SELECT COMMITTEE ON TRADE & INDUSTRY, ECONOMIC DEVELOPMENT, SMALL BUSINESS, TOURISM, EMPLOYMENT & LABOUR

COMMENTS FROM WRITTEN AND ORAL SUBMISSIONS

COMPANIES AMENDMENT BILL AND COMPANIES SECOND AMENDMENT BILL

COMPANIES AMENDMENT BILL

SECTION 1

There were submissions made to amend the definition of securities by including other instruments to insert the definition of debentures through section 43(1).

The Department is of the view that not all terms need to be defined. A debenture can be interpreted in the ordinary sense. Other instruments like bonds are regulated by National Treasury legislation.

The Department does not recommend changes to the definitions of securities and debentures.

SECTION 16

A submission proposed amendment to section 16(9)(b)(i) of the Companies Act, 2008 that an amendment to a Company's Memorandum of Incorporation takes effect 10 days after the receipt of the Notice of Amendment by the Commission, unless endorsed or rejected with reasons by the Commission prior to the expiry of the 10 business days period.

The Department notes that the CIPC has confirmed that endorse is the most applicable wording as it also addresses the actions they will take to validate the process. If the amendment is "endorsed" by the Commission before the expiry of 10 days, the amendment becomes effective immediately and there is no other timeframe to confirm. Accordingly, no change is proposed.

SECTION 25

A submission proposed amendment of section 25 to make it explicit that the notice will be published in the CIPC website.

The department is of the opinion section 25 suffices as is, CIPC does publish notices on the website and more so, it is often not best to be too prescriptive in the law because it allows for regulations.

SECTION 26

It is recommended that the typo in section 26(5)(g) be corrected. Correct the word '**comtemplated to 'contemplated**'.

There are other comments regarding s26 on the prescribed fees. Those subsections have been addressed. The fees will be prescribed in the Regulations.

One submission submitted that it is not clear what the prescribed maximum fee will be and they note that section 6 which refers to a fee of R100 for each inspection is to be deleted. Another submission raised a concern with the section to be deleted, 26(6), would exclude a section giving access to registers of directors. While this information is publicly accessible on the CIPC's website, it is often out of date. Access directly from companies should therefore be facilitated. They therefore suggest keeping section 26(6).

The department does not recommend changes, the issue of the outdated information is an operational matter that can be addressed outside the Bill and issues related to information on directors can still be requested.

SECTION 30

There are submissions that were unclear as to what exactly is the legal position if the remuneration policy were voted down, under the new section 30A. There was a submission that recommended wording to confirm that the previous policy remain in force. The Bill provides that the policy should be presented at the next AGM when not approved. This means that the company will retain the existing policy until the policy is approved.

The recommendation by BASA and the JSE in their joint submission, where they recommended to create legal certainty to the Bill by the amendment of the remuneration

report to implementation report. The concern is that the remuneration report includes three sets of documents which are the remuneration policy, background statement and the implementation report. They are concerned that the remuneration policy is already voted upon in section 30A. The point they are making is understandable, however we are of the opinion, the remuneration report includes the implementation report and that the remuneration policy is not to be voted on again in this instance but the overall report. The policy will serve as an additional document to accompany the report. The Department does not recommend this amendment.

A concern has been raised about the powers given to shareholders to appoint remuneration committee members and the deviation from normal practice where Boards appoint the members of committees of the board in relation to section 30B. A further concern is that remuneration committees do not act independent of the board. This point was raised in the context of the two strike rule consequence where members of the remuneration committee are required to stand down for re-election.

To answer that concern here is the policy consideration that the Nedlac constituencies also endorsed:

- This is a policy decision to engage with shareholders. The status quo in the country of historical disparities has to be addressed. A wide range of sources point to the unusually wide inequalities in remuneration in the formal sector in South Africa compared with the rest of the world. Analysis of Statistics South Africa data in the annual Labour Market Dynamics survey shows that inequality in pay contributes as much to overall income inequality as joblessness. According to PwC′s regular survey of executive remuneration, the median pre-tax package for a CEO of a listed company was R5,2 million in 2020, and after-tax it was R2,8 million. That was 100 times the national minimum wage. The PwC found that the median pre-tax package for CEOs was 35 times the median pay for unskilled workers in big business.

- Recent years have seen significant shareholder dissatisfaction over pay and multiple instances where large numbers of shareholders have voted against remuneration reports. In the last year, the remuneration policies of several large listed companies have not received 75% shareholder support. Under current practices, except for boards committing to discuss the matter with disgruntled shareholders, shareholders do not have sufficient mechanisms to address their grievances.

A few submissions sought clarity about the sequence of the Annual General Meetings in section 30B and one sought clarity on which AGM are the remuneration committee stand members expected to stand down when the report has not been approved by shareholders. There were suggestions to delete some subsections and rewording on the AGMs in section 30B. To clarify, the stand down for re-election is in the second AGM, where remuneration committee are expected to give an explanation of what they have done to address the shareholders concerns.

Cosatu recommended the remuneration report disclosure requirements be extended to private companies. To answer to this, the requirement of the remuneration disclosure is new in companies law and the focus is on state owned enterprises or public entities. The consideration for private companies will be made in the future when new amendments are considered. This is more so because this has not been subject to public participation including at Nedlac.

There is a submission that sought clarity about what happens when remuneration payments have been made and the remuneration report is not approved by shareholders. *The Department is of the view the companies will make the necessary arrangements and systems on this matter at an operational basis. The Bill provides the overall principle on how the approvals of these reports must be addressed.*

There were submissions that were concerned with the restrictions in the definition of employees. Some submissions made suggestions on the Labour Relations Act definition and its implications. The definition of employees must be aligned to the Labour Relations Act and some of the proposed changes require consultations and considerations with relevant Departments.

Few submissions raised concerns with the binding vote on policy and remuneration report. They recommended that they be advisory in nature. One submission went as far as to say South Africa is the only country with such a requirement. We submit that point is far from the facts. Globally there are examples of jurisdictions voting on the remuneration reports and with consequences to directors, Australia is one such example. Given the inequalities of income in South Africa and the increasing pay gaps, it is critical that the voting by shareholders be binding.

Two submissions proposed recommendations on the date of commencement of the Bill on the remuneration report disclosures. BASA and JSE proposed that the implementation date

be set from January 2025. Another comment was related to the remuneration policy commencement for its implementation date which is after 12 months after the effective date of the Act. The comments are duly noted and will be taken into considerations when Regulations are finalised. They do not have to be included in the Bill.

There were other submissions that refer to after tax basis for the disclosure requirements, total remuneration definition change and the data for remuneration report to be for 5 years. In our view, having a narrower definition of remuneration will defeat the purpose of disclosure as remuneration packages will be tailored to avoid disclosure and it is for this reason that remuneration should be broadly described in this context. The disclosure of remuneration reports is new. Making a requirement for 5 years data may be onerous. It is recommended that this proposal not be included. Further research, consultations and considerations on them will be done.

A submission by SAICA suggested that details of the remuneration report be thrashed out in the Regulations. The amendments are very significant and they change the nature of disclosure requirements as far as remuneration is concerned in South Africa. It is important that they be legislated and be in the law given the current challenges in society of inequality and excessive pay to top executives.

The Department does not recommend any amendments for section 30A and section 30B. The Department will monitor the implementation of the Act and will make recommendations later on based on issues that may arise in the remuneration disclosures.

SECTION 33

There is a submission that suggested that the wording (“after the end of the anniversary of the date of its incorporation”) is unclear. It provided suggested wording: *As a response from the department, the proposed wording is not part of the amendments to the Bill*. This was not raised as a concern before, so we take it that the legislation is generally clear. Companies have dates of incorporation. And the concept of an anniversary of date is commonly used, which would mean after the year.

Another submission on s33 sought clarity on what the purpose is of having to share information relating to securities, when a company is not listed on the JSE, or is a private company.

The department would like to clarify that there is no amendment that addresses disclosure of securities in section 33 in the Bill. The amendment is in the General Laws Amendment Act (GLAA) by National Treasury.

SECTION 45

Some submissions from Sasol, Webber Wentzel stated that the exemption is to be made in terms of s45 in respect of the subsidiaries of a company should also apply to foreign subsidiaries.

It is correct that they don't apply to 'foreign subsidiaries since they do not form part of the definition of a subsidiary not being part of a company.

The submissions then state that this was an erroneous omission as the same policy considerations would apply equally to South African subsidiaries and 'foreign subsidiaries'. This is however, not correct.

A foreign subsidiary is governed by the laws of the place in which it is incorporated. Those laws may be very different from the laws in South Africa that regulate the relationship between a company and its subsidiaries. The proposed amendment to s45 exempting financial assistance to South African subsidiaries is done in recognition of the South African legal principle that governs the relationship between a holding company and its subsidiary. There is, among other things, an established basis for the criteria that regulate what constitutes control of the subsidiary, the consequences of enjoying control, the relationship between shareholders and creditors in the company. As regards 'foreign subsidiaries the laws governing their relationship with their holding company may be entirely different. There may be disqualification of foreign control, there may be difficult relationships and ranking between equity and debt and certain forms of debt.

The LSSA, CGCSA, and SAICA submits that the proposed amendment in clause (b) does not go far enough. It should cover financial assistance to any group companies.

The amendments to section 45 are with regards to reducing regulatory burden of the compliance requirements. It does not address the access to finance to any group companies. This would constitute a new amendment that requires a process. The provision in the current Act is burdensome in that it forces the holding company to obtain a special

resolution when funding a subsidiary company. This removes the burden by taking away the special resolution requirement. The problem with "inter group loans" may need further research.

SECTION 48

A submission recommended that a revision should therefore be made for the acquisition of shares from a wholly owned subsidiary. This proposal is unclear as to why section 48 should apply in that context when the focus is on directors and prescribed officers on the specific amendments in the Bill. Acquisition of shares from a wholly owned subsidiary can be classified as a share buyback but it may problematic in that it may amount to a selling of a subsidiary. Such transactions may qualify as disposals attracting regulation by the Takeover Regulation Panel.

Another submission recommended that a new subsection should be added as follows: Unless an acquisition by the company of its securities is being done pursuant to section 114, none of the provisions of section 114 apply.

The recommendation of the Department, is that the section 114 requirements do not apply to the share buybacks in section 48. This is clarified in the memorandum of objects.

SECTION 118

Some few submissions proposed the definition of indirect shareholding and one submission recommended more than 10 shareholders.

Cliffe Dekker Hofmeyer submitted that two material aspects require clarification and refinement with regard to the proposed new definition / test for when a private company qualifies as a "regulated company" for takeover law purposes, namely the issue of "indirect shareholding"; and the issue of pending (uncompleted) transactions.

They also required clarity in clause 16 as to what exactly "indirect shareholding" means, as this is an undefined concept and can lead to regrettable confusion. Clarity in takeover law is of particular importance as the applicability (or otherwise) of takeover law to a transaction will often be a decisive factor in the structuring and launching of transactions by offers.

They are concerned with securities that have general voting rights (typically ordinary shares), and not for instance with preference shares which are more akin to debt instruments. The definition of "securities" in section 117(1)(j) refers in this regard, which applies for all purposes of takeover law.

They recommend that the defined and more well-understood term "beneficial interest", as defined in section 1 of the Companies Act,7 be utilised in this context. This term refers to the legal right or ability to exercise (or cause the exercise of) voting rights, to receive distributions, or direct the disposal of the shares. They also recommend that only holders of securities (which would, by virtue of section 117(1), carry the definition in section 117(1)(j)) be counted.

They therefore recommend that clause 16 should rather be worded as follows:

"(i) it has 10 or more shareholders with a direct or indirect shareholding in holders of a beneficial interest in the issued securities of the company and meets or exceeds the financial threshold of annual turnover or asset value determined in terms of subsection (2): Provided that the Panel may exempt any particular transaction affecting a private company in terms of section 119(6)"

The reply of the Department is that this amendment provides for a new definition of a company for the jurisdiction of a takeover regulation panel over private companies. It provides that a private company must have ten or more shareholders with direct or indirect shareholding in the company and meet or exceed the financial threshold of annual turnover or asset value which, shall be determined by the Minister in consultation with the panel.

Webber Wentzel's submission in respect of the amendments to section 118(1)(c) and the use of the term "indirect: shareholding", they previously submitted comments to the National Assembly's Portfolio Committee, that it is unclear which persons will qualify as having an "indirect shareholding" in a company and how far up the chain of shareholding or beneficial ownership would be required. They understand that the DTIC was of the view that the proposed amendment should be retained and that the Chairperson of the Specialist Committee on Company Law advising the DTIC indicated that the term "indirect shareholding" was quite often used in legislation for "beneficial ownership", was a well-known term and did not require a definition. In its deliberations, the National Assembly's Portfolio Committee thereafter resolved to retain the term.

Notwithstanding the above, they submit that given the uncertainty explained in paragraph 5.1, the provision should apply only to direct shareholdings.

The concept of indirect shareholding is commonly used in corporate South Africa and does not have to be defined. On the number of shareholders we hold the view that the number of 10 shareholders suffices.

SECTION 135

A submission proposed clause 17(b) should read: "by the substitution for subsection (3) of the following subsection"

The amendment in the Bill is correct. The reference is correct. There are no changes recommended.

Another submission stated it is unclear whether rent is intended to be included by the proposed new section 135(1A). The proposed wording is ambiguous as it refers to "any amounts due to the landlord" but then goes on to say "in respect of…such as, the company's share of rates and taxes, electricity, water, sanitation and sewer charges paid by the landlord to third parties".

A submission commented that rent is not included in section 135 (1A). The amounts included are listed and they relate to municipal utilities. Rent is excluded on the amounts described.

A few submissions raised concerns with the ranking of creditors and why the claims of landlords would receive more preference in post commencement finance.

A submission on the proposing that the section be amended considering the following principles: That the ranking of creditor claims be clarified; and that all suppliers to a company post commencement of business rescue be treated fairly and equally without favour.

The Department clarifies that section 135 amendments are meant to make sure that companies under business rescue are not evicted from the premises in which they are renting. The place or premises that the company occupy is of primary importance to the success of the business rescue proceedings. The landlord is not a preferred creditor but protection is needed that even if the rent due to be received is not unduly preferred, such

landlord must be secured in as far as mounts owing to third parties being the rates and municipal costs must not be tempered with. The landlord must still be in the position of servicing municipal costs even though he/she is not able to receive the rent owing. This is to protect the landlord from third party property costs while he /she is able to accommodate the company under business rescue.

The provision clarifies that ‘any amounts due to the landlord’ are amounts ‘not paid to the landlord during business rescue proceedings, in respect of and not exceeding the aggregate for all public utility services, such as, the company’s share of rates and taxes, electricity, water, sanitation and sewer charges paid by the landlord to third parties’. The provision further states that these amounts will be regarded as post-commencement financing.

SECTION 160

A submission proposed section 160(5)(b) states: "Where the company fails to change its name within the determined period in terms of the administrative order of the Companies Tribunal, the applicant may approach the Commission, after the expiration of the determined period, to substitute the name of the respondent with its company's registration number…". The amendments in section 160 are read with the Act.

The department does not recommend any changes. The term respondent is in line with how the Tribunal addresses matters.

The administrative order to dispute a name is issued by the Tribunal. The issuing of orders are Tribunal related functions. An applicant is the one who approaches the Tribunal to dispute a name against the other party who is a respondent. A successful order will apply against a "respondent" who is proved to be illegally using the name.

Another submission on section 160 suggests that the proposed provision deletes the term "alternative dispute resolution" and inserts "mediation or conciliation". *However, it must be noted that the heading of the section is "Alternative dispute resolution". It is submitted that the heading of the section be amended from "alternative dispute resolution" to "mediation and conciliation". Our response is that the heading is sufficiently broad. Alternative dispute resolution also covers mediation and conciliation. There are no changes recommended.*

SECTION 194

A submission proposed section 194(1A)(b) states that the chairperson may appoint a Chief Operating Officer and one or more senior managers to the Tribunal. It is submitted that the chairperson has been granted an unfettered discretion here and guidelines need to be provided as to the qualifications and experience of the appointees.

It is submitted that the chairperson has been granted an unfettered discretion here and guidelines need to be provided as to the qualifications and experience of the appointees. Section 194 when read in total has safeguards that includes consultation with the Minister and the Minister of Finance. There is no amendment recommended.

SECTION 195

A submission has recommended that this amendment seems to limit the referral of issues to the Tribunal by the B-BEE Commission only. This seems unduly and arbitrarily narrow. The Tribunal adjudicates on various matters prescribed by the Act.

The Department's response is that the B-BBEE matters are a special dispensation that will expand its mandate and that is currently not provided for because the B-BBEE Commission is established in terms of the B-BBEE Act.

Another submission raised a concern about exclusion of public companies by the FRSC from adherence to its standards. There is a conflict between the FRSC, which seems to exclude public companies from adherence to its standards. They therefore suggest that this be explicitly stated to provide clarity. They do not see why public companies should be excluded, so long as they aren't in conflict with other stock exchange agencies listing requirements (like the JSE Listing Requirements) – since these listing requirements should be IFRS compliant, we do not see why public companies should be excluded.

The Department's response is that the FRSC functions do not exclude public companies. Section 204 addresses the functions of the FRSC in issuing international financial reporting standards and adoption in the local context.

COMPANIES SECOND AMENDMENT BILL, 2023

SECTION 77

One submission was in support of the changes effected to the Section 162 (2A) and (3A) as it relates to the courts' powers to extend the time frame for bringing an application to declare a director delinquent or under probation

They recommend the following change to the proposed section 77(7) in the Bill: "(7) In relation to the proceedings to recover any loss, damages or costs which a person is or may be held in terms of this section

The department takes note of the submissions received. No amendments are recommended for the provisions in the Companies Second Amendment Bill.

SECTION 162

A submission received was of the opinion the following aspect within the proposed amendment to section 162 can lead to ambiguity and should be corrected: Section 162(2)(a) should be amended to insert the underlined phrase:

2) A company, a shareholder, director, company secretary or prescribed officer of a company, a registered trade union that represents employees of the company or another representative of the employees of a company may apply to a court for an order declaring a person delinquent or under probation if –

(a) the person is a director of that company or, within the 60 months immediately preceding the application or the extended period as referred to under subsection (2A), was a director of that company; and

The department takes note of the submissions received. No amendments are recommended for the provisions in the Companies Second Amendment Bill.

Company law is important in any economy, as it is the body of law governing the legal form, rights, and aspects of the conduct of firms and companies in an economy. It also specifies relationships between parties involved in a company, such as shareholders, members and directors, and increasingly, it also deals with other stakeholders.

The first bill, namely the Companies Amendment Bill, 2023, has gone through a very extensive process of engagement at Nedlac with the largest business organization and trade union federations, it has been considered twice by Cabinet which also received a legal opinion and socio-economic impact assessments, it has benefited from extensive public comment most recently in 2021 and through the Parliamentary process, in 2023. The second bill, namely the Companies Second Amendment Bill, 2023, arose from recommendations made at the conclusion of the public and open process of the Zondo Commission into State Capture. In the view of the Department, the Bills, with relatively focused and limited amendments, are ready to be recommended to the Committee for consideration and adoption.

A number of proposals have been made during the public submission process that raises policy proposals that deserve careful thought in the Executive and in Parliament. Where the the proposal is supported, an opportunity would need to be provided for other stakeholders and affected parties to make representations. Therefore, it may be worthwhile to consider a further Amending Bill that can be considered in the next Administration, looking at among others, proposals on

- The gender pay ratio (if there is a need for further public consultation);
- Inclusion of earnings of sub-contracted workers; and
- Provisions on giving of notices by companies to security holders.

This is aside from support to address typos and proofing edits, such as setting out words in lower-case rather than caps.

Overall in terms of recommendations to the Select Committee, the Department does not recommend any amendments to sections 1, 16, 25, 33, 45, 118, 135, 160, 194, 195 and 204.