PRICEWATERHOUSECOOPERS

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CONFIDENTIAL

PricewaterhouseCoopers Inc ("PwC")

Comments on:

THE COMPANIES BILL, 61 OF 2008

August 2008

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F Tonelli Chief Operating Officer
E R MacKeown Director – Managing Johannesburg office
The Company's principal place of business is at 2 Eglin Road, Sunninghill where a list of directors' names is available for inspection.
PricewaterhouseCoopers Inc is an authorised financial services provider.
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Ms Marcelle Williams
Committee Secretary
Parliamentary Monitoring Group

Email: mawilliams@parliament.gov.za

7 August 2008

Dear Ms Williams

Comment on the Companies Bill, 2008

PricewaterhouseCoopers (PwC) appreciates the opportunity to comment on the Companies Bill, 2008.

PwC welcomes the publication of the revised Companies Bill, 2008 as it replaces the ageing 1973 Companies Act. The Bill promotes transparency and corporate governance and observes and supports international best practice. We would like to make use of the opportunity to provide additional comment on the revised Bill including matters requiring further consideration before the Bill is finalised.

Considering the importance of this piece of legislation, due to its far reaching impact on the South African economy and the volume of information contained in the Companies Bill, it is unfortunate that a comment period of only 6 weeks was allowed. Due to the deadline we have focused our comment letter on major points of principle and editorial comments that have come to our attention.

Our comments are set out as follows:

1. Matters of principle
2. Detailed comments per section

If you would like to discuss our comments further, please do not hesitate to contact Suresh Kana at (011) 797-4312.

Yours faithfully

PricewaterhouseCoopers Inc

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F Tonelli — Chief Operating Officer
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1. MATTERS OF PRINCIPLE

Note: The following convention is used throughout this submission in respect of our recommended changes to the Bill:

Italics - Words in *italics* indicate extracts from the Draft Bill.
Bold – Words in **bold** indicate emphasis.
~~Strikethrough~~ - Words in strikethrough indicate deletions we are proposing in respect of the Draft Bill.
_____ - Words underlined indicate insertions we are proposing to the Draft Bill.

1.1 Financial Reporting Standards Council (FRSC) to be the financial reporting standard-setter for companies in South Africa

Background

The Companies Bill, 2008 (the Bill) states the following:

"Section 29
(4) Subject to subsection (5), the Minister, after consulting the Council, may make regulations prescribing—
(a) financial reporting standards contemplated in this Part; or
(b) form and content requirements for summaries contemplated in subsection (3).

(5) Any regulations contemplated in subsection (4)—
(a) must promote sound and consistent accounting practices;
(b) in the case of financial reporting standards, must be consistent with the International Financial Reporting Standards of the International Accounting Standards Board or its successor body..."

"Section 204. The Financial Reporting Standards Council must—
(a) receive and consider any relevant information relating to the reliability of, and compliance with, financial reporting standards, including information from the Commission as contemplated in section 187(3)(b);
(b) advise the Minister on matters relating to financial reporting standards; and
(c) consult with the Minister on the making of regulations establishing financial reporting standards, subject to the requirements set out in section 29(5)."

Issue/motivation

The cornerstone of high-quality financial statements is high-quality financial reporting standards. International Financial Reporting Standards (IFRS), an internationally recognised set of accounting standards, is developed by the International Accounting Standards Board (IASB), an autonomous standard-setting body, after following due process which includes extensive research and wide consultation.

To ensure investor confidence in South African companies, financial reporting standards should be set by an autonomous body, following a process that is comparable to that followed by the IASB. The Bill proposes a model in terms of which the FRSC would only fulfil an advisory role to the Minister. A standard-setting body should be able to react

quickly to the voluminous changes to IFRS to ensure that financial reporting standards in South Africa are continually aligned with the international standards.

In contrast to the Bill's proposals, the Corporate Laws Amendment Act (CLAA) empowers the FRSC to establish financial reporting standards.

Proposal

We support the financial reporting standard-setting model currently contained in the CLAA and propose that the FRSC should be empowered to independently set financial reporting standards. This will ensure that standards in South Africa are updated timeously to be in line with IFRS.

1.2 Investigating and addressing contraventions of financial reporting standards

Background

The Bill states the following:

"Section187

(2) Other than with respect to matters within the jurisdiction of the Takeover Regulation Panel, the Commission must enforce this Act, by, among other things,—...
(c) receiving or initiating complaints concerning alleged contraventions of this Act, evaluating those complaints, and initiating investigations into complaints;...

(3) The Commission must promote the reliability of financial statements by, among other things—
(a) monitoring patterns of compliance with, and contraventions of, financial reporting standards"

Issue/motivation

One of the objectives of the Bill is the encouragement of transparency and high standards of corporate governance. Monitoring of compliance with the Act forms an important part of achieving this goal.

The proposed newly established Companies and Intellectual Property Commission (the Commission) is tasked with, amongst others, monitoring patterns of compliance with financial reporting standards. Section 187(3) read with section 187(2) indicates that complaints concerning instances of alleged contraventions of financial reporting standards would be received and evaluated by the Commission, who must then initiate investigations into the complaints. The Bill, however, does not specify the format or the mechanism of such investigations, leaving this section open for inconsistent and possibly inappropriate application. The Bill also does not deal with remedies where contravention of financial reporting standards is identified. The repercussions of contravention of financial reporting standards are therefore not apparent.

In our view, alleged contravention of financial reporting standards should be investigated by a panel of financial reporting standards experts - financial reporting standard issues are

more often than not of a highly technical nature. To ensure timeous and effective conclusions of such investigations and the protection of the rights of both the aggrieved party(ies) and the company, the composition of the panel and the process to be followed should be transparent and predetermined. Where it is concluded that financial reporting standards were contravened, the remedies available for rectification should also be clear from legislation. For these reasons, we support the provisions of the CLAA (sections 440W to 440 GG) on the Financial Reporting Investigations Panel (FRIP).

The meaning of "monitoring patterns of compliance with financial reporting standards" is not clear. We do not interpret this section to indicate, for example, the proactive reviewing of financial statements by an independent body for compliance with financial reporting standards.

Proposal

The provisions of the Corporate Laws Amendment Act regarding the Financial Reporting Investigations Panel should be reintroduced in the Bill.

The Bill should include measures for a mechanism to proactively review financial statements for non-compliance with financial reporting standards.

1.3 Limitation of auditor's liability

Background

The Bill does not contain any measures dealing with the limitation of auditor's liability as a result of negligence.

Issue/motivation

Global research studies indicate that claims for damages against auditors from both clients and from third parties resulting from auditors' negligence are increasing to the extent that it threatens the sustainability of the auditing profession.

The United Kingdom (UK) and the European Union (EU) recently concluded that it is necessary to introduce measures to limit auditor's liability in the interest of:

- encouraging the growth of alternative audit firms in a competitive market
- ensuring the sustainability of the audit profession in view of the increasing trend of litigation and lack of sufficient insurance cover in this sector
- protecting capital markets by ensuring that audit firms remain available to carry out audits of companies

<u>Recent measures introduced in United Kingdom (UK)</u>

The UK introduced measures to limit Auditor's Liability through changes to the UK Companies Act in 2006.

UK law now allows auditors to limit liability for professional negligence by agreement. For agreements to be effective, it must be approved by the shareholders.

On 30 June 2008, the Financial Reporting Council (FRC) published guidance on the use of agreements between companies and their auditors to limit the auditor's liability, as provided for under the Companies Act 2006.

The guidance is available at the following link:
http://www.frc.org.uk/images/uploaded/documents/FRC%20ALLA%20Guidance%20June%202008.pdf
The guidance is attached as an appendix to this submission.

Recent measures introduced by the European Commission (EC)

The European Commission recently issued a Recommendation concerning the limitation of auditors' civil liability in the European Union (EU).

The Recommendation leaves it to Member States to decide on the appropriate method for limiting liability, and introduces a set of key principles to ensure that any limitation is fair for auditors, the audited companies, investors and other stakeholders.

In-depth research and extensive consultation in the EU concluded that:

- unlimited liability of auditors combined with insufficient insurance cover is no longer tenable
- unlimited liability is a potentially huge problem for (European) capital markets and for auditors working on an international scale
- the current conditions are not only preventing the entry of new players in the international audit market, but are also threatening existing firms
- in a context of high concentration and limited choice of audit firms, this situation could lead to damaging consequences for (European) capital markets."

The EU Recommendation proposes the following three examples as possible methods to limit auditor liability, but any other equivalent method might be used:

- establishment of a maximum financial amount or of a formula allowing for the calculation of such an amount;
- establishment of a set of principles by virtue of which a statutory auditor or an audit firm is not liable beyond its actual contribution to the loss suffered by a claimant and is accordingly not jointly and severally liable with other wrongdoers;
- provisions allowing any company and the statutory auditor or audit firm to determine a limitation of liability in an agreement.

The selected method should best suit the Member State's legal environment.

The recommendation is available at:
http://ec.europa.eu/internal_market/auditing/liability/index_en.htm
The guidance is attached as an appendix to this submission.

Measures introduced in South Africa

Section 46(8) the Auditing Profession Act, 2005 (Act 26 of 2005) states that: "*A registered auditor may not through an agreement or in any other way limit or reduce the liability that such auditor may incur in terms of this section*".

In line with trends in the UK and the EU, we are of the view that measures are necessary to limit the liability of Registered Auditors resulting from negligent performance of auditors' duties. These liability reform measures should be dealt with in both the Auditing Profession Act, 2005 and the Companies Act.

Proposal

The Companies Act should enable the limitation of auditors' liability to the extent relevant and possible, for example, the Companies Act should contain provisions allowing any company and the statutory auditor or audit firm to determine a limitation of liability in an agreement, subject to shareholder's approval and subject to the requirements of the Auditing Profession Act, 2005 (as amended from time to time) – similar to the recently introduced UK measures stated above.

1.4 All companies should be required to prepare annual financial statements

Background

The Bill states the following:

"Section 30(1) Each year, a company must prepare annual financial statements within six months after the end of its financial year, or such shorter period as may be appropriate to provide the required notice of an annual general meeting in terms of section 61(7), unless-

...

(b) subject to subsection (2) and (3), it is –
(i) a personal liability company; or
(ii) a private company, and –
(aa) one person holds, or has all the beneficial interest in, all of the securities issued by the company; or
(bb) every person who is a holder of, or has a beneficial interest in, any securities issued by the company is also a director of the company
unless the company has only one director, and that director is a person contemplated in section 69(12)"

Issue/motivation

We do not agree that the exemption from certain of the Bill's governance requirements should extend to the non-preparation of financial statements for certain companies. We

consider the most basic level of governance and financial discipline for all companies to be the requirement to prepare annual financial statements, which will promote accurate and complete accounting records.

One of the fundamental principles of regulation and this Bill in particular, is the protection of companies' stakeholders. While owner managed entities are currently excluded from the requirement to prepare annual financial statements, their operations will impact on other stakeholders such as employees or suppliers.

We concur that entrepreneurship should be developed and encouraged and that the costs associated with maintaining a company should be reduced, but suggest that the costs of compliance be considered in relation to all legislation impacting on these entities and not only this Bill.

The Bill proposes to create a capital maintenance regime based on solvency and liquidity which depends on the availability of annual financial statements. Examples of such affected sections in the Bill include:

- determining whether financial assistance can be provided for the subscription of securities (S44);
- loans or other financial assistance to directors (S45);
- distribution of dividends (S46);
- determining director and prescribed officer liability (S77).

Proposal

In our view, the most basic level of governance and financial discipline that should be required of all companies is a requirement to prepare financial statements on an annual basis. Financial discipline is considered to be a cornerstone to the growth of any economy and organisation.

1.5 Independent Regulatory Board for Auditors (IRBA) to develop reviews to be performed on financial statements

Background

The Bill states the following:

"Section 30(10) The Minister may make regulations, including different requirements for different categories of companies, prescribing –....

(b) the manner, form and procedures for the conduct of an independent review other than an audit, as contemplated in subsection (4)(b)(ii)(bb), as well as the professional qualifications, if any, of persons who may conduct such reviews."

Issue/motivation

One of the goal statements included in the Memorandum on the Objects of the Companies Bill, 2008 proposes that company law be enforced though appropriate bodies and mechanisms, either existing or newly incorporated.

The Independent Regulatory Board for Auditors (IRBA) currently acts as the auditing standard setter in South Africa, amongst its other functions. IRBA has the necessary resources, knowledge and experience to assist the Minister in determining the manner, form and procedures for the conduct of an independent review. Through its accreditation of professional bodies in South Africa, IRBA would also be able to assist the Minister in determining the professional qualifications of persons who may conduct such reviews.

Proposal

The Bill should task IRBA to assist the Minister with the development of the manner, form and procedures for the conduct of an independent review in terms of the Bill.

1.6 Requirement to have one shareholder, which is not part of the same group of companies, should be removed

Background

The Bill states the following:

"Section 35(3) A company –
- *(a) may not issue shares to itself; and*
- ***(b) must at all times have at least one share issued to at least one person other than –***
  - ***(i) a company that is part of the same group of companies;** or*
  - ***(ii) a juristic person that is controlled by one or more companies within the same group of companies."***

Issue/motivation

This section implies that one company can no longer hold 100% of the shares of another company.

We question whether this was the intention of the Bill as this could have a negative impact on foreign investment in the Republic, and could have a significant impact on thousands of companies, wholly owned by groups of companies. Many foreign companies form wholly owned subsidiaries in South Africa through which they conduct business. This section would imply that they would need to have at least one shareholder outside their group of companies, which in many cases would be undesirable and sometimes impractical.

Many South African groups also use wholly owned subsidiaries to conduct business for various reasons. Wholly owned subsidiaries are also a very common phenomenon in the international economic environment and may be critical to qualify for exemptions, for example, the exemption from the preparation of consolidated financial statements and specific treatment in other legal jurisdictions.

This requirement introduces unnecessary complexity into a group structure and may have a compliance cost implication, for example, the requirement to maintain a share register

and costs associated with the transferring of shares. It may be challenging for companies to find an acceptable shareholder to fulfil this role.

Proposal

We recommend that section 35(3)(b) be revised so that it requires every company to have at least one issued share, but that it does not place any limitations on whom the holder of such a share may be.

1.7 Subsidiaries of public companies should be required to appoint an auditor and their annual financial statements should be subject to audit

Background

A public company with subsidiaries is required to prepare both company annual financial statements and group/consolidated annual financial statements. In terms of the definitions to the Bill, "*financial statement*" includes group and consolidated financial statements in the case of a group of companies. Both company and group/consolidated financial statements are required to be audited in terms of Section 30(4)(a).

Issue/motivation

The subsidiaries consolidated into a group, with a public company as the ultimate holding company, may fall within the categories of companies not required to be audited.

The public company auditor would be required to audit the public company and all its subsidiaries to enable the auditor to issue an audit report on the consolidated group of companies.

Proposal

Subsidiaries of public companies should appoint an auditor and their financial statements should be subject to audit.

2. DETAILED COMMENTS PER SECTION

Chapter 1 – Interpretation, purpose and application

2.1 Section 1: Definitions

"Financial statements" and "Annual financial statements"

Background
Section 1 of the Bill defines "*financial statements*" as including:

"(a) annual financial statements and provisional annual financial statements;
(b) interim or preliminary reports;
(c) group and consolidated financial statements in the case of a group of companies; and
(d) financial information in a circular, prospectus or provisional announcement of results, that an actual or prospective creditor or holder of the company's securities, or the Commission, Panel or other regulatory authority, may reasonably be expected to rely on"

Issue/Motivation
The term "*financial statements*" has been defined by reference to other documents, for example, financial statements are defined to include "*annual financial statements*".

The Bill does not, however, contain a definition of annual financial statements.

Proposal

"Annual financial statements" and "financial statements" should be defined more precisely by reference to financial reporting standards, as this will ensure that the definitions remain relevant as the standards evolve.

"Group of companies"

Background
Section 1 of The Bill defines "*group of companies*" as follows:

"means two or more companies that are related or inter-related"

Issue/Motivation
The definition of a "*group of companies*", when read with section 2 "*related and inter-related persons, and control*" will now include companies held by related individuals but which are not otherwise related.

The practical implications of section 2 are that companies controlled by distant relations (or even where such persons are bound only by affinity) will be considered a group.
The mere fact that such "*related persons*" are "*able to control*" a business, may mean that those companies are to be considered a group, even where the parties involved have no intention to exercise such control in concert.

This wide definition of a group and related and inter-related persons, varies from terminology used internationally and will inevitably complicate the interpretation and implementation of the Bill, for example, the solvency and liquidity test requires that consolidated assets and liabilities of the group be taken into account where a company forms part of a group.

Proposal

"*Group of companies*" should be redefined to align the term with financial reporting standards.

The drafters should further redefine "*related and inter-related persons and control*" to ensure that these terms do not conflict with financial reporting terminology, whilst still maintaining the intended implications for other sections of the Bill, that do not affect financial reporting aspects.

2.2 Section 2: Related and inter-related persons, and control

Background
Section 2(1)(a)(ii) of The Bill states:

"2 (1) For all purposes of this Act –
(a) an individual is related to another individual if they –...
(ii) are separated by no more than three degrees of natural or adopted consanguinity or affinity"

Issue/Motivation
We consider that "*three degrees of natural or adopted consanguinity or affinity*", of related persons, is too broad to be practical or useful.

The wide ambit of this definition may result in the unintentional formation of a "*group of companies*" as discussed above.

It is not clear what is meant by the term "*affinity*".

Proposal

It is suggested that only one degree of consanguinity is applied (i.e. immediate family), and that the reference to affinity be removed or redefined.

2.3 Section 4: Solvency and liquidity test

Background
In section 4, the Bill introduces a new capital maintenance regime, based on solvency and liquidity.

Issue/Motivation
The solvency and liquidity test should be assessed and applied at an individual company level and therefore the current reference to "*consolidated assets/liabilities*" "*if the company is a member of a group of companies*" appears incorrect.

Furthermore, the company should satisfy the solvency and liquidity test only where assets, fairly valued **exceed** liabilities and not where these are equal.

This test is required to be performed on financial information based on "*accounting records that satisfy the requirements of section 28*" and "*financial statements that satisfy the requirements of section 29*". Thus, such financial information must "*satisfy financial reporting standards*".

The fair value of the assets of a company should not be "based on", which we interpret as meaning "restricted to" the financial information recorded in the accounting records or financial statements. Financial reporting standards do not mandate the recognition of all assets at fair value (for example, items of property, plant and equipment are permitted to be recognised at historical cost less accumulated depreciation). Furthermore, certain items which do not meet the recognition criteria of financial reporting standards would be prohibited from being recognised as assets. For example, certain intangible assets will not meet the recognition criteria of financial reporting standards, but may be relevant to the determination of the fair value of the company.
Restricting the financial information to that which is recorded in the accounting records or the financial statements may result in an incorrect valuation.

The Bill should not permit the use of "*any other valuation,*" considered reasonable per subsection 4(2)(b)(ii), as this may create confusion.

Proposal

It is proposed that section 4 is re-written as follows:

"4(1) For any purposes of this Act, 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 consolidated assets of the company~~, as fairly valued, ~~equal to or~~ exceed the liabilities of the company ~~or, if the company is a member of a group of companies, the consolidated liabilities of the company,~~ as fairly valued; and
(b) it appears that the company will be able to pay its debts as they become due in the ordinary course of business for a period of –
(i) 12 months after the date on which the test is considered; or
(ii) in the case of a distribution contemplated in paragraph (a) of the definition of 'distribution' in section 1, 12 months following that distribution.
(2) For the purposes contemplated in subsection (1)-
~~(a) any financial information to be considered concerning the company must be based on—~~
~~(i) accounting records that satisfy the requirements of section 28; and~~
~~(ii) financial statements that satisfy the requirements of section 29;~~
~~(b)~~ (a) subject to paragraph (b)~~(c)~~, the board or any other person applying the solvency and liquidity test to a company –

(i) must consider a fair valuation of the company's assets and liabilities, including any reasonably foreseeable contingent assets and liabilities, irrespective of whether or not arising as a result of the proposed distribution, or otherwise; and
~~*(ii) may consider any other valuation of the company's assets and liabilities that is reasonable in the circumstances; and*~~
~~*(c)*~~ *(b) unless the Memorandum of Incorporation of the company provides otherwise, a person applying the test in respect of a distribution contemplated in paragraph (a) of the definition of 'distribution' in section 1 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 upon liquidation are superior to the preferential rights upon liquidation of those receiving the distribution."*

2.4 Part B: Purpose and application

Background
The Bill does not include a general "*application*" section setting out the ambit of the Bill and indicating to whom the Bill will apply.

Issue/Motivation
Although it may be deduced from the provisions of the Bill, it is proposed that the Bill clearly defines its application.

Proposal

It is proposed that "*Part B - Purpose and application*" include a general application section which clearly indicates the scope and ambit of the Bill, for example, when and to what extent the Act will apply to foreign and external companies.

Chapter 2 – Formation, administration and dissolution of companies

2.5 Section 19: Legal status of companies

Background
Section 19(2) of The Bill states the following:

"(2) A person is not, solely by reason of being an incorporator, shareholder or director of a company, liable for any liabilities or obligations of the company except to the extent that this Act or the company's Memorandum of Incorporation provides otherwise"

Issue/Motivation
This statement of limited liability is to be welcomed. However, it is proposed that the statement be extended to include supervisors and liquidators.

Proposal

It is proposed that the statement of limited liability be extended to include protection for supervisors and liquidators of the company, whilst they act in that capacity.

2.6 Section 22: Reckless trading prohibited

Background
Subsection 22(1) of The Bill states the following:

"(1) A company must not –
- *(a) carry on its business recklessly, with gross negligence, with intent to defraud any person or for any fraudulent purpose; or*
- *(b) trade under insolvent circumstances"*

Issue/Motivation

The section above does not clarify how this section relates with the business rescue provisions of Chapter 6.

Proposal

It is proposed that the following wording is included in section 22:
"*trade under insolvent circumstances*, except to the extent that it is compliant with Chapter 6"

2.7 Section 23: Registered office

Background
Section 23 of The Bill states the following:

"(2) For the purposes of subsection (1), and the definition of "external company" as set out in section 1, a foreign company is not to be regarded as "conducting business, or non-profit activities, as the case may be, within the Republic", unless that foreign company is engaged in, or has engaged in, all or more than the following activities within the Republic:
- *(a) Maintaining, defending or settling any legal proceedings;*
- *(b) holding a meeting or meetings of the shareholders or board of the foreign company, or otherwise conducting the internal affairs of the company;*
- *(c) establishing or maintaining any bank or other financial accounts;*
- *(d)establishing or maintaining offices or agencies for the transfer, exchange or registration of the foreign company's own securities;*
- *(e)creating or acquiring any debts, mortgages or security interests in any property;*
- *(f)securing or collecting any debt, or enforcing any mortgage or security interest.*
- *(g)acquiring any interest in any property; and*
- *(h)conducting an isolated transaction that is not one in a course of repeated transactions of a similar nature."*

Issue/Motivation
In terms of section 23 an external company only needs to register if it conducts eight or more listed activities in South Africa. This makes it relatively easy for a foreign company that operates in South Africa to escape registration, for example, a company may engage in all of the activities listed in section 23(2)(a – f) and (h) but may not have "acquired any

interest in any property" per subsection (g) and thus will not be required to register. This scenario does not appear to achieve the objective of the section.

Proposal

It is proposed that section 23 be reconsidered to determine whether the list of activities meets the objectives of the section. This list of activities should be tested against various hypothetical situations to determine whether the desired result is achieved.

2.8 Section 24: Form and standards for company records

Background
Section 24 of The Bill states the following:

"(1) Any documents, accounts, books, writing, records or other information that a company is required to keep in terms of this Act or any other public regulation must be kept—...
(b) for a period of ***seven years****, or any longer period of time specified in any other applicable public regulation, subject to subsection (2)".*

Issue/Motivation
While we agree with the introduction of retention of records in electronic format, we are concerned that the requirement to maintain certain documents for seven years is too short.

The documents listed in this section may have relevance for much longer periods, and, where a company is in existence for many years it may be necessary to refer to or rely on such documents. These records provide evidence of the rationale and basis behind the decision and the decision-makers. This 'evidence' may be relied upon in a variety of scenarios, for example, where legal action is instituted against a company and its directors. Permitting the destruction of company records after a period of seven years, would allow for the deletion of the company's history.

The present legislation requires special resolutions, notices of general meetings and minutes to be retained by the company indefinitely and as no other statute or regulation specifically deals with company records, the Companies Act is considered to be the primary regulatory mechanism.

Proposal

It is proposed that the section be amended to provide for the retention of the following documents until deregistration/liquidation of the company:
- notice and minutes of all shareholder meetings, including all resolutions adopted and any document made available by the company to the holders of securities in relation to each such resolution; and any document made available to the company to the holders of securities in relation to each such resolution.
- copies of any written communications sent generally by the company to all holders of any class of the companies securities
- minutes of all meetings and resolutions of directors, or directors' committees or the audit committee.
- memorandum of incorporation

- rules as defined in the Bill

2.9 Section 27: Financial year of a company

Background
Section 27 of The Bill states the following:

"(4) The board of a company may change its financial year end at any time, by filing a notice of that change, but—...
(c) the date as changed may ***not*** *result in a financial year ending* ***more than 15 months*** *after the end of the preceding financial year".*

Section 61 of The Bill states the following:

"(7) A public company must convene an annual general meeting of its shareholders—...
(b) thereafter, once in every calendar year, but ***no more than 15 months*** *after the date of the previous annual general meeting, or within an extended time allowed by the Companies Ombud, on good cause shown."*

Issue/Motivation
Subsection 27(4)(c) limits the period between year-ends to 15 months. This is mirrored in 61(7)(b) which requires an annual general meeting no later than 15 months after the last one. These provisions are impractical, despite the fact that it allows for more recent financial information. For example if a company were legally obliged to change its year end from December to April, May or June, one would end up with having to prepare annual financial statements for 4-6 months to get back to a normal cycle of 12 months. In addition, it would become impossible for such a company to comply with what may well be a legal requirement elsewhere, in only one year.

Proposal

It is proposed that the period of 15 months be changed to 18 months, as is contained in the current Act. This would still allow companies to present, after 12 months, should they deem it appropriate.

It would further remove a legal impediment to what may be a legal requirement elsewhere, such as the fact that (newly acquired) subsidiaries may have to have year-ends that are coterminous with their holding companies.

Drafters need to note that 15 months is pervasive in the Bill and needs to be reviewed throughout.

2.10 Section 28: Accounting records

Background
Section 28 of The Bill states the following:

"(1) A company must keep accurate and complete accounting records in one of the official languages of the Republic—...

(b) including any prescribed accounting records, which must be kept in the prescribed manner and form".

Issue/Motivation
The Bill does not stipulate the prescribed records or their manner and form.

Proposal

In the interests of transparency and clarity, we propose that the minimum prescribed records be stipulated in The Bill. We would expect these records, be similar to the requirements in section 284 of the current Companies Act and section 56 of the Close Corporations Act.

2.11 Section 29: Financial statements

Background
Section 29(1) provides that any financial statements must-

"(a) satisfy the financial reporting standards as to form and content;
(b) present fairly the state of affairs and business of the company, and explain the transactions and financial position of the business of the company;"

Issue/Motivation
Subsection 29(1)(b) currently contains no reference to financial reporting standards. This drafting would make enforcement of financial reporting standards difficult, as any issues of non-compliance could be defended by the offender on the basis that they believe it is a '**fairer**' position.

Proposal

That S29(1)(b) be deleted and that S29(1)(a) be reworded as follows:
"present fairly the state of affairs and business of the company in terms of financial reporting standards;"
As a result of the changes above, S29(1)(c) should be deleted as this is now unnecessary.

2.12 Section 29: Financial statements

Background
Section 29(1) requires the financial statements to -

"(d) set out the date on which the statements were produced, and the accounting period to which the statements apply;..."

Issue/Motivation
The word "*produced*" is not used elsewhere in The Bill and the wording should be consistent with other relevant sections, for example the approval of financial statements.

Proposal

We propose that the word "*produced*" be replaced with published as published is determined to mean "made publicly available".

2.13 Section 29: Financial statements

Background
Section 29(1) requires the financial statements to -

"(e) bear, on the first page of the statements, a prominent notice indicating—
(i) whether the statements—
(aa) have been audited in compliance with any applicable requirements of this Act;
(bb) if not audited, have been independently reviewed in compliance with any applicable requirements of this Act; or
(cc) have not been audited or independently reviewed;..."

Issue/Motivation
Subsection 29(1)(e), including (i)(aa)-(cc), requires the first page of the financial statements to contain a prominent notice indicating whether the statements have been audited, independently reviewed or not audited. Whilst we agree there should be a prominent notice of this fact, we do not agree that it is necessary for this detail to be displayed on the first page.

Proposal

We propose that the reference to "*first page*" be deleted.

Background
Section 29 further requires -

"(1)(e)(ii) the name, and professional designation, if any, of the individual who prepared, or supervised the preparation of, those statements."

"(3)(b) the first page of the summary must bear a prominent notice—...
(iii) stating the name, and professional designation, if any, of the individual who prepared, or supervised the preparation of, the financial statements that it summarises;"

Issue/Motivation
The subsections above require the name and professional designation of the individual who prepared the financial statements to be disclosed. This may be misleading since the financial statements are the responsibility of the board of directors, and in addition preparation is often a team effort with no single person "preparing" them.

Proposal

We propose that subsection 29(1)(e)(ii) and subsection 29(3)(b)(iii) be deleted.
The financial statements or director's report should further state the name of the

individual director/s who take/s responsibility for or authorizes the financial statements.

2.14 Section 29: Financial statements

Background
Subsections 29(4) and (5) refer to financial reporting standards and specify that "*financial reporting standards must be consistent with the International Financial Reporting Standards of the International Accounting Standards Board or its successor body*".

Issue/Motivation
This reference should be expanded to state that financial reporting standards include interpretations of financial reporting standards issued by the International Accounting Standards Board as well as those issued by the Council for specific local issues.

Proposal

It is proposed that both Subsections 29(4) and (5) be amended to state that "financial reporting standards include interpretations of financial reporting standards".

2.15 Section 29: Financial statements

Background
Subsection 29(5)(b) states that "*financial reporting standards must be consistent with the International Financial Reporting Standards of the International Accounting Standards Board or its successor body*".

Issue/Motivation
We support the establishment of differential financial reporting standards, for example, alternative financial reporting standards for non-public entities, and do not consider that these financial reporting standards must be *consistent* with International Financial Reporting Standards.

Proposal

We propose that section 29(5) be redrafted to clarify the intended position.
To assist in achieving this clarity we recommend the following amendments:

"*29 (5) Any regulations contemplated in subsection (4)—*
(a) must promote sound and consistent accounting practices; and
(b) in the case of financial reporting standards,
(i) must be consistent with the International Financial Reporting Standards of the International Accounting Standards Board or its successor body; ~~and~~ or
~~(c)~~(ii) The Council may establish different standards applicable to—
~~(i)~~ (aa) profit and non-profit companies; and
~~(ii)~~ (bb) different categories of profit companies".

2.16 Section 30: Annual financial statements

Background
Subsection 30(5)(d) requires the annual financial statements to be presented to the first shareholders' meeting after the financial statements have been approved by the board.

Issue/Motivation
The next shareholders' meeting may be required for a specific purpose, other than the approval of the financial statements, and it may thus be inappropriate to present these financial statements at this meeting.

Proposal

We propose that this section be amended to require the annual financial statements to be presented at the annual general meeting.

2.17 Section 30: Annual financial statements

Background
Subsection 30(8) does not include benefits in kind as remuneration.

This subsection further makes reference to the term "*future director*".

Issue/Motivation
This is inconsistent with the current Act and it is considered appropriate to include benefits in kind as remuneration.

It is unclear as to what is meant by the term "*future director*" as this term is not defined in The Bill.

Proposal

Remuneration should include "benefits in kind".

Clarity should be provided as to what term or time frame is to be used to determine whether a person was at any point a "*future director*".

2.18 Section 40: Consideration for shares

Background
Subsection 40(1)(a) indicates that the board of the company may issue shares

"*for adequate consideration to the company, as determined by the board*".

Issue/Motivation
The meaning of the term "*adequate consideration*" in relation to the issue of shares is not clear.

Proposal

> The word "*adequate*" needs to be defined or placed in context by, for example, indicating the nature of the factors which the board should consider in determining whether consideration is adequate.

2.19 Section 43: Securities other than shares

Background
Subsection 43(1)(a)(ii) defines debt instruments as:

"(ii) does not include promissory notes and loans, whether constituting an encumbrance on the assets of the company or not; and..."

Issue/Motivation
It is not clear why promissory notes and loans have not been included in the definition of debt instruments.

Proposal

> We consider promissory notes and loans to be debt instruments.
>
> The reason for the exclusion should be included in the Bill. Alternatively the ordinary meaning of debt instruments should be used which would include promissory notes and loans. To give effect to this meaning subsection 43(1)(a)(ii) should be deleted.

2.20 Section 45: Loans or other financial assistance to directors

Background
Subsection 45(5)(a) makes reference to "*the company's net worth*".

Issue/Motivation
The term "*net worth*" has not been defined in The Bill.

Proposal

> The meaning of "*net worth*" should be provided within the definitions in The Bill. For example, *assets including contingent assets, fairly valued less liabilities including contingent liabilities, fairly valued.*

2.21 Section 56: Beneficial interest in securities

Background
Subsection 56(7)(b) states the following:

"(7) A company that falls within the meaning of ***"regulated company"*** *as set out in section 117(1)(i) must—...*

(b) *publish in its annual financial statements, if it is required to prepare such statements, a list of the persons who hold beneficial interests equal to or in excess of 5% of the total number of securities of that class issued by the company, together with the extent of those beneficial interests."*

Issue/Motivation
There is no indication of the date at which the beneficial interest in securities holding to be disclosed under subsection 56(7) should be measured.

Proposal

We propose that the section require that the disclosures are made in respect of the position as at the end of the financial year.

2.22 Section 64: Meeting quorum and adjournment

Background
Subsection 64(9) states the following:

"(9) Unless the company's Memorandum of Incorporation or rules provide otherwise, after a quorum has been established for a meeting, or for a matter to be considered at a meeting, the meeting may continue, or the matter may be considered, so long as at least one shareholder with voting rights entitled to be exercised at the meeting, or on that matter, is present at the meeting."

Issue/Motivation
It is unclear as to why a quorum is required to commence a meeting or discussion, but only one member with voting rights is required to continue the meeting or decide a matter.

Proposal

It is proposed that the required quorum be applied for the duration of the meeting or discussion and decision of any particular agenda item.

2.23 Section 65: Shareholder resolutions

Background
Subsection 65(11) states the following:

"(11) A special resolution is required to—
- *(a) amend the company's Memorandum of Incorporation to the extent required by section 16(1)(c);*
- *(b) approve the voluntary winding-up of the company, as contemplated in section 80(1); or*
- *(c) approve any proposed fundamental transaction, to the extent required by Part A of Chapter 5."*

Issue/Motivation
Subsection 65(11) provides an incomplete list of special resolutions as required by the Bill, for example, this list omits the special resolution required by subsection 66(10) in respect of directors remuneration.

Proposal

It is proposed that either a complete list be provided, or that the list be omitted.

2.24 Section 66: Board, directors and prescribed officers

Background
Subsection 66(10) requires director's remuneration to be approved by special resolution.

Issue/Motivation
This requirement is considered onerous. An ordinary resolution is considered sufficient for the approval of directors' remuneration.

Proposal

Subsection 66(10) should be rewritten as follows:
"*Remuneration contemplated in subsection (9) may be paid only in accordance with ~~a~~ an ~~special~~* ordinary resolution *approved by the shareholders within the previous two years*"

2.25 Section 69: Ineligibility and disqualification of persons to be director or prescribed officer

Background
Subsection 69 states the following –

"(12)Despite being disqualified in terms of subsection (8)(b)(iii) or (iv), a person may act as a director of a private company if all of the shares of that company are held by that disqualified person alone, or by –
- *(a) that disqualified person; and*
- *(b) persons related to that disqualified person, and each such person has consented in writing to that person being a director of the company".*

Issue/Motivation
We consider that a director, who has been disqualified on the grounds of misconduct involving dishonesty or who has been convicted and imprisoned or fined for theft, fraud, forgery, perjury or an offence, should not be able to be appointed as a director of a company even where he meets the requirements in subsection 69(12).

The shareholders are not the only stakeholders in a company and we consider that The Bill should extend protection, from financial loss due to misconduct, theft, fraud, forgery, perjury or an offence, to other stakeholders viz. employees, creditors etc.

Proposal

Subsection 69(12) should be deleted.

2.26 Section 72: Board committees

Background
Subsection 72(2)(a) allows board committees to "*include persons who are not directors of the company*"

Issue/Motivation
All members of Board committees should be full directors. The exclusion of committee members from the deliberations of the board means that they are precluded from gaining a full understanding of the company's business and are unable to function effectively as committee members.

Further the Act does not confer the right of access to all records to such committee members but holds such members to the same standard as directors as they are bound by the same restrictions as directors with regard to personal financial interests (section 75), standards of directors conduct (section 76) and liability of directors and prescribed officers (section 77).

Proposal

Subsection 72(2)(a) should be deleted.

2.27 Section 77: Liability of directors

Background
Within the meaning of the section 77 director are included, "*a member of the board, an alternate director, a prescribed officer and board and audit committee members*".
A prescribed officer is defined in the definitions to the Bill as the "*holder of an office, within a company, that has been designated by the Minister in terms of section 66(11)*".

Section 66(11) states that the "*Minister may make regulations designating any specific function or functions within a company to constitute a prescribed office for the purposes of this Act*".

Issue/Motivation
The inclusion of a function within the ambit of the liability clause by way of regulation creates uncertainty and it is recommended that an officer of a company is clearly defined, alternatively removed from the ambit of operation of section 77. By arbitrarily including certain functions within the ambit of the liability clause, junior management of larger organisations may pick up the same liability as the company director.

Proposal

It is therefore recommended that the prescribed officer should be defined and limited alternatively excluded from the ambit of section 77.

Ambiguity is also created by the provisions of section 66(7) that inter alia states that a person becomes a director when that person has been appointed or elected as prescribed and has delivered to the company a written consent to serve as its director. This section can imply that the persons other than directors indicated in section 77 , can only accept liability once appointed officially in the "section 77 capacity " and on written acceptance of the appointment as such.

It is proposed that section 77 should incorporate and be made subject to the provisions of section 66(7). If the persons are subjected to the same level of liability as directors they should be given the same opportunity as directors to at least indicate their consent to the appointment. By including the words "subject to the provisions of section 66(7)" the door is also closed for persons to escape liability based on the provisions of section 66(7).

2.28 Section 80: Voluntary winding-up of solvent company

Background
Subsection 80(3)(b)(ii) requires the auditor to "*state 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*".

Issue/Motivation
The auditor would not be able to execute this requirement, taking into consideration the requirements of current auditing pronouncements. It would further be virtually impossible for the auditor to make such a statement where he/she does not perform a regular audit of the company.
In order for the auditor to provide this level of assurance, particularly where a company has not been subject to audit, would require a full audit to be performed on the company which is not considered to be cost effective.

Proposal

Subsection 80(3)(b)(ii) should be deleted.

Chapter 3 – Enhanced accountability and transparency

2.29 Section 90: Appointment of auditor

Background
Subsection 90(2)(b)(ii) states -

"(2) To be appointed as an auditor of a company, whether as required by subsection (1)or as contemplated in section 34(2), a person or firm—...
(b) in addition to the prohibition contemplated in section 84(5), must not be—...
(ii) an 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;"

Subsection 90(2)(b)(iv) states -

"... (iv) a person who, alone or with a partner or employees, habitually or regularly performs the duties of accountant or bookkeeper, or performs related secretarial work, for the company;"

Issue/Motivation

Subsection 90(2)(b)(ii)

Excluding a person from eligibility as an auditor of a company because that person previously had some involvement with the accounting records of the company for an undefined period in the past, does not appear to be the intention of the section.

Subsection 90(2)(b)(iv)

The current wording is considered unnecessarily prescriptive and should be aligned with the requirements of the Corporate Laws Amendment Act.

Proposal

Section 90(2)(b) should be rewritten as follows:

'(b) in addition to the prohibition contemplated in section 84(5), must not, at any time during the five financial years immediately preceding the date of appointment, be –

(i) a director or prescribed officer of the company;

(ii)an employee or consultant of the company who was or has been engaged for more than a one year in the maintenance of any of the company's financial records or the preparation of any of its financial statements;

(iii)a director, officer or employee of a person appointed as company secretary in terms of Part B of this Chapter;

(iv) a person who, ~~alone~~ by himself or ~~with a~~ his partner or employee, habitually or regularly performs the duties of ~~accountant~~ secretary or bookkeeper, ~~or performs related secretarial work~~ ~~for~~ of the company;

(v) a person related to a person contemplated in subparagraphs (i) to (iv); and...'

2.30 Section 92: Rotation of auditors

Background

Subsection 92(1) states that –

"(2) The same individual may not serve as the auditor or ***des ignated auditor*** *of a company for more than five consecutive financial years..."*

Issue/Motivation

The term "*designated auditor*" is not defined in The Bill.

Proposal

The term "*designated auditor*" should be defined in The Bill.

2.31 Section 92: Rotation of auditors

Background
Subsection 92(2) states that –

"(2) *If an individual 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***".

Issue/Motivation
The cooling off period of five years is considered unduly restrictive especially in light of the lack of skills and knowledge in specialised industries eg. banking and insurance industries and is considered prescriptive when compared to international rotation requirements.

We further consider that the rotation requirements of the Bill should only be applied to public companies and subsidiaries of public companies, to assist in achieving the purpose of simplicity.

Proposal

We propose that the cooling off period is reduced to a period of 2 years and that this section is applied solely to public companies and subsidiaries of public companies.

2.32 Section 92: Rotation of auditors

Background
Subsection 92(3) states that –

"(3) *If a company has appointed two or more persons as joint auditors, the company must manage the rotation required by this section in such a manner that all of the joint auditors do not relinquish office in the same year*".

Issue/Motivation
As the annual general meeting is responsible for the appointment of the auditor it may not be within the company's ability to manage the rotation of joint auditors as required by subsection 92(3).

Proposal

Subsection 92(3) should be deleted.

2.33 Section 94: Audit committees

Background
Section 94 states that –

"(4)Each member of an audit committee of a company must –…

(b) not be –...

(iii) 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 director is compromised by that relationship"...

Issue/Motivation

The concept of a "director who acts independently" in the present Act has been discarded, except in relation to a material supplier or customer as described in Section 94(c)(iii).

This current exclusion, per subsection 94(4)(b)(iii) is limited and should be expanded to account for other factors which may reasonably be expected to affect independence, for example the holding of a material shareholding in the company.

Proposal

> Subsection 94(4)(b)(iii) should be rewritten as follows:
> "(4)(b)(iii) ~~a material supplier or customer~~ related to the company or to any shareholder, supplier, customer or other director *of the company,* ~~such that~~ in a way that would lead *a reasonable and informed third party* ~~would~~ *to conclude that the integrity, impartiality or objectivity of that director is compromised by that relationship".*

2.34 Section 94: Audit committees

Background

Section 94 states that –

"(7) An audit committee of a company has the following duties: ...

(f) to prepare a report, to be ***included in the annual financial statements*** *for that financial year –...*

(iii) commenting in any way the committee considers appropriate on the financial statements, the accounting practices and the internal financial control of the company;..."

Issue/Motivation

It is not considered necessary to include the report, described above, in the annual financial statements. We consider it more appropriate for the audit committee to include their report in the annual report ie. outside of the annual financial statements.

Including the audit committee report in the annual financial statements will require the information in the report to be audited. This will result in an increase in the cost of regulation, for the company, similar to the costs incurred in the United States as a result of the introduction of Sarbanes Oxley and its reporting requirements.

Proposal

> Subsection 94(7)(f)(iii) should be amended as follows:
> *"(7) An audit committee of a company has the following duties: ...*
> *(f) to prepare a report, to be included in the annual* ~~financial statements~~ report *for that financial year –...*
> *(iii) commenting in any way the committee considers appropriate on the*

> *financial statements, the accounting practices and the internal financial control of the company;..."*

2.35 Section 94: Audit committees

Background
Section 94 of The Bill states the following -

"(7) An audit committee of a company has the following duties:...
(d) to determine, subject to the provisions of this Chapter, the nature and extent of any non-audit services that the auditor may provide to the company, or that the auditor must not provide to the company, or a related company;
(e) to pre-approve any proposed agreement with the auditor for the provision of non-audit services to the company;"

Section 94(8) of the Companies Bill further states -

"94 (8) In considering whether, for the purposes of this Part, a registered auditor is independent of a company, the audit committee of that company must—
(a) ascertain that the auditor does not receive any direct or indirect remuneration or other benefit from the company, except—
(i) as auditor; or
(ii) for rendering other services to the company, to the extent permitted in terms of subsection (6)(d)..." ***[NB. this should read (7)(d)]***

Section 93(3) of the Companies Bill and section 44(6) of the Auditing Profession Act state the following:

"93 (3) An auditor appointed by a company may not perform any services for that company—
(a) that would place the auditor in a conflict of interest as prescribed or determined by the Independent Regulatory Board for Auditors in terms of section 44(6) of the Auditing Profession Act; or
(b) as may be determined by the company's audit committee in terms of section 94(7)(d)."

"44. Duties in relation to audit
(6) A registered auditor may not conduct the audit of any financial statements of an entity, whether as an individual registered auditor or as a member of a firm, if, the registered auditor has or had a conflict of interest in respect of that entity, as prescribed by the Regulatory Board."

Issue/Motivation
Where subsection 94(7)(e) is interpreted as requiring each individual proposed agreement for the provision of non-audit services to be pre-approved, it may create significant practical difficulties for audit committees to pre-approve proposed contracts for non-audit services because audit committees generally only meet a few times each year. This may result in the company being unable to procure required services between audit committee meetings.

Our proposal is intended to enable pre-approval between audit committee meetings, by the designated audit committee member, of non-audit services either:

(i) not dealt with in the pre-approved framework of permitted and non-permitted services that has been approved in terms of section 94(7)(d), or

(ii) where the company does not have a pre-approved framework.

The proposal below is workable in practice and is consistent with our understanding of the intention of the legislation that the auditor be permitted to provide approved non-audit services that do not adversely affect auditor independence. It is also consistent with the practice accepted by the regulatory authorities in other jurisdictions that have a pre-approval requirement for non-audit services, notably the United States of America (SEC Independence Rules).

Proposal

Flexibility is needed to enable non-audit services that fall within a framework of non-audit services which the audit committee has pre-approved under section 94(7)(d) to be provided under a master services agreement or ongoing services engagement letter, where the terms of the agreement (i.e. the master services agreement or ongoing services engagement letter) have been pre-approved by the audit committee at the time the agreement was entered into, or subsequently once the Companies Bill becomes law.

To achieve this, we recommend that the wording of section 94(7)(e) is changed to read as follows:

"(e) to pre-approve the contractual terms of ~~any proposed~~ agreements with the auditor for the provision of non-audit services to the company".

To put the permissibility of the pre-approval process discussed above beyond doubt, we further recommend that the following additional sub-paragraph is added to section 94(7) as section 94(7)(f), with the existing sub-sections (f) to (i) being renumbered as (g) to (j) respectively. Sub-sections (d) and (e) (as amended in terms of paragraph 8 above) have been repeated below for ease of reference.

"94(7)An audit committee of a company has the following duties:

(d) to determine, subject to the provisions of this Chapter, the nature and extent of any non-audit services that the auditor may provide to the company, or that the auditor must not provide to the company, or a related company;

(e) to pre-approve the contractual terms of any agreements or proposed agreements with the auditor for the provision of non-audit services to the company;

(f) to authorise a member or members of the audit committee to approve, between audit committee meetings, agreements with the auditor for the provision of non-audit services pre-approved by the audit committee in terms of sub-section (d) or to pre-approve the provision by the auditor of other non-audit services and to determine the procedures to be followed in respect of the approval thereof;"

Chapter 5 – Fundamental transactions, takeovers and offers

2.36 Section 112: Disposal of all or a greater part of the assets

Background

Section 112 of The Bill states the following -

"(4) Any part of the undertaking or assets of a company to be disposed of, as contemplated in this section, must be given its fair market value as at the date of the proposal, in accordance with financial reporting standards".

Issue/Motivation
Financial reporting standards do not, in all instances, require that assets be measured at their fair market value. Differential reporting requirements might propose that assets are measured at cost in terms of the applicable financial reporting standards applied by a specific category of company.

Proposal

This section should be redrafted to refer to "*fair market value*" only and should not make reference to financial reporting standards.

Chapter 6 – Business rescue and compromise with creditors

2.37 Section 128 & 129: Application and definitions applicable to this chapter and company resolution to begin business rescue proceedings

Background
Section 128 and 129 of The Bill introduces the concept of business rescue.

Issue/Motivation
The concept of business rescue is welcomed, however, the fact that the business rescue provisions are not aligned with insolvency legislation is a concern. Alignment will ensure consistency and prevent abuse. Business rescue provisions should be included in insolvency legislation so that the provisions can apply to most forms of business entities such as sole proprietorship, partnership, business trust, close corporation or company. The provisions will now only apply to companies as included in The Bill.

In the United States, Germany and England business rescue procedures are contained in insolvency legislation. In Australia the link between insolvency and business rescue is maintained by the fact that the winding up procedure for insolvent companies is also included in the Australian Corporations Act.

Proposal

It is proposed that the provisions contained in the current Bill are aligned to the insolvency legislation of South Africa.

Chapter 7 – Remedies and enforcement

2.38 Section 159: Protection for whistle-blowers

Background
Section 159 states the following –

"(3) This section applies to any disclosure of information by a person contemplated in subsection (4) if –
(a) it is made in good faith to the Commission, the Companies Ombud, the Panel, a regulatory authority, an exchange, a legal adviser, a director, prescribed officer, secretary, auditor, board or committee of the company concerned; and..."

Issue/Motivation
Disclosure by whistleblowers, in accordance with subsection 159(3), to the internal audit division of a company should also be protected.

Proposal

Section 159 (3) (a) should be amended to include "a person performing the function of internal audit".

Chapter 8 – Regulatory agencies and administration of Act

2.39 Section 193 – 195: The Companies Ombud

Background
The Bill introduces an alternative dispute resolution mechanism by way of a statutory Companies Ombud which is referred to in at least the following sections: 14,17,30,61,71,84,156,158,160,166-172,182 and 195.

Issue/Motivation
The duties proposed for the Ombud in the various sections correspond with the duties of an appeal **Tribunal.** The proposed duties inter alia include complaints by companies about administrative actions by the prescribed regulatory bodies, whilst the purpose of an Ombud is to provide a quick mechanism for consumer complaints to be adjudicated at no cost. Numerous examples support this view such as sections 12, 17, 30(3), 84(7) and 160 (3).

Proposal

It is presumably not the intention of the Legislature to provide this dispute resolution mechanism for the purpose of dealing with consumer complaints and consumers will in all probability not make use of this mechanism. It is recommended that the Companies Ombud and any reference thereto should be changed to a Companies Tribunal or appeal tribunal or equivalent to avoid uncertainty and confusion.

2.40 Schedule 3.26

Background
Schedule 3 requires certain financial information to be included in a prospectus. A full set of financial statements is however not required.

As part of the requirements concerning the offering of securities, a company is required to obtain a report from the auditor with respect to *ia* profits or losses and assets and liabilities of the company (Schedule 3.26(1), (2)). Certain obligations on the auditor are specified in Schedule 3.26(4).

Issue/Motivation

Considering that potential investors will base their decision on whether or not to invest in a company on the information contained in a prospectus, we are of the view that a full set of financial statements, prepared in accordance with financial reporting standards, should be included in the prospectus.

The specific requirements of Schedule 3.26(4) regarding the auditor's responsibilities are superfluous where an audit has been performed in terms of the requirements of the Auditing Profession Act 2005 (Act 26 of 2005).

Proposal

A full set of financial statements, prepared in accordance with financial reporting standards, should be included in the prospectus.

We propose that Schedule 3.26(4) be deleted.