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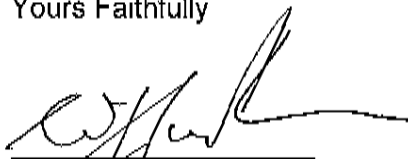
Dear Ms Williams

**ESKOM'S COMMENTARY ON THE COMPANIES BILL [B61-2008]**

We thank you for granting us an opportunity to comment on the abovementioned Companies Bill as part of the consultation process being driven by the Portfolio Committee on Trade and Industry.

Herewith please find our comments.

Yours Faithfully

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Eskom Holdings Limited Reg No 2002/016527/06



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**COMPANIES BILL (B61 -2008)**

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**COMMENTS BY ESKOM**

**07 AUGUST 2008**

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## COMMENTS BY ESKOM ON THE COMPANIES BILL (B61 – 2008)

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### PUBLISHED FOR GENERAL COMMENT IN THE GOVERNMENT GAZETTE – NOTICE 31104 OF 30 MAY 2008 (“BILL”)

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#### 1. Introduction

- 1.1. The following submissions are made by ESKOM in response to the Companies Bill, [B 61 – 2008] (the “**Companies Bill**”) recently published for comment by the Department of Trade and Industry.
- 1.2. ESKOM is a major state-owned enterprise (“**SOE**”) listed as a Schedule 2 public entity in terms of the Public Finance Management Act, No. 1 of 1999 (the “**PFMA**”). Accordingly, the primary focus of these submissions is on those aspects of the Companies Bill which impact on SOEs, in particular “major” SOEs.
- 1.3. Attached to these submissions is a matrix (“**the Matrix**”) setting out overlapping and inconsistent provisions in the Companies Bill, PFMA and Public Finance Management Bill (“**PFM Bill**”). Comments and recommendations in respect of such provisions are made in the fourth column of the Matrix and thus the Matrix forms an integral part of these submissions.

#### 2. Background

- 2.1. In written submissions made by the Department of Public Enterprises and various SOEs (including ESKOM) in 2007 in response to the previous version of the Companies Bill, it was noted that many SOEs, in particular “major” SOEs, conduct their activities within a competitive, commercial environment alongside, and often in competition with, wholly private companies. However, the State is typically the sole or majority shareholder in an SOE and the SOE generally performs some service or activity in the public interest. Thus, SOEs also exhibit certain “public/governmental” qualities.
- 2.2. In the circumstances, it was acknowledged that the public has a direct interest in the manner of operation of the SOEs and that it is both reasonable

and necessary for SOEs to be subject to both the additional regulatory provisions contained in the PFMA and the provisions of the Companies Bill. However, it was contended that the regulatory regime applicable to the governance of SOEs should be as similar as possible to that applicable to private companies, with SOEs being subject only to such additional obligations as are appropriate given their "public" quality. Thus, it was submitted that the Companies Bill should, insofar as it is possible, aim to simplify the regulatory environment within which SOEs operate. This would minimise duplication and unnecessary over-regulation. It was contended that this could be achieved, *inter alia*, through:

- 2.2.1. clarifying the relationship between conflicting provisions contained in the Companies Bill and other SOE related legislation (primarily the PFMA);
  - 2.2.2. ensuring, as far as possible, that unnecessary duplication of substantially similar provisions in the Companies Bill and PFMA is avoided; and
  - 2.2.3. exempting SOEs from certain overlapping legislative provisions (or at least granting the relevant Minister the power to do so by regulation).
- 2.3. Since making these submissions in 2007 two significant developments have occurred:
- 2.3.1. the Companies Bill has been considerably revised and re-gazetted for public comment; and
  - 2.3.2. the PFM Bill, proposing the wholesale repeal and replacement of the PFMA has been gazetted for public comment.
- 2.4. As the inter-relationship between the PFMA and the Companies Bill is a key area of focus for an SOE, the implications of the latter development is discussed in more detail below.

### 3. PFM Bill

- 3.1. In June 2008 the PFM Bill was gazetted for public comment. The PFM Bill proposes to repeal, along with certain other legislation, the whole of the existing PFMA. Accordingly, at this stage, two key and inter-related pieces of legislation regulating ESKOM's conduct are facing significant revision. There is inevitably some uncertainty on what form both the new Companies Bill and PFM Bill will ultimately take.
- 3.2. This adds some complexity to the commenting process on the Companies Bill, as it makes sense in certain circumstances to compare the provisions of the Companies Bill both to the existing PFMA and the PFM Bill. However, it does offer an opportunity for both pieces of legislation to be better streamlined. This could resolve the previously identified inconsistencies and duplications experienced by SOEs in having to comply with both Companies Act, 1973 (the "**Companies Act**") and PFMA provisions.

3.3. However, ESKOM submits that it is important for the Companies Bill legislative process to take cognisance of any developments in the PFM Bill legislative process, and *vice versa*. This will avoid any unintended inconsistencies or anomalies arising out of the parallel legislative amendment processes.

#### 4. SOEs in the context of the Companies Bill

4.1. Whereas the previous version of the Companies Bill did not distinguish SOEs from any other type of corporate entity, the Companies Bill now specifically defines SOEs and, with the exception of our more detailed comments below, generally makes it clear which provisions apply to SOEs and which not. This development is welcomed, however, please see our comments at paragraph 5 below on the definition of "SOE" in the Companies Bill.

4.2. A further welcome development is section 9 of the Companies Bill, which grants the Minister the power to grant to an SOE(s) total, partial or conditional exemptions from any one or more provisions of the Companies Bill on the grounds that those provisions overlap or duplicate a regulatory regime established in terms of other legislation. This provision accordingly offers a remedy in the event that there is an overlap or duplication between the provisions of the Companies Bill and the PFMA.

4.3. However, the actual application of the exemption provision is not entirely clear as the scope of allowing exemptions has been limited in the Companies Bill to provisions:

4.3.1. that "*overlap*" or "*duplicate*" an applicable "*regulatory scheme established in terms of any other national legislation*"; and

4.3.2. where the alternative "*regulatory regime*" ensures the achievement of the objectives of the Companies Bill as least as well as the Companies Bill does.

4.4. The introduction of the phrase "*regulatory regime*" implies more than, for example, duplication or overlap of a single stand-alone provision. In this sense, the use of the words "*regulatory regime*" appear to limit the scope of application of section 9. In ESKOM's view, it would be preferable for the circumstances in which an exemption can be requested to be as unrestricted as possible.

4.5. Furthermore, the requirement that the "regulatory regime" achieve the objectives "*at least as well as*" the Companies Bill does, introduces a hurdle which may be difficult to overcome. In ESKOM's view it would be preferable to reformulate the requirement such that the Minister has a discretion and needs to be "*satisfied*" or "*of the opinion*" that the alternative regime satisfies the objectives "*as well as*" the Companies Bill.

4.6. For example, would the overlapping, but inconsistent, provisions regarding director's fiduciary duties (see item 13 of Matrix) warrant a request for exemption under section 9? Given, *inter alia*, that the Companies Bill codifies directors' duties and conduct in greater detail than the PFMA, this

raises the question whether the PFMA provisions would nonetheless be able to meet the test of achieving the required objectives "as well as" the Companies Bill? A similar question may be asked in respect of the provisions regarding audit committees (see items 15 to 17 of the Matrix) where it is not clear whether this is the type of regime intended to be capable of exemption in terms of section 9. See also item 14 of the Matrix regarding the markedly different consequences for directors' misconduct. Under the Companies Bill a director can be declared a delinquent (section 162) and liable for loss, damage or costs (section 77). However, depending on the nature of the director's breach or misconduct, under the PFM Bill, a director could be liable to imprisonment for a maximum of 5 years (section 229). Does the Companies Bill contemplate that an SOE could request and be granted an exemption from Companies Bill consequences for director misconduct?

- 4.7. The above are merely examples used to illustrate the type of provisions in the Companies Bill and PFM Bill (or PFMA) that overlap or are inconsistent and to demonstrate that it will not always be a simple task to determine when an SOE can rely on section 9. Please refer to the Matrix for further details illustrating this point.
- 4.8. ESKOM also acknowledges that it may be more appropriate for any changes to address this issue to be made to the PFMA rather than the Companies Bill. For example, it may be preferable to leave all directors' duties, and the consequences of the breach of such duties, within the domain of the Companies Bill and to only specify such additional provisions in the PFMA as may be required to cater for the fact that the company is an SOE.
- 4.9. However, as far as the Companies Bill is concerned, it is important that the SOE exemption provision is not unnecessarily restricted as this will fail to achieve the objective of reducing the duplicated and complex regulatory regime currently applicable to SOEs. The conflict of laws provisions in section 5 of the Companies Bill (discussed below) will be unlikely to assist in reducing the duplicated regulatory burden on SOEs as the provision allowing for the PFMA to prevail when there is conflict will be of very limited application.
- 4.10. ESKOM notes, that in terms of section 9(2) of the Companies Bill the member of Cabinet "*responsible for...state-owned enterprises...*" is authorised to request the Minister for an exemption in respect of a provision applicable to all SOEs, any class of them or to one or more particular SOEs. It should be noted that not all SOEs fall within the responsibility of a single Cabinet member. Thus, while ESKOM and a number of other major SOEs fall within the area of responsibility of the Minister of Public Enterprises, there are many other SOEs that expressly fall within the area of responsibility of another Cabinet member (for example, the Minister of Transport is responsible for the Airports Company).

- 4.11. The PFMA, when defining the term "*executive authority*" provides that the executive authority of a national public entity means the Cabinet member who is accountable to Parliament for that public entity and in whose portfolio that public entity falls (the PFM Bill retains this provision).
- 4.12. In order to avoid unintentionally restricting the ability of any particular SOE to request an exemption, ESKOM suggests that the Companies Bill be refined to take the fact that different Cabinet members may be responsible for different SOEs into account.
- 4.13. Section 9 provides a remedy for overlapping or duplicated provisions between two pieces of national legislation. It does not, however, address conflicts between the two pieces of legislation. In the case of conflict, the provisions of section 5 of the Companies Bill apply, which provide that the PFMA will prevail should it be impossible to comply with one of the inconsistent provisions without contravening the second. It is assumed that the word "*or*" between sections 5(4)(b)(i) and (ii) should in fact be "*and*". ESKOM submits that it is critical to remedy this error as failing to do so would create uncertainty regarding whether the PFMA in fact prevails over the Companies Bill in the circumstances contemplated in section 5(4)(b).
- 4.14. Again, this change is a welcome development from the version in the previous Companies Bill, where it was not entirely clear what would occur in the event of inconsistency between the Companies Bill and the PFMA. However, this provision will be of limited assistance in streamlining the parallel regulatory regimes applicable to SOEs. This is because there will be very few instances where it is not possible to comply with one of the provisions without contravening the second.
- 4.15. For example, the provisions regarding the required criteria for members of the audit committee are inconsistent (see item 16 of the Matrix). The Companies Bill provision is more restrictive in that all members must be non-executive (the PFMA merely require a majority of members to be non-executive). However, it is possible to comply with the Companies Bill provision without contravening the PFMA. Similarly, the PFMA grants the board a discretion to allow a director with a conflict of interest to stay in the meeting if the conflict is deemed trivial. The Companies Bill makes recusal compulsory. Again, if the Companies Bill is complied with and a director is required to leave the meeting, doing so will not constitute a contravention of the PFMA (see item 12 of the Matrix).
- 4.16. An example where the PFMA is more prescriptive than the Companies Bill is on delegation to board committees (see item 11 of the Matrix). The PFMA is silent on delegation to a board committee (delegation to an official is authorised under section 56) however the PFMA expressly prohibits delegation of borrowing powers (section 66). In this circumstance, it is possible to comply with the PFMA provision without being in contravention of

the Companies Bill and thus both provisions will continue to apply concurrently.

- 4.17. It is noted that the PFMA currently provides (at section 3), that the PFMA will prevail in the event of any inconsistency between it and any other legislation. The PFM Bill, however, limits this somewhat, by providing that if there is any inconsistency between the PFM Bill and any other legislation in force when the PFM Bill takes effect which "*regulates any aspect of the financial affairs*" of an SOE, then the PFM Bill prevails. It is important that the conflict provisions of the Companies Bill and PFMA/PFM Bill are aligned to avoid any confusion on which legislation prevails over the other in the case of conflicting provisions.
- 4.18. Furthermore, ESKOM submits that the process of exemption of SOE's from provisions of the Act by the Minister by means of notice in the Government Gazette, as provided for in section 9(2) and (3), is unnecessarily burdensome. This may be obviated by providing that the Minister may permit an SOE to deviate from the provisions of the Act by making provision for such deviation in its memorandum of incorporation. This approach accords with section 6(2) of the Eskom Conversion Act, 13 of 2001, which provides that the memorandum and the articles of association of ESKOM must be determined by the Minister.

## 5. Definition of SOE

- 5.1. The Companies Bill defines a "*state-owned enterprise*" as, inter alia, an enterprise which is registered in terms of the Companies Bill "*as a company*" and which "*falls within the meaning of 'state-owned enterprise' in terms of the Public Finance Management Act...*".
- 5.2. The PFMA does not define nor use the terminology "state-owned enterprise". In terms of section 3 of the PFMA, the institutions to which the PFMA applies are described as:
- 5.2.1. departments (i.e. national or provincial government departments);
  - 5.2.2. public entities (national and provincial);
  - 5.2.3. constitutional institutions (such as the Human Rights Commission); and
  - 5.2.4. Parliament and provincial legislatures.
- 5.3. At this stage, the only institutions in the list above which could potentially be companies are "public entities". Accordingly, one could define "*state-owned enterprises*" in the Companies Bill as being any "public entity" as defined in the PFMA, which public entity is also a registered company in terms of the Companies Act.
- 5.4. However, it should be noted that the PFM Bill may change certain of the terminology of the institutions to which it applies. The PFM Bill introduces new categories of institution to which the PFM Bill applies, namely:
- 5.4.1. "state institutions";
  - 5.4.2. "public entities"; and
  - 5.4.3. "public interest institutions".



5.5. Insofar as one cannot exclude the possibility that the term "public entity" may change in the final form of the PFM Bill, or that a category of institution other than "public entity" may potentially include a company registered in terms of the Companies Act, ESKOM recommends that the Companies Bill define an SOE as being any institution to which the PFMA applies, which institution is also a company as registered in terms of the Companies Act.

## 6. Business Rescue

6.1. It is noted that SOE's are not specifically exempted from the business rescue provisions at Chapter 6. Such provisions, given the unique nature of SOE business (rendering a public service) would typically not be appropriate to SOEs. Furthermore, certain SOEs, notwithstanding that they are companies for the purposes of the Companies Act, may be subject to particular provisions arising out of their founding legislation which provide for issues related to their establishment, protection of creditors or dissolution procedures.

6.2. As the business rescue provisions would not constitute "overlapping" or duplicated provisions, this would not entitle the SOE to request exemption from such provisions in terms of section 9. It is submitted that it would be appropriate to grant SOEs the right to request exemption from such provisions, alternatively, that the Companies Bill should expressly exclude SOEs from such provisions.

## 7. General Comments

### Section 3

7.1. The amendments to the definition of a subsidiary at section 3 of the Companies Bill are welcomed. While ESKOM appreciates that this may be a point better addressed in an amendment to the PFMA, it is suggested that for the sake of certainty and consistency, the definition of a "subsidiary" company in the Companies Bill and PFM Bill should be aligned.

7.2. While it is noted that the definition of a subsidiary in the PFM Bill is similar to that in the Companies Bill, it is submitted that it would be preferable for the PFM Bill to define a subsidiary company by reference to how that term is defined in the Companies Bill.

### Sections 44 and 45

7.3. It is noted that there is some inconsistency between the terminology of "*direct or indirect financial assistance*" used in section 45 (financial assistance to directors) when compared with the terminology used in section 44 (financial assistance for subscription of securities). It is recommended that consistent terminology should be used throughout.

#### Section 46

- 7.4. Section 46 provides that distributions must be authorised by the board taking into account the solvency and liquidity requirements. This provision does not, in our view, preclude ESKOM from also stipulating for shareholder approval in its memorandum or articles of association or shareholder compact although this is not expressly provided for in this section.

#### Section 94

- 7.5. The reference in section 94(8)(a)(ii) to subsection (6)(d) appears incorrect and should in fact be a reference to subsection (7)(d).
- 7.6. Section 94(4) prescribes that each member of an audit committee must be, inter alia, a director of the company. It is submitted that this requirement is unduly restrictive and that suitably qualified persons who meet the other requirements of this section should be eligible to serve on audit committees. If there is concern that audit committee members must be bound by fiduciary duties applicable to directors then such duties could be made binding on (non-director) audit committee members by way of a suitable additional stipulation to this section.
- 7.7. Furthermore, section 72(2) provides that a board committee may include persons who are not directors of the company, but no such person has a vote on a matter to be decided by the committee. ESKOM submits that such members should in fact be entitled to vote, and the provisions of paragraph 7.6 above regarding fiduciary duties should apply.

#### Section 112

- 7.8. Section 112 (Proposals to dispose of all or greater part of assets or undertaking) provides, inter alia, that any part of the undertaking or assets to be disposed of must be given its fair market value as at the date of the proposal, in accordance with the stipulated financial reporting standards (section 112(4)).
- 7.9. This provision may occasion difficulty. For example, how will such value be determined if the disposal takes place at a date other than a financial year end? Will a separate audit need to be conducted as at the anticipated disposal date?

#### Section 113

- 7.10. Section 113 deals with proposals for amalgamation or merger. In addition to meeting the solvency and liquidity tests upon the implementation of such merger, requirements are stipulated in respect of the merger agreement. These must include details of any arrangement or strategy necessary to complete the amalgamation or merger and to provide for the subsequent management and operation of the proposed amalgamation or merged company or companies as well as the estimated cost of the proposed amalgamation or merger (section 113(2)(g) and (h)).

- 7.11. It is submitted that these are not generally matters regulated under agreements of this nature and thus may occasion difficulty.

Section 114

- 7.12. It is noted that section 114 (proposals for scheme of arrangement) makes provision for a company (more specifically its board) to propose a scheme of arrangement between it and its shareholders (the holders of its securities). It is noted, however, that no specific reference is made in section 114(1) to a compromise. Nor is there any specific reference to a scheme of arrangement between the company and its creditors.

General

- 7.13. To the extent that an SOE submits any information only to its executive authority, National Treasury or other government department in accordance with the PFMA, such information should not, in that format, and for that purpose alone, be regarded as financial information for any other purpose under the Companies Bill.

**8. Conclusion**

Eskom would like to extend its appreciation to the Portfolio Committee on Trade and Industry for the opportunity to influence the provisions of the Bill. We trust that our comments have been constructive and that they are of assistance in finalising the Bill. In the event that further clarification or information is required, Eskom would be more than happy to provide same.

**ESKOM SUBMISSIONS: COMPANIES BILL, 2008**

**MATRIX OF INCONSISTENT/OVERLAPPING OR DUPLICATED PROVISIONS BETWEEN COMPANIES BILL, PFM BILL AND PFMA**

Item	Companies Bill 2008	PFM Bill 2008	PFMA	Comments
1.	Section 1 – definition of financial statements – includes provisional annual financial statements, interim and preliminary reports and information in a circular, prospectus and the like.	Section 1 – definition of financial statements – includes statement of financial position, financial performance and others. Includes "any other statements that may be prescribed by treasury regulations".	Section 1 – definition of financial statements – includes balance sheet, income and cash-flow statement and other statements as prescribed.	<p>The definitions of financial statements are not aligned.</p> <p>Treasury regulations may add to the inconsistency depending on what they require.</p> <p>The definition should be consistent. This is an area where it may not be appropriate to be governed by two regimes and to do so would add an administrative burden on ESKOM. However there is no conflict between these provisions such that the PFMA would prevail as contemplated in section 5(4)(b) of the Companies Bill.</p> <p>Would need to be clarified</p>

Item	Companies Bill 2008	PFM Bill 2008	PFMA	Comments
2.	<p>Section 3 – definition of subsidiary – juristic person (or subsidiaries, nominees) alone or in any combination (i) indirectly or directly able to control majority of general voting rights or (ii) to appoint directors who hold majority of votes in board meeting.</p>	<p>Section 1 - subsidiary is a company under the "effective control" of the SOE. "Effective control" – (i) power of a shareholder to appoint or remove the majority of the board or (ii) control the majority of voting rights at a general meeting.</p>	<p>Not defined. Schedule 2 refers to any "subsidiary or entity under the ownership control" of a listed SOE (emphasis added).</p> <p>Section 1 - "Ownership control" – the ability to exercise powers "to govern the financial and operating policies of the entity in order to obtain benefits from its activities" to (i) appoint/remove majority of board; (ii) appoint/remove CEO; (iii) cast majority votes at board; (iv) control majority of votes at a general meeting.</p>	<p>whether the two financial reporting regimes could fall within the scope of a section 9 exemption.</p> <p>To avoid confusion, there should be single definition of "subsidiary". It is suggested that the PFM Bill define a subsidiary by reference to how it is defined in the Companies Bill.</p>

Item	Companies Bill 2008	PFM Bill 2008	PFMA	Comments
3.	Section 5(4) – Provisions of Companies Bill and PFMA apply concurrently but PFMA prevails if it is impossible to comply with one inconsistent provision without contravening the other.	Section 8 – If there is any inconsistency between PFM Bill and any legislation in force when the PFM Bill takes effect " <i>and which regulates any aspect of the financial affairs</i> " of an SOE, the PFM Bill prevails.	Section 3(3) – If there is any inconsistency between PFMA and any other legislation, the PFMA prevails.	The PFM Bill limits PFM Bill prevailing to cases of inconsistency regarding the regulation of "financial affairs". The Companies Bill has wider application. It should be ensured that the provisions regarding which legislation prevails over the other are aligned.
4.	Section 27 – Financial year is as per Notice of Incorporation.	Section 1 – financial year means 31 March unless a different financial year has been approved by treasury.	Section 1 –financial year means 31 March unless a different financial years has been approved by treasury	This is presumably an example of a provision which can be applied concurrently as per section 5(4)(a) of the Companies Bill.
5.	Section 28 – company to keep accurate and complete accounting records. Manner and form of keeping accounting records may be prescribed.	Section 151(1)(b) – board to keep full and proper records of financial affairs of SOE in accordance with any norms and standards prescribed by treasury.	Section 55(1) – board to keep full and proper records of financial affairs of the SOE.	There is potential for inconsistency if the manner and form of keeping accounting records is differently prescribed under the Companies Bill and the PFM Bill.

Item	Companies Bill 2008	PFM Bill 2008	PFMA	Comments
6.	<p>Section 29(1) - financial statements, including annual financial statements, must satisfy the "financial reporting standards".</p> <p>Section 29(4) - the Minister may make regulations prescribing "financial reporting standards" or form and content requirements for summaries of financial statements.</p> <p>Section 29(5) - such regulations to promote sound and consistent accounting practices and be consistent with the International Financial Reporting Standards of the International Accounting Standards Board ("IFRS").</p>	<p>Section 190(5) - annual financial statements of a public entity to be prepared in accordance with "standards of generally recognised accounting practice" or other standards approved by the Minister.</p>	<p>Section 55(1)(b) - financial statements to be prepared in accordance with "generally accepted accounting practice" unless the Accounting Standards Board approves the application of "generally recognised accounting practice."</p> <p>Treasury Regulation 28.1.6 - SOEs to prepare financial statements in accordance with "generally accepted accounting practice. If the statements materially differ from GAAP, the departure (and reasons therefore) must be disclosed.</p>	<p>It is important that the financial reporting standards applicable to an SOE are aligned as between the PFMA and Companies Act.</p> <p>There is a potential for inconsistency and overlap if the respective Ministers under the Companies Bill and PFM Bill or the Accounting Standards Board prescribe different standards.</p> <p>Would need to be clarified whether the two financial reporting regimes could fall within the scope of a section 9 exemption and thus allow ESKOM to apply only one regime. It does not appear that compliance with one provision would contravene another and so PFMA would not prevail as contemplated</p>

Item	Companies Bill 2008	PFM Bill 2008	PFMA	Comments
7.	<p>Section 29(1)(b) - financial statements must present fairly the state of affairs and business of the company and explain the transactions and financial position of the business of the company.</p> <p>Subsection (c) - the financial statements must show the company's assets, liabilities and equity, as well as its income and expenses, and any other prescribed information.</p>	<p>Section 190(a) and (b) - annual financial statements must fairly present the state of affairs of the SOE, its performance, its management of revenue, expenditure, assets, and liabilities, its business activities, financial results, and financial position and the notes must disclose the information prescribed by treasury regulation or instruction.</p>	<p>Section 55(2)(a) - financial statements to fairly present the state of affairs of the SOE, its business, financial results, performance against financial objectives and financial position as at end financial year.</p> <p>Section 55(2)(b) - include further information, including any other matters that may be prescribed.</p>	<p>in section 5(4)(b) of the Companies Bill.</p> <p>See comment above regarding importance of financial reporting requirements to be aligned and whether such overlap would warrant section 9 exemption.</p>
8.	<p>Section 30 - a company to prepare annual financial statements within 6 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.</p>	<p>Section 190(1) - board of an SOE to promptly after the end of a financial year prepare annual financial statements for that financial year.</p> <p>Section 192(3) - annual financial statements of SOE must, within</p>	<p>Section 55(1) - board to submit annual financial statements within 2 months of end of financial year to auditors, treasury (if relevant) and within 5 months of the end of the financial year submit the financial</p>	<p>See comments above on necessity to align financial reporting requirements.</p>



Item	Companies Bill 2008	PFM Bill 2008	PFMA	Comments
9.	<p>Section 30(6), (7) and (8) – annual financial statements to include remuneration and benefits of each director or prescribed office holder and must show pensions paid, compensation for loss of office, securities issued to directors or office holders and details of service contracts.</p> <p>Must also show money received for services rendered. Remuneration to include, inter alia, fees, salary, expense allowance options or financial assistance.</p>	<p>2 months after the end of the financial year, or within such shorter period as may be prescribed by treasury regulation or instruction, be submitted to SOE's auditor, parent department and treasury.</p>	<p>statements (and annual report) to executive authority and Auditor-General.</p>	
		<p>Section 191 – annual financial statements to disclose the information as prescribed by treasury regulation or instruction.</p>	<p>Treasury Regulation 28.1. – annual financial statements to disclose the remuneration of all board members, CEO, CFO and senior management. Remuneration to be disclosed in aggregate and per member or person for the last financial period.</p> <p>28.1.4 – Disclosure to include, fees, salary, bonuses, expenses, pension contributions, commission, profit share and share options.</p>	<p>See comments above on necessity to align financial reporting requirements.</p>

Item	Companies Bill 2008	PFM Bill 2008	PFMA	Comments
10.	Section 33 – annual transparency and accountability report to be submitted as prescribed.	Section 186 – annual report to be prepared to provide record of activities, performance and to promote accountability.	Section 55(1)(d) – SOE to prepare an annual report of the activities of the company for the year.  Treasury Regulation 28.2.2 – annual report to include strategic objectives and outcomes, key performance measures and actual performance.	Depending on the prescribed requirements in the Companies Bill for the annual report, there is potential for overlap and/or inconsistency in this respect.  Not appear that compliance with one provision would contravene the other and thus PFMA would not prevail. Would have to be clarified whether a section 9 exemption could be requested on the basis of an overlapping regulatory regime.
11.	Section 72 – the board may appoint any number of committees and may delegate to the committee any authority of the board.	Section 110(4) – the power of the board to borrow money, issue a guarantee or incur a contingent financial commitment cannot be delegated unless with the prior written approval of the	Section 66 – the power to borrow money, issue a guarantee or incur a contingent financial commitment cannot be delegated unless with the prior written approval of the	These provisions, although more prescriptive under the PFMA, are capable of being complied with concurrently as contemplated in section 5(4) of the Companies Bill and thus both Companies Bill and

Item	Companies Bill 2008	PFM Bill 2008	PFMA	Comments
12.	<p>Section 75 – directors personal financial interests - director who has a "personal financial interest" in a matter to be considered at a meeting of the board, or who knows that a related person has a personal financial interest in the matter, must take various steps, including disclosure before the matter is considered at the meeting and disclose pertinent insights into the matter.</p> <p>A "related person" is defined in detail (section 2)</p> <p>Recusal of relevant director is compulsory.</p>	<p>Minister.</p> <p>Section 150(3) - director to disclose any "direct or indirect personal or private business interest" that the director or any spouse, partner or close family member may have in any matter before the board and to withdraw from the proceedings unless the interest is trivial or irrelevant.</p> <p>Personal or private business not as clearly defined as Companies Bill.</p>	<p>Minister.</p> <p>Section 50(3) – director to disclose any direct or indirect personal or private business interest that the director or any spouse, partner or close family member may have in any matter before the board and to withdraw from the proceedings unless the board decides the interest is trivial or irrelevant.</p> <p>Personal or private business not as clearly defined as Companies Bill.</p>	<p>PFMA provisions would apply.</p> <p>These provisions overlap but are not entirely consistent.</p> <p>PFMA and PFM Bill grant the board the right to allow the conflicted director to remain in the meeting if the matter is trivial. Although inconsistent, appears that compliance with the Companies Bill provision (prohibiting the director to remain) does not have the effect of contravening the PFMA and thus, as per section 5, the more onerous provision of Companies Bill would prevail.</p> <p>Would need to be clarified if these provisions could warrant a request for a</p>

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13.	<p>Section 76 provides for the standards of a director's conduct. These include, <i>inter alia</i>, provisions codifying fiduciary duties and the duty of care and skill.</p> <p>Directors to exercise powers in good faith, for a proper purpose, in the best interests of the entity and with degree of care, skill and diligence reasonably expected of person carrying out the same functions.</p>	<p>Section 150 (fiduciary duties) and 151 (general financial management responsibilities) – director, <i>inter alia</i>, to act with "reasonable care and skill, fidelity, honesty, integrity and in the best interests of the entity in managing the financial affairs of the entity."</p>	<p>Section 50 – fiduciary duties – include duty to exercise "utmost care" and to act with fidelity, honesty, integrity and in best interests of the entity in managing its financial affairs.</p>	<p>section 9 exemption.</p> <p>Definition of private interest and related persons should be more clearly defined in the PFMA/PFM Bill. Preferable that definition to align with Companies Bill.</p> <p>These provisions overlap but are not entirely consistent.</p> <p>Needs to be clarified if the two slightly different regimes would warrant a request for a section 9 exemption.</p> <p>It is not desirable for SOE directors to be subject to two different regimes. Unless a section 9 exemption is granted, both regimes have to be complied with concurrently as per section 5 of the Companies Bill.</p>

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14.	<p>Section 77 – liability of directors for loss, damage or costs sustained by the company for breach of fiduciary or other duties. Detailed provisions regarding instances where directors may be held liable.</p> <p>Section 77(9) - in proceedings against a director, other than for wilful misconduct or wilful breach of trust, the court may relieve the director from liability if this is fair or if the director acted honestly and reasonably.</p> <p>Section 78 provides certain circumstances in which a director may be indemnified against liability by the company.</p> <p>Section 162 – director may be declared a "delinquent" or under probation, including if the director grossly abused the position of director, intentionally or by gross negligence caused harm to</p>	<p>Section 222 – deliberate or negligent contravention of the PFM Bill by a director is "financial misconduct". Each director jointly and severally liable for the financial misconduct of the board.</p> <p>Financial misconduct is ground for dismissal or suspension of director.</p> <p>Section 228(2) – certain contraventions by the board are a criminal offence (including if in a deliberate or grossly negligent way fails to comply with fiduciary duties and general responsibilities of board).</p> <p>Potential penalty on conviction</p>	<p>Section 83 - deliberate or negligent contravention of certain provisions of the PFMA by a director is "financial misconduct". Each director jointly and severally liable for the financial misconduct of the board.</p> <p>Section 86 – board guilty of an offence if wilfully or in a grossly negligent way fails to comply with certain provisions of the PFMA. Potential penalty on conviction of 5 years or appropriate fine.</p>	<p>Compliance with one standard would not contravene the other, thus the PFMA would not prevail.</p> <p>There is a marked difference in the consequences of a director's misconduct under the PFMA/PFM Bill and the Companies Bill.</p> <p>It appears that these provisions would apply concurrently as envisaged by section 5(4)(a).</p> <p>Would need to be clarified whether sanctions against directors would be regarded as a duplicated regulatory regime warranting a section 9 exemption.</p>

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	the company or acted in a manner of wilful misconduct or breach of trust.	of 5 years or appropriate fine.		
15.	<p>Section 94(2):</p> <p>SOE must elect an audit committee.</p> <p>Appointment must take place at AGM.</p> <p>Must have a minimum of 3 members</p> <p>Allows audit committees to be shared with subsidiaries.</p>	<p>Section 182:</p> <p>SOE must have an audit committee (not refer to AGM)</p> <p>Must have a minimum of 3 members.</p> <p>A "shared audit committee" is allowed if the relevant treasury so directs (section 185)</p>	<p>Treasury Regulation 27.1:</p> <p>SOE must establish an audit committee.</p> <p>A shared audit committee can be established for an SOE and its subsidiaries (does not depend on treasury approval as per PFM Bill).</p>	<p>These provisions overlap however, it is possible to comply with one without contravening the second and accordingly both regimes would apply concurrently as per section 5(4) of the Companies Bill.</p> <p>This may be an example of two similar regulatory regimes which warrant a request for a section 9 exemption.</p>
16.	<p>Section 94(4) - each member of the audit committee must be a director of the company who complies with any requirements prescribed by the Minister.</p> <p>No member of audit committee can have executive duties.</p>	<p>Section 184(1) - members of the audit committee must have appropriate experience and a majority of them may not be in the employ of institution or entity.</p>	<p>Treasury Regulation 27 - chairperson of audit committee must be independent, knowledgeable and have requisite skills and may not be chairperson of the board or person who fulfils</p>	<p>The criteria for members of the audit committee are inconsistent.</p> <p>The Companies Bill is more restrictive in that none of the members of the audit</p>

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	<p>Each member must <u>not be</u> i) involved in the day-to-day management of the company's business or have been so involved at any time during the previous three financial year of the company, ii) a prescribed officer, or full time executive employee of the company or another related or inter-related company or have been so at any time during previous three financial years of company or iii) a material customer or supplier 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 and such person should not be related to any person who falls within the above criteria</p>	<p>The chairperson must not be in the employ of the SOE.</p>	<p>executive function. Majority of members of audit committee must be non-executive and majority must be financially literate.</p>	<p>committee may be executive directors. However, compliance with one provision (the more onerous Companies Bill requirement) does not have the effect of contravening the PFMA provision and accordingly there is no conflict such that the PFMA would prevail as contemplated in section 5(4)(b) of the Companies Bill.</p>
17.	<p>Section 94(7) – role of audit committee. Very detailed role of audit committee set out</p>	<p>Section 183 – lists roles and duties of audit committees. Includes any matters as may be prescribed by treasury.</p>	<p>Treasury Regulation 27.1.8 – sets out what “amongst others” the audit committee is required to do. Not as lengthy as in the Companies Bill.</p>	<p>The Companies Bill and PFMA set out roles and duties of the audit committee which are not aligned. It would be preferable for the role of the audit committee to be aligned.</p>

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18.	Section 168 – complaints to Commission or Panel. Person alleging a contravention of the Act to file a complaint with the Commission. The Commission may investigate the matter.		Treasury regulation 33 – if the board or any director alleged to have contravened the Act (by "financial misconduct") – the Minister responsible for that SOE must initiate as investigation.	<p>As compliance with the audit committee duties under one piece of legislation would not contravene the other, both sets of duties would have to apply concurrently as contemplated in section 5 of the Companies Bill.</p> <p>This may be an area where a request for a section 9 exemption is warranted given that there are two overlapping regulatory regimes for audit committees.</p>
				<p>It appears that two separate investigations would have to be conducted in the event of a contravention of the Companies Act which also constituted financial misconduct under the PFMA.</p> <p>Should be clarified if a</p>



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				section 9 exemption could be requested so that contraventions of the Companies Act which also constitute "financial misconduct" would only have to apply the PFMA regulatory regime.