b>Share buybacks</b>	
Section 85	Section 48
Authorisation by articles Approval by special resolution Solvency and liquidity requirements	Resolution by the board Solvency and liquidity test Resolution to approve share buyback must specifically acknowledge application and compliance with the solvency and liquidity test  Subsidiaries may not own more than 10% in aggregate of the shares of the (holding) company Subsidiaries may not exercise any voting rights attached to shares in the holding company
<b>Financial statements</b>	
Section 285 and 286	Section 29 and 30
Widely held companies must comply with financial reporting standards	Financial reporting standards prescribed in Regulations (IFRS or IFRS for SME's)
Directors to cause annual financial statements to be prepared, in respect of all companies, and presented to the annual general meeting	Financial statements must be approved by the board and presented to the first shareholders meeting after such approval (not necessarily the AGM)
Financial Statements to be prepared within 9 months of financial year end	All companies must prepare annual financial statements within six months of its financial year end (Likely to change to 12 months in the Amendment Bill)
Signed by at least 2 authorised directors	Signed by 1 authorised director
Copy of annual financial statements to be sent to each shareholder	Shareholders to receive a summary of annual financial statements, full statements to be made available electronically (on a website) or on request  Summary financial statements may be issued
<b>Audit of financial statements</b>	
Section 300	Section 30
All companies to be audited	Companies that MUST be audited: <ul style="list-style-type: none"> <li>• Public companies</li> <li>• State owned companies</li> <li>• Private companies, personal liability companies and non-profit companies that meet the requirements as per the</li> </ul>

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## Regulations

Any other company may voluntarily choose to be audited

All companies that are not audited, must have an independent review

### Exception

Private companies where all the shareholders are also directors do not need either audited nor independently reviewed statements

## Enhanced accountability and transparency

Section 269A

Chapter 3

Widely held companies must appoint an audit committee

Public companies having share capital must appoint a company secretary

Appointment of audit committee

- Public companies
- State owned companies
- Other companies only 'to the extent provided for by the company's Memorandum of Incorporation'

Appointment of company secretary

- Public companies
- State owned companies
- Other companies only 'to the extent provided for by the company's Memorandum of Incorporation'

Appointment of an auditor

All companies that MUST be audited (Public companies, state owned companies, private companies, personal liability companies and non-profit companies that meet the requirements as per the Regulations), as well as other companies that choose to be audited, must appoint a registered auditor as set out in the Act.

## Audit committee

Section 296A

Section 94

Appointment

- 2 independent non-executive directors
- Appointed by board or shareholders

Functions

- Nominate and verify independence of auditor
- Determine audit fee
- Distinguish between audit/non-audit services
- Pre-approve non-audit work
- Deal with complaints re AFS, accounting practices etc
- Other functions

Appointment

- 3 directors, specific requirements (similar to independent non-executives)
- Appointed by shareholders at the AGM

Functions

- Nominate and verify independence of auditor
- Determine audit fee
- Distinguish between audit/non-audit services
- Pre-approve non-audit work
- Deal with complaints re AFS, accounting practices etc
- Other functions assigned by the board

## Attendance of auditors at Audit Committee and AGM

Section 300

Auditor of widely held company must meet with the audit committee not more than one month before the board meets to approve the financial statements

No requirement

Auditor must attend every AGM of a widely held company

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<b>Social and ethics committee</b>	
	Section 72
No requirement	All public companies and state owned companies must appoint a social and ethics committee at the annual general meeting .The committee must comprise at least 3 directors (the majority of whom should meet the requirements of membership of the audit committee, in other words be independent non-executive directors).
<b>Quorum for shareholders meeting</b>	
Section 190	Section 64
Unless the articles of a company provide for a greater number of members entitled to vote to constitute a quorum at meetings of a company, the quorum for such meetings shall be—	Unless the company's Memorandum of Incorporation provides otherwise, the quorum will be constituted by at least 25% of all of the voting rights that are entitled to be exercised in respect of at least one matter to be decided at the meeting
<ul style="list-style-type: none"> <li>in the case of a public company, three members entitled to vote, personally present, or if a member is a body corporate, represented</li> <li>in the case of a private company, not being a private company having one member, two members entitled to vote, present in person or by proxy or, if a member is a body corporate, represented, and</li> <li>in the case of a wholly-owned subsidiary company, the representative of the holding company.</li> </ul>	
<b>Resolutions</b>	
Section 199	Section 1 and 65
Ordinary resolution – 50%	Ordinary resolution – 50% (Memorandum of Incorporation may require higher percentage)
Special resolution	Special resolution – 75% (Memorandum of Incorporation may require a lower percentage provided that there must at all times be a margin of at least 10 percentage points between the requirements for approval of an ordinary resolution, and a special Resolution
<ul style="list-style-type: none"> <li>At least 25% of members holding in the aggregate not less than one-fourth of the total votes of all the members entitled to vote thereat, must be present in person or by proxy</li> <li>Resolution approved by not less than three-fourths of the number of members of the company entitled to vote at the meeting</li> </ul>	
Special resolution must be registered with Registrar for it to be valid	No requirement to register special resolutions
<b>Registers</b>	
Sections 105, 127, 128, 215, 239 and 326	Section 24, 50 and 85
Requirement to keep:	Requirement to keep:
<ul style="list-style-type: none"> <li>Register of members</li> <li>Register of directors</li> <li>Register of auditors</li> <li>Register of interests in contracts of directors and officers</li> <li>Register of pledges, cessions and bonds</li> <li>Register of debenture-holders</li> </ul>	<ul style="list-style-type: none"> <li>Register of directors</li> <li>Register of auditors</li> <li>Register of company secretary</li> <li>Certificated and uncertificated securities register</li> </ul>
<b>Disposal of assets</b>	
Section 228	Section 115
Special resolution to dispose of the greater part of the assets or business (also applicable to subsidiary disposal)	A disposal of all or the greater part of the assets or undertaking, amalgamation or merger, or a scheme of arrangement must be approved by:

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Compromise and arrangement is binding if approved by majority of 75% in value of creditors or members

- a special resolution of shareholders at which enough persons are present to exercise at least 25% of all the voting rights
- a special resolution of the company's holding company if the proposed transaction concerns the disposal of all or the greater part of the assets or undertaking of the subsidiary, and the disposal by the subsidiary substantially constitutes a disposal of all or the greater part of the assets or undertaking of the holding company, and
- the court, if the resolution was opposed by at least 15% of the voting rights

## Business rescue and compromise with creditors

Chapter XV

Chapter 6

Judicial manager takes charge of the company for the duration of the process. Stakeholder involvement limited.

Business rescue is described as the rehabilitation of a company that is financially distressed by temporary supervision of the company and its management, a temporary moratorium on rights of claimants against the company, and the development and implementation of a plan to rescue the company by restructuring its affairs, business, property, debt and other liabilities, and equity in a manner that maximises the likelihood of the company continuing to exist on a solvent basis.

Business rescue is largely self-administered by the company, under independent supervision within constraints set out in the Act, and subject to court intervention, at any time, on application by any of the stakeholders.

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