



CORPORATE GOVERNANCE GUIDE



KENILWORTH OFFICE
Block Q
Meridian House
Greenford Office Estate
Punters Way
Kenilworth
7708

TYGERVALLEY OFFICE
4th Floor
Cento Building
Bella Rosa
Durban Road
Tygervalley
7350

Tel: (021) 683 4446
Fax: (021) 683 4484

Tel: (021) 683 4446
Fax: (021) 914 4523

PO Box 36321
Glosderry
7702

Email: info@meridianacc.co.za
Website: www.meridianacc.co.za

CONTACT PERSONS:

Steven Mostert
Deon Marais

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|--|---|
| Notes on the guide to corporate governance in SA | 2 |
| Introduction | 3 |

DIRECTORS, PRESCRIBED OFFICERS AND MEMBERS

COMPANIES ACT 2008 AND REGULATIONS

| | | |
|----|--|----|
| 1 | Appointment and dismissal of directors | 4 |
| 2 | Probation and delinquency | 7 |
| 3 | Duties, responsibilities and rights of directors | 8 |
| | 3.1 Rights | 8 |
| | 3.2 Powers | 8 |
| | 3.3 Common law duties | 10 |
| | 3.4 Statutory duties | 11 |
| | 3.5 Responsibilities – decision making and delegation | 14 |
| 4 | Actions requiring shareholder approval | 14 |
| 5 | Remuneration | 15 |
| 6 | The board, committees and meetings | 16 |
| 7 | Accounting records, financial statements, financial reporting standards – audit and independent review | 17 |
| 8 | Enhanced accountability, audit and audit committees | 19 |
| 9 | Reckless trading and trading under insolvent circumstances | 23 |
| 10 | Remedies and protection of whistle-blowers | 24 |
| 11 | Liability of directors | 26 |
| 12 | Indemnification and directors' insurance | 28 |
| 13 | Members of close corporations (CC's) and corporate governance | 29 |
| 14 | A brief overview of King 111 | 33 |
| 15 | Key aspects | 34 |

TABLES

| | | |
|----|---|----|
| A. | Probationary directors | 37 |
| B. | Delinquent directors | 38 |
| C. | Codified regime of directors duties | 39 |
| D. | Solvency and liquidity test | 40 |
| E. | Related and inter-related persons and control | 41 |
| F. | Leniency/exemptions for certain companies – (S57) | 42 |
| G. | Conditions for lending financial assistance | 43 |
| H. | Draft financial reporting standards | 44 |
| I. | Categorisation of companies | 46 |
| J. | Requirements to qualify as member of audit committee, social and ethics committee and independent accounting professional | 47 |
| K. | Draft regulations – requirements for documents to be held in electronic format | 47 |
| L. | Shareholder resolutions | 48 |

NOTES ON THE GUIDE TO CORPORATE GOVERNANCE IN SA

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”) as well as the draft Regulations. Where appropriate we have indicated where King 111 could give amplification.

The Act was signed by the President on the 08th 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, in other words during 2010.

The draft Rectifications and Regulations were published in the Government Gazette no 32832 dated 22 December 2009. It is envisaged that the final Regulations become effective on the implementation date of the Act. It is thus specifically noted that all references to the Draft Regulations in the guide are subject to change, as these are in draft format at time of publication hereof. A number of bodies have raised commentary on the Draft Regulations which are thus still under review, however the overarching principles of good corporate governance for directors and officers will remain as per the Act.

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 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.

New Regulatory Bodies Introduced by the Act

- Previously known as CIPRO (the Companies Intellectual Property & Registration Office) will as from the general effective date of the new Act be known as – the Companies -Companies and Intellectual Property Commission (“the Commission”);
- Companies Tribunal (CT);
- Take-Over Regulation Panel (TORP);
- Financial Reporting Standards Council (FRSC).

DIRECTORS, PRESCRIBED OFFICERS AND MEMBERS

COMPANIES ACT 2008 AND REGULATIONS

1 APPOINTMENT AND DISMISSAL OF DIRECTORS

Categories of companies

A company can be either a for profit company or a non-profit company (NPC). Refer to Table I on page 46 for a detailed description of the different categories of companies as per the Companies Act 2008 ('the Act').

Directorships – nature

| DIRECTORSHIP – NATURE | DIRECTORSHIP – NATURE-CTD |
|---|--|
| <ol style="list-style-type: none">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; | <ol style="list-style-type: none">5. The “Board” refers to the collective word used 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 23) and the persons responsible (usually a director) may become personally liable for the debts of the company (see pages 26–28). |

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, directors personal financial interests, liability and indemnification – the definition is extended to include 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);
- For purposes of Section 69 (ineligibility and disqualification) and Section 76 (codified regime of directors duties) is further extended to include an alternate director and a prescribed officer;
- In addition, for purposes of Sections 75, 77 and 78 (declaration of interest and liability and indemnity) is further extended to include prescribed officers;
- Draft Regulation 45 – sets out the definition of a prescribed officer of a company (despite not being a director), which includes a wide range of senior company personnel. In order to qualify the person needs to have either:
 - ◆ general executive authority over the company (such as CEO or equivalent);
 - ◆ general responsibility for the financial management of the company (Treasurer, Chief Financial Officer);
 - ◆ general responsibility for the management of legal affairs of the company (such as General Secretary);
 - ◆ general managerial authority over the operations of the company (such as Chief Operating Officer); or
 - ◆ otherwise directly or indirectly exercises or significantly influences the exercise of, control over the general management and administration of the whole or a significant portion of the business and activities of the company, irrespective of any title assigned by the company to an office held by that person or function performed by that person.
- Those designated as Public Officers will therefore be subject to the same duties of care, skill and diligence and to the fiduciary duties applicable to directors, and will be held jointly and severally liable with directors. The MOI is also specifically binding between the company and the prescribed officer.

Appointment of directors and the Board (Section 66 & 70)

- Only natural persons with legal capacity are eligible to be appointed as Directors to the Board;
- For Profit Companies: One or more directors required to be appointed;
- Public (Limited) and Non-Profit Companies: Three or more are required;
- **The Act requires each director to be appointed by a separate resolution of shareholders;**
- **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;**

- The Memorandum of Incorporation (MOI) may provide for the appointment of Directors or alternate directors to the Board, by any person named therein;
- A profit company (not a SOC Ltd) must allow for **shareholders to elect a minimum of 50% of the directors**, and 50% of the alternate directors;
- 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 person who becomes ineligible or disqualified while serving as a director ceases immediately to be a director;
- ◆ A person is ineligible if the person is-
 - A juristic person;
 - An unemancipated minor or under similar legal disability; or
 - Does not satisfy any qualification set out in the MOI
- ◆ The Act sets out disqualifications as follows:
 - ◆ **Section 69(8)(a):**
 - a person who has been declared a delinquent or a court has prohibited that person to be a director (or member of a CC) – refer to Section 2 on next page 7.
 - ◆ **Section 69(8)(b):**

- | |
|--|
| <ol style="list-style-type: none"> 1 an unrehabilitated insolvent 2 is prohibited in terms of any public regulation to be a director 3 any person removed from an office of trust because of misconduct involving dishonesty 4 any person convicted of offences involving fraud, theft, forgery, perjury or an offence involving fraud, misrepresentation or dishonesty or in connection with the promotion, formation or management of a company or under this Act, the Insolvency Act, CC's Act , Competition Act, FICA, Security Services Act, Prevention and Combating of Corruption Activities Act. [Draft regulation 46 – the prescribed minimum value of a fine upon conviction for these offences which would result in automatic disqualification as a director as per 4 is R1000]. |
|--|

- Note: DESPITE the disqualifications listed in 3 and 4 contained in S69(8)(b) above, a person may still act as a director of a private company under certain circumstances (see items (e) and (n) on Table F, page 42). 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)].

Resignation/Dismissal/Removal of Directors (Section 71)

- Directors may resign by tendering a letter of resignation;
- The Board may discharge a director for various reasons, including negligence or dereliction of duty;
- Despite anything to the contrary in the MOI or rules or agreement between a company and director, or between any shareholders and a director, a director may be removed by an ordinary resolution* adopted at a shareholders meeting by the persons entitled to exercise voting rights in an election of that director, provided that director has been given notice of the meeting and the resolution, and has been afforded a reasonable opportunity to make a presentation in person or through a representative to the meeting, before the resolution is put to vote;
- [King 111 recommends that the MOI should allow the Board to remove any director from the Board, including executive directors – and that shareholder approval not be necessary for these decisions (provided this is included in the MOI)].

(*see requirements for valid ordinary and special resolutions of shareholders on Table L, page 48)

2 PROBATION AND DELINQUENCY

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

3 DUTIES, RESPONSIBILITIES AND RIGHTS OF DIRECTORS

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

3.1 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.

3.2 POWERS

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

- 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 17 – this must be done within 20 days of being published]. These additional rules require shareholder approval before they may become permanent (see page 15)-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 41 – 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.
- Section 38: To issue shares
 - ◆ The Board has the power to issue shares* – {however see page 14 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 23 (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 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 41) 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 43 relating to conditions and consequences of lending financial assistance.

B Loans or other financial assistance to directors (Section 45):

- A company may not give direct or indirect financial assistance (i.e provide a loan to or secure a debt or obligation) to a director or prescribed officer of a company or of a related or inter-related company or CC, or to a person related to any such company, CC or director – i.e the Board may not authorise it unless it meets the requirements as set out in (a) and (b)(i) in Table G on page 43.

C Authorisation of distributions (Section 46):

- 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 40), 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 26 if the conditions (for providing financial assistance-per Table G) are not met.

**{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 – an advance to meet legal expenses re a matter concerning the company or an amount to defray the persons expenses for removal at the company’s request}*

Section 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 above.

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 26).

3.3 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.

3.4 STATUTORY DUTIES

A Accountability and Transparency

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

- Certain documents and records 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;*
- *Draft Regulation 24 states that the securities register, MOI (with amendments), Registration Certificate and Register of Directors are required to be kept **indefinitely**;*
- *See Table K on page 47 for requirements if securities register kept in electronic format;*
- *Certain specified records must be made available to shareholders. Draft Regulation 26 states that the right of access to the register of members and register of directors applies:*

In the case of a profit company, to:

- (i) Its securities register (ii) its register of directors and (iii) its register of secretaries and auditors

In the case of a non-profit company to:

- (i) Its register of members and (ii) its register of directors

Any such right of access may be exercised only in accordance with The Promotion of Access to Information Act 2000. Draft Regulation 25 sets out in detail the information to be kept concerning directors such as addresses for service, and the name and registration number of any company of which a person related to that director is a director or a prescribed officer.

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 23).

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 the prescribed period after the end of the anniversary of the date of its incorporation;
- **Draft regulation 32 states that if a company's financial year end does not coincide with the anniversary date of its incorporation, the company must file its annual return within 20 business days after the anniversary date of its incorporation;**

- A company required in terms of Draft Regulation 29 to have an audit will be required to submit a copy of its financial statements as supplement to the annual return;
- A company required in terms of Draft Regulation 29 not required to have an audit but has voluntarily elected to do so may either submit a copy of its financial statements as supplement to the annual return or file a financial accountability supplement;
- Draft regulation 32(3)(c) A company that is not required to have an audit and has not voluntarily chosen to do so, must file a financial accountability supplement to its return.

A.4 Registered use of name and number

- A company must ensure that its registered name and number are clearly stated in legible characters in all notices and other official publications of the company including those in electronic format, and in all bills of exchange, promissory notes, cheques and orders for money or goods, and in all letters, delivery notes, invoices, receipts and letters of credit of the company. 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 27(3) sets out what is required to be included in the accounting records of a company, and can be summarised as follows:

- (a) A register of the company's assets and liabilities
 - (i) Register of company's non-current assets
 - (ii) Record of any property held by the company
 - (iii) Record of all liabilities and obligations of the company
- (b) If the company trades in goods – a record of inventory and stock in trade
- (c) Record of company's revenue and expenditure including daily records of all money received and paid out

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 28-31. Refer to page 17.

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 18 (required to approve before circulated and published).

E Directors Report

Section 30(3), page 18.

F Business Rescue duties-S137

- King 111 and Section 129 of the Act (see page 9).

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 66 places a positive duty on the directors to manage the company;
- 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 39 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);
- 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 (g) on Table F, page 42).

I Other Duties

1.1 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.

1.2 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.

1.3 Corporate governance minimum guidelines and recommendations per King 111 (see pages 33–36)

3.5 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.

4 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, see Table L) 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 the holders of at least **10%** of the voting shares 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);

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 shares that are issued or issuable as a result of the transaction* will be equal to or exceed **30%** of the voting power of all the shares of that class held by the shareholders immediately before the transaction.

{*reference to “transaction” includes a series of integrated transactions}

- Refer to page 26 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 the audit committee or as a member of a committee of the board.

The company’s MOI can also list scenarios when shareholder approval will be required for Director actions.

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 pages 26–27 – remedies for shareholders [Section 20(4)].

5 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.

6 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 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];
- 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;
- **The Minister has by Draft Regulation 50 prescribed that a public company or SOC Ltd are obliged to have a Social and Ethics committee (confirmed by King 111).**

7 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 in terms of any other law and any agreement to which the company is a party and (b) provide for the proper conduct of an audit or independent review of its annual financial statements as applicable for the particular company [Draft Regulation 27(2)];
- Draft Regulation 27(3) sets out information / documentation that should be included in the accounting records of a company;
- Accounting records may be kept in electronic format, subject to certain conditions – see Table K;
- It is an offence for the company to fail to keep accounting records as prescribed with an intent to deceive or mislead or to falsify these records or permit a person to do so.

Section 29 Financial statements

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

| |
|--|
| (a) Satisfy the financial reporting standards as to form and content, if any such standards are prescribed |
| (b) Present fairly the state of affairs and business of the company, and explain the transactions and financial position of the company |
| (c) show the company's assets, liabilities and equity as well as its income and expenses and any other prescribed information |
| (d) Set out the date on which the statements were produced and the accounting period to which they apply |
| (e) Bear on the first page a prominent note indicating <ul style="list-style-type: none">(i) Whether the statements – (in compliance with any applicable requirements of this Act:<ul style="list-style-type: none">(aa) have been audited(bb) if not audited, have been independently reviewed(cc) have not been audited or independently reviewed(ii) The name, professional designation (if any) of the individual who prepared or supervised the preparation of the statements. |

Any such statements must not be false or misleading in any material respect or incomplete in any material particular, subject to if they are a summary – i.e a company may provide any person with a summary however these must comply with prescribed requirements – and non compliance is an offence – Section 29 and Section 218.

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 28-31 have been issued in this regard. Refer to Table H on page 44 relating to prescribed financial reporting standards per category of company.

Section 29(6) It is an offence to prepare or be party to the preparation of any financial statement knowing that those statements do not comply with international reporting standards. 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 AFS 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 company, –
 - (i) Audited if so required by the regulations*
 - (ii) Be either audited voluntarily at the option of the company or independently reviewed unless it has exempted

*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-

- (aa) its annual turnover
- (bb) the size of its workforce
- (cc) the nature and extent of its activities (refer to Table H)

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

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).

Independent Review by an Independent Accounting Professional

- Draft Regulation 30 relating to “Independent Review“, states the minimum requirement for a professional person to conduct an independent review [see table H on page 44 for those categories of companies that require a review] as:
 - ◆ An “independent accounting professional” being a person who:
 - (i) Is a member in good standing of a professional body that is a member of the International Federation of Accountants; 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 J on page 47;
 - (iv) Is not related to any person who falls within any of the criteria set out in clause (ii) or (iii).

8 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 they can voluntarily do so;
- Draft Regulation 49 states that any company which is required to be audited in terms of Draft Regulation 28 must comply with every obligation of a public company in the Act.

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 50 requires such companies to also appoint a **Social and Ethics Committee** unless exempted (see page 22).

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 (as per item (a) on table below). The Act does not deal with the process to be followed where a company voluntarily appoints an auditor. It is recommended that the auditor be appointed annually at the shareholders meeting (for the approval of annual financial statements);
- 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, the relevant company (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 J on page 47;
- The audit committee has the following statutory duties with respect to the financial year for which it is appointed:

| |
|--|
| (a) Nominate & appoint a registered auditor of the company, who is independent of the company; |
|--|

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|--|
| (b) Determine fees to be paid to the auditor and the auditors terms of engagement; |
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| |
|---|
| (c) ensure the appointment of the auditor complies with the Act & any other legislation governing auditors; |
| (d) to determine the nature & extent of non-audit services the auditor may provide to the company; (subject to the provisions of Chapter 3) |
| (e) to pre-approve any proposed contract with the auditor for the provision of non-audit services to the company; |
| (f) to insert into the AFS to be issued in re that financial year, a report describing how the audit committee carried out its functions & stating whether or not the audit committee is satisfied that the auditor was independent, and commenting in any way the committee considers appropriate on the financial statements, the accounting practices and internal financial control of the company and; |
| (g) to receive & deal appropriately with any complaints from within or outside the company relating to the accounting practices or internal audit of the company or to the content or auditing of its financial statements or to any related matter; |
| (h) make submissions to the Board on any matter concerning the company's accounting policies, financial control, records and reporting, and |
| (i) to perform other functions determined by the board. |

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

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 relevant company must directly or indirectly –
 - ◆ Establish and maintain a system to receive **confidential disclosures** of any person as contemplated in Section 159 (ref section on Whistle-blowers on page 24) and act on them; and
 - ◆ Routinely publicise the availability of that system to directors, secretaries, other officers, employees, registered trade unions of the company, a supplier of goods or services to a company or an employee of such a supplier.
- **Register of Officers**
- A public interest company must keep a register of its directors, auditors and secretaries;

Social and Ethics (S&E) Committee (draft regulation 50)

- This is compulsory for public or SOC Ltd 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, a majority of whom must satisfy the requirements set out below*;
- 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, commencing with the AGM held during 2011;
- 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. Such members must also meet the requirements set out below.

***Requirements for person to act on S&E Panel and Committee (majority of directors):**

- (a) Must not be disqualified in terms of the Act from being a director or prescribed officer of the company;
 - (b) Is not a person described in Table J on page 47;
 - (c) Is not an office bearer of any registered trade union representing employees of the company; or
 - (d) Is not related to any person who falls within any of the criteria set out in (b) and (c).
- Draft regulation 50 (12) sets out the functions of the committee in detail, which can be briefly summarised as follows:
 - ◆ To monitor the company's activities having regard to any relevant legislation and codes of best practice regarding matters relating to social and economic development (e.g the Employment Equity Act, Broad Based Black Economic Empowerment Act);
 - ◆ good corporate citizenship (including the company's promotion of equality , prevention of unfair discrimination, contribution to development of communities in which its activities are predominantly conducted, record sponsorship, charitable giving);
 - ◆ the environment, health and public safety;
 - ◆ consumer relationships;
 - ◆ labour and employment (company's contribution to the education of its employees);
 - ◆ to report annually to the shareholders at the company's AGM on matters within its mandate.

9 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”.*

“Insolvent circumstances” is not defined in the Act, however solvency and liquidity is defined (see table D on page 40).

Administrative consequences:-Compliance Notices:

- **Draft Regulation 20** 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 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;
- **Draft Regulation 21** states that if at any particular time a company is trading in circumstances in which its liabilities exceed its assets, the company must file a notice to that effect with the Commission and continue to do so on a quarterly basis until such time as the assets equal or exceed its liabilities;
- In the exercise of its discretion, the Commission.
 - A. may not issue a notice if:
 - (i) The amount by which the company’s liabilities exceed its assets is less than or equal to the total of all amounts owed by the company –
 - a. To its shareholders in terms of any shareholder loans or similar arrangements or
 - b. To any other person in terms of a secured loan, secured credit facility or similar arrangement and
 - (ii) It is reasonable in the circumstances to expect that the company will be able to meet its obligations as they fall due and payable
 - B. may issue a notice only if it is reasonable and justifiable to prevent the company from operating in the circumstances, having regard to the following factors:
 - (i) the potential for the company to trade out of insolvency
 - (ii) the extent to which the company liabilities are
 - a. In terms of any state sponsored economic development or economic empowerment program, scheme or policy
 - b. In the form of obligations to or guaranteed by the state or a state owned entity
- 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 pages 26–28);

- 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.

Note: commentary on this regulation states that Section 22 in the Act prohibits a company from trading in insolvent circumstances yet the draft regulations allow the Commission to issue a notice to the company condoning the actions of the company, which is contradictory. In addition commentators have stated that the NPA should have the prerogative to investigate any unlawful act.

10 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 174 prescribes as R1 000 000
- (b) 10% of the respondent's turnover

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 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 Constitution 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 privilege 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.***

11 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 page 24;
- 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:

(Section 213):

commit a breach of confidence or

(Section 214): False statements, reckless conduct and non-compliance

- (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) who was knowingly a party to (i) reckless trading or trading with intent to defraud creditors or trading under insolvent circumstances (Section 22) or to (ii) an act or omission calculated to defraud a creditor or employee or security holder of a company or
- (1)(d) is party to the preparation or approval, dissemination or publication of financial statements or summaries to the extent set out in Section 29 or a prospectus or written statement that contained an untrue statement. Note: The same penalty applies to a person who has been responsible for financial statements being prepared approved disseminated or published which are materially non-compliant with standards or are misleading or false.

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.

- Such offences may also lead to directors also incurring civil liability;
- All other offences – fine or imprisonment up to one year (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).

GENERAL LIABILITY OF DIRECTORS & OFFICERS: Section 77

A director, is liable for:

- a breach of a fiduciary duty;
- for losses, damages or cost resulting from breach of Sections 75, 76(2), 76(3)(a) or (b) (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};
- 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) for agreeing to the granting of financial assistance to directors or other parties, when not in accordance with requirements (Section 45) for knowingly failing to vote against a share purchase which did not accord with legislative requirements;
 - (v) a director will only be liable for failing to vote against a distribution if immediately after so voting, the company failed to satisfy the solvency and liquidity test (see Table D on page 40 and also page 9) and this was reasonably predictable;
 - (vi) an allotment by the company despite knowing that the allotment was contrary to the provisions of Chapter 4.

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 to take proceedings 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 fraudulently or due to gross negligence causes the company to do anything inconsistent with 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 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 – See second half of Table C on page 39.

12 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.

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.

13 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:

CC's continue to exist until deregistered or dissolved in terms of the Close Corporations Act.

CC's can continue to be registered until Section 13 of the Companies Act 2008 comes into operation and thereafter no further registrations of CC's will be allowed, and no company can be converted to a CC.

Part IX of the CC's Act will continue to be applied under Chapter XIV of the Companies Act (relating to winding up) until such time as new legislation in this regard is in place.

Conversion of CC to Company

- From the date of operation of the Act, existing CC's may convert to a company by filing a **Notice of Conversion**; together with required documentation to the Commission; (Draft Regulation 19);

- Every member of a converted CC is entitled to become a shareholder of the company;
- Many of the characteristics of the CC are now incorporated into a private company including many of the benefits, such as no audit being required under certain conditions.

Financial Statements and accounting records of CC's

- The same requirements as per Section 28, 29, 30 (see pages 17 and 18 above) apply to CC's unless it has been dormant or on application to and exemption by the Commission, or if the CC has only one member;
- However if there is only one member and (s)he is disqualified to act as such and (s)he manages the CC, financial statements must be prepared;
- If it appears necessary to protect the interests of any members of the CC or desirable in the public interest, having regard to the economic or social significance of the CC as indicated by its annual turnover, the size of its workforce or the nature and extent of its activities, the Commission may issue an administrative notice requiring an exempt CC to prepare AFS in future and until further notice;
- The CC may also voluntarily make the enhanced accountability and transparency provisions of Chapter 3 applicable;
- The Minister, after consulting the FRSC may make regulations prescribing financial reporting standards or the form and content requirements for summaries of financial statements.

Management of CC's & disqualified members

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

Business Rescue and winding up of CC's

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

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.

Deregistration and Dissolution of CC's

- Schedule 3 of the Companies Act amends Section 26 of the CC's Act – whereby deregistration provisions relating to Companies apply with respect to CC's and a reference in any of these provisions to a company must be regarded as a reference to a CC;
- Dissolution – Section 66 of the CC's Act is amended so that the laws mentioned in item 9 of Schedule 5 of the Companies Act which relate to the winding up of a company apply to the liquidation of a CC.

Names of CC's

- The CC's Act has been amended by the Act relating to use and publication of names and an order to change names, and the provisions of the Act apply equally to CC's.

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.

Some general information relating to CC's and their members are:

(reference to Sections hereafter apply to CC's Act)

A Appointments, qualifications of members

The following may be members of a CC: natural persons, testamentary trusts and inter vivos trusts. **A juristic person (eg a company or another CC) may NOT either directly or indirectly hold a member's interest in a CC. Maximum of ten members.**

B Duties, responsibilities and obligations of members

A. Internal relations

A.1 Fiduciary Position of Members

Section 42 – Each member stands in a fiduciary relationship to the CC.

A.2 Liability of Members for Negligence

- Section 43 – A member shall **be liable to the CC**, where in the carrying on of the business of the CC, (s)he fails to act with **a reasonable degree of care and skill** as can be expected from a person of his/her knowledge and experience.

A member can bring an action ON BEHALF OF THE CC against another member in regard to items A1 and A2 above.

A.3 Unfairly prejudicial conduct

- Section 49 – Any member of a CC who alleges that any act or omission by the CC or by another member is unfairly prejudicial, unjust or inequitable to him or her or that the affairs of the CC are being conducted in such a way, may make an application to Court for an order, which Court will accordingly make an order as it sees fit.

Section 49(5) has been repealed by the Act which stated that any corporation which failed to comply with this Section would be guilty of an offence.

B. External relations

B.1 Powers of Members to bind CC

- Part V1 of the CC's Act – any member of a CC, when dealing with a third party, shall be considered to be **an agent** of the CC;
- Any member shall be able to bind the CC in dealing with a third party, whether or not (s)he is carrying on the business of the CC, unless the 3rd party has knowledge or reason to believe that the member is acting without the necessary authority of the CC. In such a case, the transaction will NOT be binding on the CC, unless it was expressly or impliedly authorised by the CC in advance or ratified by it after the event.

C. Personal liability for CC's debts

C.1 Liability of Members for Debts and Negligence

Section 63: Certain circumstances exist where the members of a corporation shall be jointly and severally liable for the debts of the corporation as follows:

- where the name of the corporation is used without the required abbreviation (CC);
- where a member fails to make his members contribution where the number of members exceeds **10** for a period of **6 months**;
- where a juristic person or trustee holds a members interest under false pretenses;
- where a CC makes a payment for a members interest where certain statutory requirements are not complied with where the CC gives financial assistance in connection with the purchase of a members interest and immediately thereafter the CC does not remain solvent and liquid;
- where a person takes part in the management of the corporation where he is disqualified from doing so;
- where the office of accounting officer is vacant for a period of 6 months;
- if the CC is able to pay its debts as they become due and payable in the ordinary course of business;
- if the rendering of such financial assistance does not cause the CC to be unable to meet its obligations as they become due in the ordinary course of business;

If any of the above occur immediately after giving that assistance or acquiring that interest, the members will have a personal liability **to the creditors** prejudiced as a result.

D. Internal relations – association agreements & variable rules

Association Agreements

- Section 44(1) – Where two or more members exist, these members may at any time enter into a written association agreement signed by or on behalf of each member who has the effect of regulating the **internal relations** between the members and between the members and the CC (provided that it is in a manner that is not inconsistent with the provisions of the Act);
- Such association agreement should be kept at the registered office and should be available for inspection by any member of the corporation;
- Any new member of the corporation shall be bound by any existing association agreement between the other members, as if (s)he had signed it as a party thereto.

Variable rules relating to internal relations

If the members do not enter into an association agreement, their internal relationship is governed by the Act, and in particular, by the variable rules laid down in Section 46.

14 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).

15 KEY ASPECTS

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 company's 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 separated.

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 |
|--|
| <p>A court may make an order placing a person under probation if:</p> <p>a) while serving as a director (s)he (i) improperly supported a resolution despite the inability of the company to satisfy the solvency & liquidity test (ii) acted in a manner inconsistent with the duties of a director (iii) acted in a manner or supported the company in an action contemplated in section 163 (oppressive or prejudicial conduct or abuse of separate juristic personality of company) OR</p> <p>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</p> |
| <p>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</p> |
| <p>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</p> |
| <p>a person on probation may apply to court to set aside the order at any time more than two years after it was made</p> |
| <p>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</p> |

Table B

| DELINQUENT DIRECTORS |
|---|
| <p>A court may make an order declaring a person a delinquent director if:</p> <p>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</p> <p>b) while under a court order of probation, acted as a director in a manner contravening that order</p> |
| <p>an order made re (a) & (b) above is unconditional & subsists for the lifetime of the person declared delinquent</p> |
| <p>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 26</p> <p>d) has repeatedly been subject to a compliance notice or similar enforcement mechanism for similar conduct i.t.o any legislation</p> <p>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</p> <p>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</p> |
| <p>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</p> |
| <p>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</p> |
| <p>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</p> |

Note: all references to director apply equally to members of CC's in this section

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 AND (ii) does not have a material personal financial interest in the subject matter of the decision (nor does a related person)(and it is a decision that a reasonable person in a similar position could hold in comparable circumstances) and the director has complied with Section 75 (disclosure of financial interests-see above) and (iii) the director made a decision or supported the decision of a committee and had a rational basis for believing that the decision was in the best interests of the company;

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

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, if the company is a member of a group of companies, the aggregate assets of the company as fairly valued, equal or exceed the liabilities of the company, or if the company is a member of a group of companies, the aggregate liabilities of the company, as fairly valued, and
- b) it appears that the company will be able to pay its debts as they become due in the course of business for a period of – (i) 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 requirements of S29
- b) subject to para (c) the board or any other person applying the solvency and liquidity test to a company must (i) consider a fair valuation of the company’s assets & 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, a person applying the test in re of a distribution contemplated in para (a) of the definition of ‘distribution’ in S1 is not to be regarded as a liability any amount that would be required if the company were to be liquidated at the time of the distribution to satisfy the preferential rights upon liquidation of shareholders whose preferential rights on liquidation are superior to the preferential rights on liquidation of those receiving the distribution.

Table E

| RELATED AND INTER-RELATED PERSONS AND CONTROL |
|---|
| <p>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 separated by no more than two degrees of natural or adopted consanguinity or affinity</p> |
| <p>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*</p> |
| <p>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*</p> |
| <p>Section 2(1)(d): two or more persons are inter-related if the 1st and 2nd such persons are related, the 2nd and 3rd such persons are related and so forth in an unbroken series.</p> |
| <p>* control: a person controls a juristic person (JP) or its business if</p> <ul style="list-style-type: none"> a) in the case of a JP that is a company, (i) that JP is a subsidiary of that 1st person (ii) that 1st person together with any related or inter-related person is (aa) directly or indirectly able to exercise control over the majority of voting rights associated with the securities of that company (bb) has the right to appoint directors who control the majority of votes at a meeting of the Board b) in the case of a JP that is a 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 |

Table F

LENIENCY/EXEMPTIONS FOR CERTAIN COMPANIES – (S57)

A for Profit company (other than SOC)

where only 1 person holds beneficial interest in all securities issued by the company (eg only one shareholder)

- a) less onerous reporting requirements
- b) no notice requirements (simplified decision making)
- c) S59-65 do not apply (re shareholders meetings-notice, conduct, quorum, resolutions) ie no need for compliance with internal formalities
- d) exempted from audit or independent review of financial statements or AFS

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

- e) the disqualifications listed in S69(8)(b)(iii) & (iv) (see page 6) a person may still act as a director if all the shares are held by him/her or by him/her together with persons related to him/her (see table E) and they all consented in writing to his continued position as director
- f) no notice requirements for board meeting
- g) S75(2)(b): requirement for disclosure of directors personal financial interest does not apply (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).

where there is only one director

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

& where every director is also a shareholder

- i) S30(2) – exempted from audit or independent review of FS or AFS (unless voluntarily decides to do so) UNLESS the company has only 1 director and he/she continues to act as such despite being disqualified (as per S69(12) – then exemption falls away
- j) diminished need to seek shareholder approval for certain board actions
- k) no notice or other internal formalities re referral by Board for shareholders decisions
- l) less onerous reporting requirements (see table H page 44)
- m) 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
- n) flexibility re disqualification: if disqualified, can still be a director

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 (this applies to S44 only)

**CONSEQUENCES OF LENDING FINANCIAL ASSISTANCE
CONTRARY TO PROVISIONS OF THE ACT**

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

Table H – Draft Financial Reporting Standards

Draft Regulations 28 – 31

For any particular company, any financial statements contemplated in Section 28 & Section 29 must comply with the applicable standards for that category of company as follows:

| Entity | Description | Co Act 2008 | report | reporting framework | aud/rep standard |
|-----------------------------|--|----------------------|--------------------------------------|---------------------|------------------|
| Public companies | All | sect 8(2)(d) | audit | IFRS | ISA |
| State owned companies | All | sect 8(2)(a) | audit except when minister exempts | GRAP/IFRS | ISA |
| Large private companies | Assets > R100m (3 prec years average) OR Turnover > R200m (3 prec years average) | sect 8(2)(b) | review | IFRS for SME's | ISRE 2400 |
| Small private companies | Assets < R5m prec year AND Turnover < R20m prec year | sect 8(2)(b) | independently compiled and reported* | none | none |
| All other private companies | | sect 8(2)(b) | review | IFRS for SME's | ISRS 4400 |
| Owner managed companies** | sect 30(2)(b)(ii)(bb)(AA) and (BB) | sect 8(2)(b) and (c) | none | none | none |

| Entity | Description | Co Act 2008 | report | reporting framework | aud/rep standard |
|--|--|-------------|--------------------------------------|---------------------|------------------|
| Company holding assets in fiduciary capacity | All | sect 8(2) | audit | IFRS | ISA |
| Non profit company inc by state, or performs regulatory function, or large = | Assets > R60m prec year OR Exp > R120m prec year | sect 8(2) | audit | GRAP/ IFRS | ISA |
| small non profit company | Assets < R5m prec year AND Turnover < R20m prec year | sect 8(2) | independently compiled and reported* | none | none |
| Other non profit companies | | sect 8(2) | review | IFRS for SME's | ISRS 4400 |

IFRS = the International Financial reporting standards as adopted from time to time by the International Accounting Standards Board (IASB) or its successor body and approved for use in South Africa from time to time by the Council

IFRS for SME's = the International Financial reporting standards for small or medium enterprises as adopted from time to time by IASB as per above

none = there is no prescribed financial reporting standard

ISA = International Standard on Auditing

GRAP = Generally Recognised Accounting Practice

ISRE 2400 = means the international standards for Review Engagements as promulgated from time to time

ISRS 4400 = means the international standards for Independent Reviews as promulgated from time to time

* independently compiled and reported = the annual financials statements are prepared by an independent accounting professional (see def on page 19) on the basis of financial records provided by the company, and in accordance with any relevant financial reporting standards.

** Draft Regulation 31: provides an unconditional exemption from audit or independent review to these owner managed companies

Table I

| CATEGORISATION OF COMPANIES | | |
|------------------------------------|---|--|
| FOR PROFIT | a) state owned company (SOC Ltd); | {Audit required except where Minister exempts} |
| | 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} | {Audit required} |
| 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} | |

Table J

| REQUIREMENTS TO QUALIFY AS MEMBER OF AUDIT COMMITTEE, SOCIAL AND ETHICS COMMITTEE AND INDEPENDENT ACCOUNTING PROFESSIONAL |
|--|
| <p>Draft regulation 30(3) relating to independent accounting professional requirements and 50 relating to members of the Social and Ethics Panel and Committee, 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:</p> <ul style="list-style-type: none">(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 30 and 50) 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 |

Table K

| DRAFT REGULATIONS – REQUIREMENTS FOR DOCUMENTS TO BE HELD IN ELECTRONIC FORMAT |
|--|
| <p>Draft regulation 36(6) 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</p> <p>Draft regulation 27(6) if a company keeps any of its accounting records in electronic form the company must provide similar precautions as described above</p> |

Table L

SHAREHOLDER RESOLUTIONS

Every resolution adopted is either:

- A special resolution – adopted by holders of at least 75% of the voting rights exercised on the resolution – unless the company’s MOI permits lower % of voting rights to approve the special resolution or 1 or more lower % of voting rights to approve special resolutions concerning 1 or more particular matters PROVIDED there must at all times be a margin of at least 10 % points between the requirements for approval of an ordinary resolution and a special resolution on any matter;
- An ordinary resolution – supported by holders of at least a majority (51%) of the voting rights exercised on that resolution – unless the company’s MOI permits higher % of voting rights to approve the ordinary resolution or 1 or more higher % of voting rights to approve ordinary resolutions concerning 1 or more particular matters PROVIDED there must at all times be a margin of at least 10 % points between the requirements for approval of an ordinary resolution and a special resolution on any matter;
- **Note: the minimum % of 51% will however still apply in the removal of a director under Section 71 (see page 7).**

Quorum:

Votes quorum

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

Person quorum

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



Services

- Auditing
- Independent Review
- Compilations
- Annual Financial Statements
- Tax Advisory Services
- Business Advisory Services
- Valuations
- Business Structuring
- Forensic Services
- Due Diligence
- Corporate Tax Returns
- Personal Tax Returns
- Processing of Accounting Records
- Monthly Management Accounts
- Outsourced Payroll
- Budgets and Cash Flow Forecasts
- Company Secretarial Services
- Company Formation
- Trust Formation
- Shareholder Agreements
- Wills And Estate Planning
- Executors Of Estates