KPMG Comments on the Companies Bill, 2008

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This report contains 26 pages
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1 Introduction

KPMG South Africa appreciates the opportunity to comment on the Companies Bill 61 of 2008 (the Bill).

We believe that the overall objectives of simplification, flexibility, corporate efficiency, transparency and predictable regulations will be achieved by the Bill.

In general, we support the Bill, but we take this opportunity to provide additional input on certain sections.

Our comments, contained in this report, are structured as follows:

Part A – Main comments

Part B – Secondary comments

Part C – Editorial comments

2 PART A – Main Comments

2.1 Clarity on the audit, independent review requirement and financial reporting standards

2.1.1 Clarity on the audit and independent review requirement

In terms of s 30(10), the Bill provides for the Minister to make regulations, including different requirements for different categories of companies, prescribing the categories of any private companies that are required to have their respective annual financial statements **audited.**

It must be recognized that there are a number of private companies in South Africa with a significant public interest. The purpose of a statutory audit is to provide reasonable assurance that financial statements are free from material misstatements and fairly present the company's financial position and therefore and audit offers a level of public protection. In order to provide clarity to this category of companies it is advisable that the regulations relating to the audit requirement are promulgated timeously.

The Bill also allows for the Minister to make regulations prescribing the manner, form and procedures for the conduct of an **independent review** other than an audit, as well as the professional qualifications of persons who may conduct such reviews.

As auditors we are bound by the suite of standards issued by the International Auditing and Assurance Standards Board. These standards prescribe the principles for performing a review engagement. The Independent Regulatory Board for Auditors then monitors compliance with these standards. By allowing members outside of the auditing profession to perform these review engagements we note that there may be inconsistency in the standards applied for the review engagement, as well as the monitoring of adherence to these standards.

Submission: **To ensure certainty we suggest that regulations be made before the effective date of the Act relating to:**

- **prescribing categories of private companies where their financial statements are to be audited; and**
- **the manner, form and procedures for the conduct of an independent review.**

2.1.2 Financial reporting standards should be set by the Financial Reporting Standards Council

In terms of s 440S of the Companies Act (introduced by the Corporate Laws Amendment Act), one of the functions of the Financial Reporting Standards Council is to establish financial reporting standards for widely held companies and develop accounting standards for limited interest companies. S 204(b) of the Bill, however, amends the function of the Council to advising the Minister on matters relating to financial reporting standards and consulting with the

Minister for the making of regulations establishing the financial reporting standards. S 29(4) of the Bill empowers the Minister, after consulting the Council, to make regulations prescribing financial reporting standards contemplated for the preparation of financial statements.

Submission: **Due to the dynamic nature of the financial reporting environment, we support that the FRSC (and not the Minister) should be charged with the responsibility of co-ordinating the standard setting process as we believe that this would be more practical. This should include the issuing of various supporting documents such as guidelines, circulars and South African specific financial reporting standards. We suggest that s 204(b) and s 29(4) be amended to empower the Council to make regulations prescribing financial reporting standards and other South African specific guidance e.g. circulars or guides.**

2.2 Audit Committees

2.2.1 Pre-approval of non-audit services

S94(7)(e) provides that one of the functions of the audit committee is to: "*pre-approve any proposed agreement with the auditor for the provision of non-audit services to the company*".

This pre-approval, which was introduced by the Corporate Laws Amendment Act provides many practical challenges and there are currently differing interpretations regarding implementation.

Option 1

Does the pre-approval envisage a master service agreement in place governing the auditor's provision of *non-audit services*, provided the agreement includes all material terms governing the provision of such *non-audit services*? Where an auditor has such pre-approval in place it would nonetheless be incumbent on the auditor to table for approval from time to time the extent of fees to be paid in respect of actual *non-audit services* provided. Further, the master service agreement would include the terms under which the services are provided, the nature of services which can be provided, and the extent of such services, which is pre-approved by the audit committee. If services are provided under different terms to those pre-approved by the audit committee, then these terms should be pre-approved by the audit committee.

This option is similar to the US SEC requirements.

Option 2

Alternatively, does the sub-section require pre-approval for every proposed contract (each individual assignment) with the company and that the full terms of such agreement and fee structure be included in the contract being pre-approved?

Submission: **We believe that Option 2 is impractical as audit committees meet once a quarter, and legislation does not allow this responsibility to be delegated to one member of the committee. Further, it may not be feasible to obtain pre-approval on a round robin basis, as all audit committee members may not be available at the same time. Therefore, option 1 provides the most practical answer, however, this needs to be clarified in the Bill.**

2.3 Auditors

2.3.1 5 year cooling-off period

S92(2) – "*If a person has served as the auditor or designated auditor of a company for two or more consecutive financial years and then ceases to be the auditor or designated auditor, the individual may not be appointed again as the auditor or designated auditor of that company until after the expiry of at least five further financial years.*

As can be seen in legislation in other jurisdictions (see table below), the cooling off period before an audit partner can be re-appointed is usually less than the period of the initial audit engagement. We agree with the need to implement a cooling off period in order to ensure the highest standards of independence and to prevent the risks inherent with over familiarity. However, due to the complexities of the modern business environment, a certain degree of specialization and in depth understanding of an audit client's business is vital for the efficient and effective execution of the audit. Also an added factor that should not be ignored from a South African perspective is the shortage of auditors, with an ever increasing number of Registered Auditors leaving the country, this 5 year rotation period may create an untenable situation.

Reference	Initial rotation term	Cooling off period
Corporate Laws Amendment Act	5 years	2 years
SEC Lead audit engagement partner (LAEP)	5 years	5 years
SEC – LEAP on subsidiary	7 years	2 years
SEC – Other audit partners at issuer level	7 years	2 years
SEC – Client service partner	7 years	2 years
Australian legislation	5 years	2 years
European Union legislation	5 years	2 years

Submission: **The cooling off period for audit partner rotation should be 2 years as is the case in a number of international jurisdictions and also the current position introduced by the Corporate Laws Amendment Act**.

2.4 Solvency and liquidity

2.4.1 Clarification of where the solvency and liquidity test needs to be applied within the Bill

The shift from a capital maintenance regime towards one based on solvency and liquidity is laudable as this is in keeping with international corporate best practice. The Bill sets out the solvency and liquidity tests in section 4 and then makes references to these tests throughout the Bill. However, the Bill also refers to various derivatives of "solvency" where it is unclear whether the solvency test should be applied.

Chapter 2 Part G s 79, 80 and 81 provide for the winding up of "**solvent companies**" but it is unclear whether a company is a "solvent company" because it has passed the solvency test set out in s 4. The term "solvent company" is not defined anywhere in the bill.
S 22 states that a company must not, amongst others, **trade under insolvent circumstances**. It is unclear if a company trades under insolvent circumstances if it does not comply with the solvency test set out in s 4.

Chapter 6 Part A dealing with business rescue proceedings defines "business rescue" with reference to the term "**solvent basis**" (s 128(2)(b) and "financially distressed" with reference to **the inability of a company to pay its debts as they fall due**, where the **liabilities of the company exceeds its assets** and where it becomes increasingly likely that the company becomes insolvent within the immediately ensuing 6 months (s 128(2)(f)).

In addition, s 128(3) provides that the Judge President of High Court may designate any judge generally as a specialist in, amongst others, **commercial insolvencies and business rescue**.

Submission: **It is uncertain whether the above terms in bold are circumstances which occur when a company does not comply with the solvency test set out in s 4. We suggest that where derivatives of "solvent" are used in the Bill that the relevant sections specify whether the terms are to be used with reference to the solvency test.**

2.4.2 Is compliance with the solvency and liquidity tests at the group level or company level?

2.4.2.1 Confusion around the term "consolidated assets of the company" and "consolidated liabilities of the company"

It appears that the tests are to be applied at company level unless the company is a member of the group, in which case, it appears that the solvency test utilizes "… *the consolidated assets of the company*, …" and "… *consolidated liabilities of the company*…".

There is uncertainty around the use of the term "… *consolidated assets of the company …´* as the use of the term "consolidated" is usually synonymous to group assets and not assets of the company.

The phrase "consolidated assets of the company" can also be interpreted to mean only the consolidated assets of the sub-group where the company contemplating the transaction is the holding company and not the consolidated assets of the holding company of the group, ie the ultimate holding company at the top of the group. This implies that there would be many sub-groups within one group of companies. This is potentially impractical as there would have to be many different amounts of consolidated assets of sub-groups depending on the position of the subsidiary (contemplating the transaction) in the group.

2.4.2.2 Reference to financial circumstances of the company rather than group

S 4(1) states that "all reasonably foreseeable financial circumstances of the company" are to be considered and omits to mention the financial circumstances of the group. Where the solvency test is applied at group level (if it is to be applied at the group level), then all reasonably foreseeable financial circumstances of the group should also be considered in the solvency test.

Submission: **We suggest the phrase "or the group, as the case may be," be inserted after "financial circumstances of the company" in s 4(1) and section 4(1)(a) be amended to clarify whether and when the consolidated assets and consolidated liabilities of the group is used in the solvency test. In certain transactions and situations, despite the company being a member of a group, a more accurate economic perspective may be obtained by considering the solvency and liquidity tests from the company's perspective and not the group's perspective.**

2.5 Limitation of liability for auditors

Corporate failure and the exposure of previously undetected cases of management deception, often lead to accusations of audit failure, which in turn can lead to law suits. Shareholders, creditors and prospective investors of the audited company may suffer damages for which statutory auditors may be held liable. These liability risks combined with insufficient insurance threaten the sustainability and competitiveness of the statutory audit market share, since they may deter statutory auditors from providing audit services. The South African capital market needs a sustainable and competitive market for audit services. We note international acceptance for limitation of auditor liability by the European Union Commission and trends towards this in the United States and other countries. For this reason we support the limitation of auditors' liability in South Africa.

Concerns that shareholder interest may be prejudiced by such arrangements should be assessed in the light of the efforts being made by the auditing profession to improve audit quality, the requirement that such agreements must be approved by a company's shareholders, and by the fact that, if an auditor seeks to rely on such an arrangement, a court must be satisfied that its terms are fair and reasonable.

Submission: **We confirm that the current prohibition on limitation of liability is dealt with in the Auditing Professions Act and that this would probably be the best place to deal with this issue. However, it is also important for the Companies Bill to introduce this concept, since it is the Companies Bill that creates the relationship between the company and the auditor. Internationally, limitation of auditors' liability is also dealt with in legislation equivalent to the Companies Bill.**

2.6 General comments on business rescue proceedings (Chapter 6)

At the outset, we note that there is an existing initiative to streamline the plethora of insolvency and corporate recovery legislation in South Africa into one statute. This initiative, led by the Department of Justice and Constitutional Development, culminates in a Bill entitled Insolvency and Business Recovery Bill.

Submission: **For reasons of clarity and consistency, we submit that it would be preferable for the Insolvency and Business Recovery Bill to deal with matters currently dealt with in Chapter 2 Part G and Chapter 6 of the Bill. Therefore, we submit that the relevant sections in these chapters be removed in their entirety from the Bill and that the current legislation continues to be in force until the Insolvency and Business Recovery Bill comes into force.**

Refer to PART B, Chapter 6 for specific comments on the "business rescue" section of the Bill.

3 PART B – Secondary Comments

3.1 Chapter 1

3.1.1 Definition of "financial statements"

In the definition of "financial statements", what is meant by "group and consolidated financial statements" in part (c)? Normally the group's financial results are set out in consolidated financial statements. The Bill does not make mention of any other form of group financial statements.

In addition, although this definition of "financial statements" is qualified by the phrase "may reasonably be expected to rely on", it is not clear from this definition for what purpose the affected party would reasonably be expected to "rely on" the financial information before the circular becomes "financial statements" as defined.

Submission: **Remove the word "group" from part (c) of the definition**

Expand on part (d) to provide further clarity

3.1.2 Definition of "state-owned enterprise"

The definition of "state-owned enterprise" includes the following: *"falls within the meaning of "state-owned enterprise" in terms of the Public Finance Management Act, 1999"*

However, "state-owned enterprise" is not a term defined or used anywhere in the PFMA.

Submission: **We suggest that either:**

- **the section be re-worded to: "*falls within the meaning of "national government business enterprise" in terms of the Public Finance Management Act, 1999*" or**
- **the term "state-owned enterprise" be defined in the Bill itself.**

3.2 Chapter 2

3.2.1 Pre-incorporation contracts

We believe that the automatic ratification as contemplated in s21(5) could be unfair. What if someone acted in bad faith and the directors are not even aware of this? There needs to be a mechanism where the company first knows about it - then if they don't act it can be ratified.

The way it currently stands, the board may not even know about a particular contract, and therefore do not act – and the contact would be ratified.

Submission: **Include a provision that this automatic ratification only applies if it is proven that the directors were aware of the pre-incorporation contract and did not act.**

3.2.2 External company

S23(2) – the definition of external company is very onerous. A foreign company would need to meet all eight criteria in order to qualify as an external company.

Submission: **Amend this subsection such that a foreign company would need to meet with one of the criteria instead of all eight.**

The section also needs to include further mention of translation of constitutive documents and how this would work.

3.2.3 Preparer of financial statements

S29(1)(e)(ii) requires the name of the preparer or supervisor of the financial statements to be disclosed.

However, generally, quite a number of people are involved in the preparation and supervision of a set of financial statements. Therefore it is unclear who is envisaged as the "preparer" or "supervisor".

Submission: **Further clarity is needed on who this "preparer" or "supervisor" would be and whether it could be more than one person.**

3.2.4 Definition of future director

S30(8)(e), s30(8)(f), s30(8)(g), all make mention of the term "future director". However, this term is not defined in the Bill.

Submission: **A definition for "future director" should be included in the Bill**

3.2.5 Access to financial statements

How would s31(2)(b) work practically? If the company is not required to produce annual financial statements, how would they have financial statements dated no more than 60 business days before that date?

Submission: **Remove part (b) of the section**

3.2.6 Wholly-owned subsidiaries no longer possible

S 3(1)(b) appears to contradict s 35(3)(b). It will no longer be possible to have wholly-owned subsidiaries as it will be a requirement for companies to have at least one shareholder which is a company not forming part of the group or not controlled by one or more companies within the group. What is the rationale for s 35(3)(b). This will unnecessarily complicate group structures which oftem have wholly owned subsidiaries.

Submission: **Reword this section such that wholly-owned subsidiaries are possible or remove this provision completely.**

3.2.7 Notice of meetings

S 62(3)(d)(i) requires a notice of AGM to include a summarised form of the financial statements to be presented. This forces a company to prepare "summarized financial statements", which contradicts with s29(3) which states that "*a company **may** provide…."*

Submission: **This requirement forces companies to prepare summarized financial statements and should be removed from the Bill.**

3.2.8 Meeting quorum

S64(9) states that after a quorum has been established for a meeting, the meeting may continue as long as at least one shareholder is present. This does not make sense, as the one shareholder that is left will be able to make decisions that affects all of the shareholders.

Submission: **Remove this provision from the section**

3.2.9 Voluntary winding-up of solvent company

S 80(3)(b)(ii) requires a company to submit to the Master a certificate by the company's auditor or a person that meets the requirements for appointment as an auditor, stating that to the best of the auditor's knowledge and belief and according to the financial records of the company, the company appears to have no debts.

Submission: **Further clarity is needed on:**

- **What type of "report/certificate" is contemplated here?**
- **In terms of what standard would this work be performed?**
- **What type of assurance is required?**

3.2.10 Winding up of solvent companies by court order

S81(3)(a) disallows a court to make an order if, before conclusion of the court proceedings, any of the directors have resigned or have been removed, and the court concludes that the remaining directors were not materially implicated in the conduct on which the application was based.

If the directors have resigned, why should the court be precluded from continuing with the liquidation process?

Submission: **Remove this provision. The court proceedings should be able to continue even if the directors have resigned.**

3.3 Chapter 3

3.3.1 Conflict with other Acts

S84(3)(a) provides that where there is a conflict between this Chapter and a provision of the Public Audit Act, this Act would prevail.

Should the Public Finance Management Act (PFMA) not also be included here?

Submission: **The Bill should state what would happen where there is conflict between the Bill and the PFMA**.

3.4 Chapter 4

3.4.1 Advertisements relating to offers

s98(3)(a) states that an advertisement drawing attention to an offer to the public is not required to be filed or registered with an exchange.

Submission: **We do not believe that this is sufficient. As a minimum the offer, if it relates to a listed entity needs to be filed on SENS.**

3.4.2 General restrictions of offers to the public

S99(1)(b) requires a foreign company to file a copy of its Memorandum of Incorporation before an offer to the public is made.

However, a foreign company would not necessarily have a Memorandum of Incorporation.

Submission: **Change this wording "Memorandum of Incorporation" to "founding documents"**

3.4.3 Secondary offers to public

S101(2)(b) requires a written statement to accompany a secondary offer to the public where a prospectus is not available. However, the section does not clarify to whom this should be provided, as well as the timeframe.

Submission: **This section should include a timeframe and further details on who requires this.**

3.5 Chapter 5

3.5.1 Proposals to dispose of all of greater part of assets or undertaking

S112(4) reads that you can't make a major disposal other than at fair market value. However, this conflicts with the concept of BEE deals, which are generally not made at fair market value.

Submission: **Change the wording to read:**
"Any part of the undertaking or assets of a company to be disposed of, as contemplated in this section *for the purposes of determining the size of the transaction*, must be given its fair market value as at the date of the proposal, in accordance with the financial reporting standards"

3.5.2 Required approval for transactions

The minority protection incorporated in S 115(2) could lead to great practical difficulty in implementing transactions. It may also discourage shareholders from having minority shareholders and may even discourage BEE transactions and employee share schemes

Submission: **Therefore, in line with the objectives of minority protection, we suggest that it would be clearer to require a super majority of 85% approval for the transactions contemplated in this section.**

3.5.3 Implementation of amalgamation or merger

S116(3)(b)(ii) states that a notice of amalgamation or merger must be filed, subject to the order of the court. Our concern is that this could take a long time and delay proceedings quite drastically.

Submission: **An alternative to the "court" should be provided in this section, for example, The Companies Ombud. This could be added to the Companies Ombud functions as outlined in s195.**

3.5.4 Application of Takeover Regulations

S118(1)(c)(i) – "*the percentage of issued securities of that company that have been transferred, other than by transfer between or among related or inter-related persons, within the period of 24 months immediately before the date of a particular affected transaction or offer exceeds the percentage prescribed in subsection 2"*

This requirement goes too far, as some years you will fall in and some years you will fall out of the scope. This could mean that some very small companies could also need to go through the TRP.

Submission: **Add further limiting factors to this criterion, for example, companies above a certain annual turnover etc.**

3.6 Chapter 6

3.6.1 Definition of "financially distressed"

Currently, s 128(f) provides that a company is "financially distressed" if

"(i) the company is unable to pay its debts as they fall due and payable, ***and its liabilities exceed its assets****;*
(ii) it appears to be reasonably unlikely that the company will be able to pay all of its debts as they fall due and payable within the immediately ensuing six months; or
(iii) it appears to be reasonably likely that the company will become insolvent within the immediately ensuing six months".

Submission: **We suggest that the bold phrase in part (i) of the definition may not be practical and should be removed. Alternatively, the entire definition should be clarified as to whether the solvency test in s4 bears any relevance to whether a company is financially distressed.**

We also suggest that the 6 month period in part (ii) and (iii) of the definition be increased to 12 months.

3.6.2 Company resolution to begin business rescue proceedings

S129(7) - *If the board of a company has reasonable grounds to believe that the company is financially distressed, but the board has not adopted a resolution contemplated in this section, the board must deliver a written notice to each affected person, setting out the criteria referred to in section 128(2)(f) that are applicable to the company, and its reasons for not adopting a resolution contemplated in this section.*

Submission: **We suggest that it may not be practical to implement s 141(2)(c)(i) as it is uncertain the nature of "voidable transaction" as this term is not defined in section 128. If the meaning of "voidable transaction" should**

be that found in the Insolvency Act, this should be made clear by inserting an appropriately worded definition in section 128.

3.6.3 Duration of business rescue proceedings

S132(2)(c)(ii) - Business rescue proceedings end when –

(a) a business rescue plan has been –

*(i) adopted in terms of Part D of this Chapter, and the supervisor has subsequently filed a notice of **substantial** implementation of that plan.*

We do not understand what "substantial implementation" means, as they have either complied of have not complied.

Submission: **Either define the word "substantial" or replace it with "material" in this section.**

3.6.4 Effect of business rescue on employees and contracts

S136(2) and (3) - *Subject to sections 35A and 35B of the Insolvency Act, 1936 (Act No. 24 of 1936) despite any provision of an agreement to the contrary, during business rescue proceedings, the supervisor may cancel or suspend entirely, partially or conditionally any provisions of an agreement to a which the company is a party at the commencement of the business rescue period, other than an agreement of employment.*
Any party to an agreement that has been suspended or cancelled, or any provision of which has been suspended or cancelled, in terms of subsection (2) may assert a claim against the company only for damages

Submission: **We suggest that powers given to the supervisor to cancel or suspend any provisions of agreement, are excessive and erode the certainty of enforceability of business agreements.**

136(4) - *If liquidation proceedings have been converted into business rescue proceedings, the liquidator is a creditor of the company to the extent of any outstanding claim by the liquidator for any remuneration due for work performed, or compensation for expenses incurred, before the business rescue proceedings began.*

Submission: **We suggest that the remuneration of the liquidator and costs of the liquidation rank equally with the fees and costs of business rescue proceedings.**

3.6.5 Removal and replacement of supervisor

S130(2) - Upon request of an affected person, or on its own motion, the court may remove a supervisor from office on any of the following grounds…

We are concerned with the time delays this could entail. There should be a mechanism where an affected person could request the removal of a supervisor through another regulatory body instead of the court.

Submission: **Consider adding the power of removal to the functions of the Companies Ombud as outlined in s195.**

3.6.6 Qualifications of supervisor

S 138 sets out the qualifications of persons who may be appointed as the supervisor of a company, subject to regulations prescribed by the Minister. The demands on the supervisor, especially in the early stages of a business rescue, are considerable. The supervisor's responsibilities include maintaining stability, conducting his investigations and reporting to affected parties and the court. The range of skills and experience required of the supervisor should not be underestimated as the supervisor is required to have not only significant business acumen, influence and authority but also the financial and legal expertise to manage complex group structures in a business rescue. Currently, very few organizations, let alone individuals, have the necessary breadth of skills and experiences, making the option of a business rescue a costly exercise, especially if the risks of failure of rescue proceedings are also factored into the equation.

Submission: **In prescribing regulations for qualifications for the "supervisor" we suggest that the Minister bears the above in mind.**

3.6.7 General powers and duties of supervisors

S140(1)(c)(i) provides that during a company's business rescue proceedings, the supervisor may remove from office any person who forms part of the pre-existing management of the company.

This seems quite harsh and perhaps would infringe on the Labour Relations Act.

Submission: **Add to this section: "with due cause and in compliance with other relevant employment legislation**"

3.6.8 Investigation of affairs of company

S141(1) states that as soon as practicable after being appointed, a supervisor must investigate the company's affairs etc. This contradicts with s147(1)(a) – *First meeting of creditors* – which states "*within 10 business days after being appointed*"

Submission: **Change wording in one of these sections to ensure no conflict**.

3.6.9 Directors of the company to co-operate with and assist supervisor

S142(2) states that any director who knows where other books and records relating to the company are being kept, must inform the supervisor.

We feel that any person who has this information should disclose it, not only directors.

Submission: **We suggest the following change: "any director *and/or other officer* of a company"**

S142(3)(b) - *" any court, arbitration or administrative proceedings,* ***including enforcement proceedings****, involving the company"*

We do not understand what "including enforcement proceedings" means.

Submission*:* **The term "including enforcement proceedings" needs further clarity, or needs to be reworded.**

s142(3)(f) – "*any creditors and their rights or claims against the company"*

What is meant by "rights of creditors"? Does this include lay byes, HP's, consignment?

Submission: **Reword part (f) to "any creditors, stating any rights that they might have"**

3.6.10 Remuneration of supervisor

S143(2)(a) provides for a contingency fee to the supervisor. We cannot see how contingency fees will work without protracted negotiations. Also, how do they apply to sub-contractors and other parties used by the Supervisor?

Submission: **Remove all reference to "contingency fee" in this section.**

3.6.11 The first meeting of creditors

S 147 requires the supervisor within 10 business days of being appointed, to convene and preside over a first meeting of creditors. In this meeting, the supervisor must inform the creditors whether s/he believes that there is a reasonable prospect of rescuing the company and may receive proof of claims by creditors. We suggest that the 10 business day period may be inadequate for the supervisor to form a view on the prospects of rescue of the business, especially for complex group structures. In addition, as creditors will only be submitting their

claims at this meeting, the supervisor will likely only have a more realistic perspective on the claims of creditors after this meeting.

Submission: **We suggest that the 10 business days be increased to 20 business days.**

3.6.12 Proposal of business rescue plan

S150(2)(a)(iii) requires the business plan to include "*the probable dividend that would be received by creditors, in their specific classes, if the company were to be placed in liquidation"*

Submission: **In the calculation of this probable dividend, the supervisor must take into account his expenses, fees and other costs. This proviso should be added into the section**.

S150(2)(b) – refers to the business rescue plan and what proposals this should include.

Submission: **An additional point should be added – *"(viii) the manner in which creditors security or preference will be affected should they adopt the business plan*"**

S150(2)(c)(iv)(bb) and s155(3)(c)(iii)(bb) requires "*a projected statement of income and expenses for the ensuing three years*".

We feel that his requirement is impractical – who would be able to make this projection?

Submission: **Remove this requirement from the section.**

3.6.13 Consideration of business rescue plan

S152(1)(c) - *At a meeting convened in terms of section 151, the supervisor must provide an opportunity for the employees' representatives to address the meeting.*

Why only the representative? Why can't the employee himself address the meeting if he so chooses?

Submission: **Reword the sections to: "*…the supervisor must provide an opportunity for the employees or employee's representatives…*"**

3.6.14 Compromise between company and creditors

S155(2) and 155(6) - ***The board of a company, or the liquidator*** *of such a company if it is being wound up, may propose an arrangement or a compromise of its financial obligations to all of its creditors, or to all of the members of any class of its creditors, by delivering a copy of the proposal, and notice of meeting to consider the proposal, to –*

(a) every creditor of the company, ***or every member of the relevant class of creditors*** *whose name or address is known to, or can reasonably be obtained by, the company; and….*

Why is this limited to the board or the liquidator? Should give any 3rd party the opportunity to purchase ailing companies?

Submission: **Reword the section to: *"The board of a company, the liquidator, or any other relevant third party…"***

What does "or every member of the relevant class of creditors" mean? We do not understand it. Also, why can't it be extended to include shareholders?

3.7 Chapter 7

3.7.1 Protection of whistle-blowers

S159(4)(a) - A shareholder, director, secretary, prescribed officer or employee of a company, a registered trade union that represents employees of the company or another representative of the employees of that company, a supplier of goods or services to a company, or an employee of such a supplier, who makes a disclosure contemplated in this section –
(a) has qualified privilege in respect of the disclosure

We do not understand what a qualified privilege is? How would this work?

Submission: **Define "qualified privilege" and explain how this would work.**

3.7.2 Application to declare director delinquent or under probation

S162(10)(d)(ii) provides an exemption for a private company. We do not agree with this as even though there may be fewer shareholders, there are certainly other stakeholders such as employees and creditors who require protection.

Submission: **Remove this exemption from the section.**

3.8 Chapter 8

3.8.1 Functions of Companies and Intellectual Property Commission

S187(3) states that the Commission must promote reliability of financial statements. This is quite an onerous obligation for the Commission.

Submission: **Consideration should be given to this function being carried out by the Financial Reporting Standards Council or another regulatory body as was the case in the Corporate Laws Amendment Act, in terms of the Financial Reporting Investigations Panel.**

3.9 Chapter 9

3.9.1 Proof of facts

S221(1)- *In any proceedings in terms of this Act, if it is proved that a false statement, entry or record or false information appears in or on a book, document, plan, drawing or computer storage medium, the person who kept that item must be presumed to have made the statement, entry, record or information, unless the contrary is proved.*

We believe that this is far too wide. If a client does something wrong, and an advisor has a copy of it, the adviser is presumed to have made the wrong statement.

Submission: **We suggest that this be amended**

3.10 Schedules

3.10.1 Schedule 7

Paragraph 6(1) - *Par value of shares, treasury shares, capital accounts and share certificates*
We do not have a legal concept of "treasury shares" in South Africa. What is this referring to?

Submission: **Treasury shares should be defined in the Bill**

Paragraph 7(6) - *Approval of any distribution, financial assistance,* ***insider share issues****, or options, are subject to this Act, even if any such action had been approved by a company's shareholders before the effective date, despite anything to the contrary in the company's Memorandum of Incorporation.*

What is meant by "insider share issues"?

Submission: **Insider share issues should be defined in the Bill**

4 PART C – Editorial Comment

4.1 Chapter 2

4.1.1 Criteria for names of companies

S11(3)(c)(ii) - *A company name, irrespective of its form or language, must end with one of the following expressions, as appropriate for the category of the particular company:*

(i) The expression "Proprietary Limited" or its abbreviation "(Pty) Ltd", in the case of a private company.

As the Bill currently reads, there are brackets around the abbreviated (Pty) but not around the full word (Proprietary)

Submission: **Include brackets around "Proprietary" in order to be consistent with current practice.**

4.1.2 Registered office

S23 - This section is titled "registered office" but deals mostly with "external company"

Submission: **We suggest this section be split between "registered office" and "external company"**

4.2 Chapter 4

4.2.1 Definition of expert

In the definition of expert (s95(1)(d)), why is part (i) necessary? Specific people are mentioned, but the list is not exhaustive. For example, lawyers are not specifically mentioned. Also, surely part (ii) would be sufficient to cover all of these people mentioned in (i).

Secondly, part (ii) is very wide…"any person who professes"

Submission: **Suggest reword the definition to read: "any person who has extensive knowledge or experience, or exercises special skill which gives or implies authority to a statement made by that person**

4.2.2 Public offerings of company securities

S95(1)(k) - *"registered prospectus" means a prospectus that complies with this Act and –*

*(i) in the case of listed securities, has been approved by the relevant exchange; **or***

(ii) otherwise has been filed

Submission: **Should this "or" not be an "and"? As in the past, both were required**.

4.2.3 Standards for qualifying employee share schemes

S97(1) - *An employee share scheme qualifies for exemptions contemplated in sections 41(2)(d), **44(2)(c)(i)** or **45(2)(c)(i)**, this chapter or Schedule 3, if …*

The references in bold are not correct. They do not exist in the Bill.

Submission: **Correct these references or remove them**

4.2.4 Responsibility for untrue statements in prospectus

What is meant by "responsibility" as opposed to "liability" in the sections 104, 105 and 106?

Submission: **Consistent terminology needs to be used in these sections**

4.3 Chapter 6

4.3.1 Duration of business rescue proceedings

S132(1)(c) - *During the course of liquidation proceedings, or **proceedings to enforce a security interest**, a court makes an order placing the company under supervision*

*S131(7) – "During the course of liquidation proceedings, or **proceedings to enforce any security against the company**…"*

Inconsistent terminology is used in these two sections:
"proceedings to enforce any security against the company" vs

"proceedings to enforce a security interest"

Submission: **Consistent terminology should be used**

4.3.2 General moratorium on legal proceedings against company

S133(1) - *During business rescue proceedings, no legal proceeding, including enforcement action, against the company, or in relation to any property belonging to the company, or lawfully in its possession, may be commenced or proceeded within in any forum, except-*

(a) with the written consent of the supervisor;
(b) with the leave of the court and in accordance with any terms the court considers suitable;
(c) as a set-off against any claim made by the company in any legal proceedings, irrespective whether those proceedings commenced before or after the business rescue proceedings began;
(d) criminal proceedings against the company or any of its directors of officers; or
(e) proceedings concerning any property or right over which the company exercises the powers of a trustee.

Submission: **Needs the word "or" after (a), (b) and (c)**

4.3.3 Protection of property interests

S134(3)(a) refers to obtaining the prior consent of that other person.

Submission: **We suggest this be strengthened as follows: "obtain the prior *written* consent"**

4.3.4 Proposal of business rescue plan

S150(2)(b)(v) - *The order of preference in which the proceeds of property will be applied to pay creditors if the business rescue plan is adopted.*

This is a repetition of 150(2)(a)(ii) – "*a complete list of the creditors of the company when the business rescue proceedings began, as well as an indication as to which creditors would qualify as secured, statutory preferent and concurrent in terms of….."*

Submission: **Remove s150(2)(b)(v)**

4.3.5 Consideration of business rescue plan

S152(5) - *The company, under the direction of the supervisor, must take all necessary steps to (a) attempt to satisfy any conditions on which the business rescue plan is contingent…*

Submission: **Remove the words "attempt to"**

4.3.6 Failure to adopt business rescue plan

S153(1)(b)(ii) – refers to a value "*independently and expertly determined"*

What does "independently and expertly determined" mean?

Submission: **Suggest reword to "a value determined by an independent expert"**

4.3.7 Compromise between company and creditors

S155(3)(a)(ii) - *A complete list of the creditors of the company as of the date of the proposal, as well as an indication as to which creditors would qualify as secured, statutory preferent and concurrent in terms of the laws of insolvency, and an indication of which of the creditors have proved their claims*

Submission: **Add the following to the end of this sentence…"*in the case of a liquidation only*"**

4.4 Chapter 7

4.4.1 Relief from oppressive or prejudicial conduct

S163(2)(d) talks of a "unanimous shareholder agreement" What is this and why is the court power limited to this and not applicable to all shareholder agreements?

Submission: **We suggest reword this to "any agreement amongst shareholders"**