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7 August 2008

Attention: Ms M A Williams

(By email to mawilliams@parliament.gov.za)

Ms Marcelle Williams

The Secretary to Parliament of the RSA

P O Box 15

Cape Town

8000

Dear Ms Williams

SUBMISSION ON THE COMPANIES BILL [B 61-2008]

We appreciate the opportunity to provide our written submission on the Companies Bill [B61-2008] (the "Bill") published on 27 June 2008. The Independent Regulatory Board for Auditors (the "IRBA") is the independent regulator of the auditing profession in South Africa and is established in terms of the Auditing Profession Act, Act No. 26 of 2005 (the "APA").

The IRBA supports the Department of Trade and Industry's (the "DTI") efforts to develop a "*clear, facilitating, predictable and consistently enforced law*" to provide a "*protective and fertile environment for economic activity*". We believe the specific goals of "*simplification, flexibility, corporate efficiency transparency and predictable regulation*" as set out in the *Memorandum on the Objects of the Companies Bill, 2008* will be achieved by the Bill.

In general, we support the Bill, but appreciate the opportunity to provide additional comments on specific sections, which we believe will facilitate the achievement of these objectives.

The IRBA has as one of its statutory objectives the protection of the public by regulating audits performed by registered auditors, and the consequential promotion of investment and employment in the Republic. Our comments should be interpreted in light of meeting these

objectives. We also support the protection of minority interests and therefore any provisions in the Bill that will meet this objective.

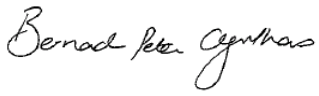
Our submission is set out under the following main headings:

PART A: MATTERS OF PRINCIPLE

PART B: DETAILED COMMENTS ON SPECIFIC SECTIONS OF THE BILL WITH OUR RECOMMENDATIONS

Should you wish to discuss our comments or require clarity on any of the matters raised, or if we can assist in any way, for example, with the drafting of Regulations, please do not hesitate to contact me at the IRBA or by e-mail at: bagulhas@irba.co.za.

Yours faithfully



Bernard Peter Agulhas

ACTING CHIEF EXECUTIVE OFFICER

PART A: MATTERS OF PRINCIPLE

1. Independent Review

1.1. We are concerned that Section 30(10) provides for the Minister to make regulations, including different requirements for different categories of companies prescribing:

1.1.1. "30(10)(a) the categories of any private companies that are required to have their respective financial statements audited; and

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

1.2. We believe that such a review should express some level of assurance to stakeholders, users and the public at large, and that it should not be equated to the type of engagement currently carried out on Close Corporations, which does not express **any** level of assurance, and therefore a review offers limited protection to those who rely thereon.

1.3. Furthermore, it is important that such an independent review should be conducted in accordance with a recognised review standard, to be issued by a recognised standard setter for assurance engagements.

1.4. The auditing pronouncements, with which registered auditors in South Africa must comply, include standards for both audits and reviews of historical financial statements, prepared in accordance with an accepted financial reporting framework, which enable the auditor to express reasonable assurance (audit) or limited assurance (review) on the annual financial statements of any company incorporated under the Bill. Registered auditors are thus professionally qualified to conduct both independent audits and independent reviews of annual financial statements of the different types of companies as envisaged in the Bill. Section 41(2) of the APA does not permit any person who is not registered in terms of the APA to perform an audit.

1.5. The quality of assurance work performed by registered auditors is monitored by an Inspections Department at the IRBA, which ensures consistent application of recognised assurance standards. Registered auditors who do not comply with prescribed standards are referred for investigation and disciplinary action.

1.6. Given the statutory mandate of the IRBA to develop assurance standards, and its involvement with standard setting, both locally and internationally, it is recommended that the standards for an independent review and the manner in

which such a review is performed should be developed in consultation with the IRBA.

2. Maintenance of Accounting Records

2.1. It could be interpreted from the manner in which Section 28 is drafted, that if a company is not required to prepare financial statements it does not have to keep accurate and complete accounting records.

2.2. We believe it is important and necessary for all companies to keep accurate and complete accounting records as the information would be needed to manage the affairs of the company and to provide a trail of transaction recording for regulatory and judicial purposes. This would also be necessary when the Commission issues an administrative notice in terms of Section 30(2) to a company that was previously exempt from preparing financial statements.

2.3. We recommend the deletion of the words "with respect to the preparation of financial statements" in Section 28(1)(a).

3. Financial Reporting Standards

3.1. The basis on which the functions of the Financial Reporting Standards Council ("FRSC") are provided for is critical to maintain the credibility of financial reporting in South Africa and its ability to attract foreign investment.

3.2. In terms of Section 29(5) the financial reporting standards must be consistent with International Financial Reporting Standards (IFRS) of the International Accounting Standards Board (IASB). This creates inflexibility and raises the question whether reporting standards currently applied by companies in South Africa such as:

3.2.1. IFRS, Generally Accepted Accounting Practice (SA GAAP) and South African Statement of Generally Accepted Accounting Practice for SME's (SA GAAP for SME's), applied by private sector entities, and

3.2.2. Generally Recognised Accounting Practice (GRAP) standards, applied by public sector entities, would continue to apply.

3.3. We recommend that the FRSC functions set out in Section 204 include a mandate to determine what financial reporting standards are appropriate for different companies and state owned enterprises, in order for those that are audited to be prepared in terms of a recognised framework that achieves fair presentation. Public companies and private companies with public accountability (for example companies listed on a

securities exchange), or part of global groups of companies should be required to prepare financial statements on the basis of IFRS.

3.4. The function of the FRSC in terms of Section 440S of the present Companies Act, is "*to establish financial reporting standards for public interest companies and develop accounting standards for limited interest companies*". This function appears to have been set aside in Section 204 of the Bill and accordingly we require clarity about whether the FRSC will only fulfil an advisory role to the Minister as stated, or whether it will become the National Accounting Standard Setter with responsibility for the setting of financial reporting standards, a role presently undertaken by the Accounting Practices Board (APB) to ensure alignment with International Financial Reporting Standards.

3.5. Due to the dynamic nature of the financial reporting environment, we recommend that the functions of the FRSC should include responsibility for coordinating the accounting standard setting process, including the issuing of various supporting documents including guidelines, circulars and South African specific financial reporting standards. We therefore recommend that Section 204(b) and Section 29(4) be amended to include these functions.

3.6. We recommend that the regulations, specifically regarding the financial reporting standards which will also affect the independent review (refer to comment 1 above) be made available at a date earlier than the effective date of the Bill and that the comment process and period allowed for draft Regulations in Schedule 7, Paragraph 14, is followed.

4. Preparation of Annual Financial Statements

4.1. The exemption from the requirement to prepare annual financial statements in Section 30(1) sets a precedent as any person wishing to enjoy the benefits of conducting business through the medium of a company should accept the responsibility for being accountable, at least on an annual basis, for the preparation of financial statements that reflect the results of its operations and financial position at a point in time.

4.2. Numerous regulatory requirements within South Africa are based on the underlying requirement for the preparation of annual financial statements. Consequently, by removing this requirement for companies (other than dormant companies), is to ignore and potentially undermine other regulatory requirements of government.

4.3. Consequently, we recommend that the requirements of Section 29 should rather be encapsulated into Section 30 with appropriate changes to ensure all companies have a responsibility to prepare annual financial statements as at a specific year end date, and not subject to change by virtue of the fact that it ends on a Saturday, Sunday or public holiday (Section 27(6)).

5. Auditors – Removal and Rotation

5.1. We noted that the Bill does not include any provisions for the removal of auditors and thus recommend the inclusion of sections similar to Sections 277 to 279 in the current Companies Act.

5.2. We recommend that Section 92 in the Bill regarding **rotation of auditors** should be aligned with international practice and the Code of Ethics of the IRBA and be made specifically applicable to the audit of public companies. Internationally and in terms of the Code of Ethics, the rotation of auditors applies to public companies only and the rotation period for the individual lead audit engagement partner is 5 years with a cooling-off period of 2 years.

5.3. It is unclear from the Bill to whom the rotation applies because of the use of "**auditor**" and "**designated auditor**". The Bill does not define a "designated auditor" and the APA includes a "firm of auditors" under the definition of "auditor". We recommend that the Bill should specify that the rotation applies to the "individual registered auditor within the firm that is responsible or accountable for that audit" for companies that are public companies, and not the "**firm**" that is the registered auditor, if that was the intention.

PART B: DETAILED COMMENTS IN RELATION TO SPECIFIC SECTIONS

No.	Section	Issue	Recommendation
Chapter 1			
1.	1	There appears to be an editorial error in the definition of "**distribution**".	We suggest that the word "or" be added to subsection (c) as follows "… owed to the company by one **or** more holders of any of the shares …"
2.	1	There is no definition in the Bill for "designated auditor", although section 92 of the Bill refers to it. It is unclear what the difference between "auditor" and "designated auditor" is. The Companies Act in Section 274(3) defines a "designated auditor as "the individual registered auditor who undertakes the audit". The APA in Section 44(1)(a) requires "… the audit firm immediately after the appointment as auditor is made, take a decision as to the "individual registered auditor within the firm that is responsible or accountable for that audit"	We recommend that the term be defined or removed if there is no difference between "auditor" and "designated auditor".
3.	1	The term 'annual financial statements' is not defined. The term 'financial statements' should be defined more precisely (not merely by listing examples of documents that would fall under that heading) to ensure consistency and avoid uncertainty.	We recommend that these concepts be defined by reference to the financial reporting standards, as this will ensure that the definitions remain relevant as the standards evolve.
4.	1	The definition of "financial statement" makes reference to "interim or preliminary reports" in subparagraph (b), but is not mentioned elsewhere in the Bill.	We recommend that the references be removed.
5.	1	The meaning of the word 'group' in part (c) of the definition of 'financial statements' is unclear. Normally the group's financial results are set out in	We recommend the removal of the word "group" in part (c) of the definition.

No.	Section	Issue	Recommendation
		consolidated financial statements. The Bill does not make mention of any other form of group financial statements. In addition, although this definition is qualified by the phrase 'may reasonably be expected to rely on', it is not clear from this definition for what purpose the affected party would reasonably be expected to "rely on" the financial information before the circular becomes a "financial statement" as defined.	We recommend that part (d) is expanded to provide further clarity.
6.	1	The definition of a 'group of companies' will now include companies held by related individuals but which are not otherwise related. The practical implications of the definition for 'related and inter-related persons and control' allow for companies controlled by distant relations (or even where such persons are bound only by affinity) to 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 or inclination to exercise such control in concert. This wide definition of a group varies from terminology used internationally and will inevitably complicate the interpretation and implementation of the Act, e.g. 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.	It is proposed that a 'group of companies' be defined with reference to the structure of the group itself only, i.e. holding company and subsidiaries.
7.	1	A "juristic person" is defined to include "a trust, irrespective of whether or not it was established	We recommend that the words 'for the purposes of this Act' be included in part (b) or that 'trust'

No.	Section	Issue	Recommendation
		within the Republic". This principle goes against a fundamental principle of trust law which is that a trust is not a juristic person.	be removed from the definition.
8.	1	The definition of 'state-owned enterprise' refers to the definition included in the Public Finance Management Act or the Municipal Systems Act. This definition is not mentioned in either one of these Acts.	We recommend that the term should either be defined or referenced to the actual terms used in those Acts.
9.	1	Sections 30(8)(e), 30(8)(f) and 30(8)(g) refers to 'future director' which is not defined.	We recommend that the term should be defined.
10.	2(1)(a)(ii)	Related persons – degrees of consanguinity. Three degrees of consanguinity stretches the definition of related persons too far to be practical or useful. Also, it is not clear what is meant by affinity. Although this definition clearly aims to protect stakeholders, it may be argued that three degrees of consanguinity and affinity may lead to unintended consequences.	We recommend that only one degree of consanguinity is applied (immediate family), and that the reference to affinity be removed or defined.
11.	4	The Act should not refer to consolidated assets and liabilities of a group of companies as the solvency and liquidity test should be assessed at an individual company level. A fair valuation of the company's assets and liabilities must be performed based on the accounting records. Reference should not be made to the source of financial information in part 2(a). We further consider that part 2(b)(i) should not include any reasonably foreseeable contingent assets and liabilities as these would be taken into	We recommend that the section be re-drafted 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, fairly valued, exceed the liabilities of the company, 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

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		account in the determination of fair value. The meaning of “fair valuation” is unclear.	(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) (c) should be redrafted to read: (c) “ 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 regard as a liability, any amount that would be required, if the company was 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.” We recommend that the term “fairly valued” be used and be defined as “The amount for which an asset could be exchanged, or a liability settled, between knowledgeable, willing parties in an arm’s length transaction.” Additionally, the Act should not permit the use of ‘any other valuation’ as this will create inconsistencies and will allow for manipulation of the results.
12.	8	The significance of the date 31 December 1939, in relation to associations of persons is not apparent to the reader of this proposed Act. We do not believe that this section needs to be retained in our corporate law.	We recommend that consideration be given to removing the paragraph.

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13.	10(2)(c)	The reference to Section 67(9) or (10) is not correct as these paragraphs do not exist in Section 67.	We recommend that the reference is rectified.
Chapter 2			
14.	11(2)(a)(ii)	Changes to the naming of companies are proposed without amending the Business Names Act.	We recommend that consequential amendments are made to the Business Names Act to ensure consistency.
15.	11(3)(b)	Section 11(3)(b) requires a company's name to be followed by (RF) if its Memorandum of Incorporation includes any provision contemplated in section 15(2)(b) or (c). It is unclear why this section refers to "section 15(2)(b) or (c)". The meaning of ("RF") is unclear as it has not been defined anywhere in the Bill, nor is it used anywhere else in the Bill.	We recommend that the reference to "section 15(2)(b) or (c)" be removed or, if the reference is incorrect, that the reference be updated to refer to the intended sections of the Bill. We recommend that the reference to "(RF)" be clarified.
16.	15(6)(c)(ii) and 72(2)(a) S94(4)(a)	Persons who are not directors are allowed to be members of the audit committee. We further noted that Section 94(4)(a) requires directors only, to be members while Sections 15 and 72 allow persons other than directors to be members.	We recommend that these Sections be consistent.
17.	20(4) & 45(5)	Rights are given to trade unions representing employees but not to employees who are unrepresented.	We recommend that these sections indicate the rights of unrepresented employees. Section 20(4) should be rewritten as follows: '(4) One or more shareholders, directors or prescribed officers of a company, or a trade union representing employees of the company, or employees not represented by a trade union, may take proceedings to restrain the company from doing anything inconsistent with this Act.' Section 45(5) should be rewritten as follows:

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			'(5) If the board of a company adopts a resolution to do anything contemplated in subsection (2), the company must provide written notice of that resolution to all shareholders, unless every shareholder is also a director of the company, and to any trade union representing its employees and to employees not represented by a trade union-'
18.	21(5)	We believe that the automatic ratification as contemplated in Section 21(5) could be unfair if someone acted in bad faith and the directors are unaware of this fact. There should be a mechanism where the company first have to be aware of a particular contract before it is automatically ratified.	We recommend the inclusion of a provision that the automatic ratification only applies if it is proven that the directors were aware of the pre-incorporation contract and did not act.
19.	22	The ambit of this section is wider than the present Act and now includes carrying on business recklessly, with gross negligence or fraudulent intent. It is unclear whether the grounds of prohibition in (a) should be read collectively as five conditions that must apply simultaneously, or should be regarded as five separate grounds, of which only one needs to be applied for the section to be triggered. Further, the prohibition is phrased prospectively, rather than a finding that may be made after the event, and as such it can be applied to actions that cause no harm and which may benefit the company. This section does not allow a company to "trade under insolvent circumstances", it is unclear if a company would be able to trade when a subordination agreement is	We recommend that Section 22(1) should be clarified. Guidance should be provided as to whether insolvency, in this section, will be determined by reference to the solvency and liquidity test in section 4. The section should be reworded to apply only in instances where a company has been determined to be insolvent. This will provide support to the Business Rescue provisions of the Bill rather than create a contradiction.

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		obtained. If not, it should be understood that a company will then have no opportunity to trade. The term "insolvent circumstances" is not defined.	To enable compliance we suggest that 'insolvent circumstances' be defined.
20.	23	Section 23 is titled "Registered Office" but deals mostly with an "external company".	We suggest the heading of Section 23 be amended to "External company".
21.	24	While we welcome the introduction of retention of records in electronic format, we are concerned that the retention period for documents is only seven years. Some documents 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. Further, any director of a board who has objected to a decision, but was overruled by the majority, would want his or her objection permanently recorded, and a court would rely on this record in deciding on levels of accountability of individual directors.	We recommend that the following documents, amongst others should be retained until deregistration 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 and rules.
22.	27(6)	Section 27(6) states that if the financial year of a company ends on a Saturday, Sunday or public holiday in a particular year, that financial year will be regarded to have ended on the next following business day.	Whether a financial year ends on a Saturday, Sunday or public holiday is irrelevant and accordingly we recommend that this section should be deleted.
23.	29(1)(e)(ii)	Section 29(1)(e)(ii) requires the name of the preparer or supervisor of the financial statements to be disclosed.	Further clarity is needed on who the "preparer" or "supervisor" would be and whether it could be more than one person.

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		However, generally, quite a number of people are involved in the preparation and supervision of a set of financial statements. Therefore it is unclear who is envisaged as the "preparer" or "supervisor".	Currently directors of a company take responsibility for the preparation of the financial statements, so this section appears unnecessary and should be deleted
24.	30(1) & 61(7)	Section 30(1) of the Bill requires a company to "prepare annual financial statements within 6 months after the end of its financial year…" Section 61(7) of the Bill requires a public company to convene an annual general meeting "once in every calendar year, but no more than 15 months after the date of the previous annual general meeting…" The period in which the financial statements would have to be prepared would thus diminish annually.	We recommend the amendment of these sections to allow for a fixed period after the financial year end in which the AGM has to be held and the annual financial statements has to be prepared and presented.
25.	30(5)(b)(ii)	The prescribed information that has to be included in the directors' report is not clearly specified.	We recommend that the information required should be clarified.
26.	30(8)(e), 30(8)(f) and 30(8)(g)	These Sections refer to disclosures regarding remuneration or benefits paid to a "future director" which term is not defined in the Bill, and such disclosures are not required by any financial reporting framework.	We suggest that any reference to a "future director" either be defined in the Bill or is deleted from this section. Remuneration paid to a "future director" is hypothetical and disclosures could be misleading.
27.	31(2)(b)	We question how Section 31(2)(b) would work practically if the company is not required to produce annual financial statements. Where certain companies have been exempted from preparing financial statements in ordinary situations, it is doubtful if 60 days will be sufficient to enable financial statements to be	We recommend the removal of part (b) which in any event will fall away should the Bill be amended to require every company to prepare annual financial statements.

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		prepared for a judgment creditor.	
28.	33(1)	It is unclear to whom the annual information return should be sent. We presume that it has to be filed with the Commission.	We recommend that this should be made clear.
29.	34	Public companies usually have significant operating subsidiaries that are private companies. The current provisions in section 34 of the Bill do not extend the enhanced accountability and transparency provisions to such private companies.	We propose that Sections 84 – 94 should apply to subsidiaries of public companies, in addition to those companies stipulated in the Bill.
30.	3(1)(b) 35(3)(b)	Section 35(3)(b) requires that a company must at all times have at least one share issued to at least one person, other than a company that is part of the same group of companies, or a juristic person that is controlled by one or more companies within the same group of companies." This seems to contradict the intention of Section 3(1)(b) which recognises wholly-owned subsidiaries held by juristic entities. This seems to imply that one company can no longer hold 100% of the shares of another company, because if they did, the company would not "have at least one share issued to at least one person other than a company that is part of the same group of companies". We question whether this was the intention of the Bill as this could have a negative impact on foreign investment and could have a significant impact on many groups of companies within South Africa. Many foreign companies form wholly owned subsidiaries in South Africa through which they conduct business. This section	We recommend that this position is reconsidered and that Section 35(3)(b) be deleted.

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		would imply that they would need to have at least one other, unrelated shareholder, which, in many cases would be undesirable and sometimes impractical. Additionally, 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. This requirement would also result in a very limited application of Section 30(1)(b)(ii)(aa) which exempts a private company from preparing annual financial statement if “one person holds, or has all of the beneficial interest in, all of the securities issued by the company” as Section 35(3)(b) would limit this to instances where a natural person holds all of the shares in a company.	
31.	40(1)(a)	The meaning of the term “adequate consideration” in relation to the issue of shares is unclear. We are concerned that there is no requirement for shareholder approval when shares are issued at a "discount".	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. We recommend that a special resolution of shareholders should be required if shares are issued at a discount.
32.	43(1)(a)	It is not clear why promissory notes and loans should not be classified as debt instruments.	We consider promissory notes and loans to be debt instruments. As such the intention supporting 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.
33.	43(3)	This section seems to allow debt instruments to be issued by the board in terms of section 43(2), that may have the effect of	We recommend that the ability of the board of directors to issue debt instruments that have voting rights be curtailed to ensure the

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		diluting the rights of shareholders.	protection of shareholders. Existing shareholders should approve the issuance of debt instruments that carry voting rights.
34.	45(5)(a)	The term “net worth” has not been defined.	We recommend that the term should be defined.
35.	46	It is not clear why section 46(1)(b) is necessary in addition to section 46(1)(c), as both appear to achieve the same purpose. It is not clear why subsection (2) is couched in peremptory terms.	We recommend that section 46(1)(b) be removed. We recommend that the board of directors retain the ability to revoke a previous resolution should the circumstances of the company demand this.
36.	56(7)	There is no indication of the date on which the beneficial interest in securities holding is to be disclosed under this section should be measured, nor any offence for failing to do so.	We recommend that the section indicates that securities outstanding at the balance sheet date of the last financial period presented in the annual financial statements be listed in terms of the section. Furthermore, the consequences for non compliance with the provisions would need to be indicated in the legislation.
37.	57(2)(a)	While we agree with the overall exemptions granted to companies owned by a single shareholder, we believe that certain key decisions of the company must be recorded. It is desirable that any decisions taken by the person in his or her capacity as a shareholder should be recorded in the same way as minutes of shareholders’ meetings are kept by other companies.	We propose that a record aligned to the requirements set out in section 61(8) also be maintained for companies owned by a single shareholder.
38.	61(8)	The matters specified in section 61(8) are incomplete as it should also provide for the opportunity to present and discuss a company’s strategy.	We recommend that the requirements be expanded to include the strategy of the company.
39.	62(3)(d)(i)	Section 62(3)(d)(i) requires a notice of AGM to include a summarised form of the financial statements to be presented which contradicts Section 29(3) that provides a company with an	We recommend that this requirement be removed.

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		option to provide this.	
40.	64(9)	The purpose of this subsection is unclear and may produce an unfair result. It is unclear 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.	It is proposed that the required quorum be applied for the duration of the meeting or discussion and decision of any particular agenda item.
41.	65(11)	Section 65(11) provides an incomplete list of special resolutions as required by the Bill.	We recommend that either a complete list be provided, or that the list be omitted.
42.	66(10)	It is considered onerous to require directors' remuneration to be approved by special resolution. It is noted that section 66(10)(b) offers some relief as it states that "A company's Memorandum of Incorporation may permit (a) a lower percentage of voting rights to approve any special resolution; or (b) one or more lower percentages of voting rights to approve special resolutions concerning one or more particular matters, respectively, provided that there must at all times be a margin of at least 10 percentage points between the requirements for approval of an ordinary resolution, and a special resolution, on any matter." However, a special resolution is required to amend the Memorandum of Incorporation, which results in the relief provided by section 66(10)(b) being impractical. An ordinary resolution is considered sufficient for the approval of directors' remuneration.	Section 66(10) should be rewritten as follows: 'Remuneration contemplated in subsection (9) may be paid only in accordance with an ordinary resolution approved by the shareholders within the previous two years.
43.	80(3)(b)(ii)	This requirement is very onerous on the auditor. The current wording of the paragraph stating that, to the best of the auditor's	We recommend that, if a company is audited or reviewed, a set of the most recent audited/reviewed annual financial

No.	Section	Issue	Recommendation
		knowledge and belief and according to the financial records of the company, the company appears to have no debts is considered ambiguous and does not provide sufficient guidance to the auditor of the scope of work to be performed, taking into consideration current auditing pronouncements. Further clarity is needed on: • The type of "report/certificate" • The standard that would be applied for this work • The type of assurance that is required.	statements are submitted to the Master, in addition to the most recent financial statements. Where a company is not audited or reviewed, a set of the most recent financial statements should be submitted to the Master. Section 80(3)(b)(ii) should be rewritten as follows: '(ii) the most recent financial statements of the company dated no more than 30 business days before the date on which the resolution and notice are filed and (iii) where the company is audited or reviewed, the most recent audited/reviewed annual financial statements of the company.'
44.	81(2)(b)(i)	Section 81(2)(b)(i) includes the words 'acquiring another shareholder…'	We recommend the wording 'acquiring the shares of another shareholder' as it is not possible to acquire another shareholder.
45.	81(3)(a)	Section 81(3)(a) disallows a court to make an order if, before conclusion of the court proceedings, any of the directors have resigned or have been removed, and the court concludes that the remaining directors were not materially implicated in the conduct on which the application was based. We question why the court should be precluded from continuing with the liquidation process if the directors have resigned.	We recommend the removal of this provision as the court proceedings should be able to continue even if the directors have resigned.
Chapter 3			
46.	84(1)	Private companies to which the Commission issues a notice under Section 30(2) should also be subject to the Chapter to create consistency in the application of this section.	We recommend that the following should be included: '(d) a personal liability company or a private company to which the Commission has issued an administrative notice in terms of section 30(2)'
47.	84(3)(a)	Section 84(3)(a) provides that where there is a conflict between this Chapter and a provision of	We recommend that the PFMA should be included.

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		the Public Audit Act, this Act would prevail. We question whether the Public Finance Management Act (PFMA) should not also be included.	
48.	90(2)(b)(ii) 90(2)(b)(iv)	Section 90(2)(b)(ii) - The meaning and purpose of this subsection is not clear. To exclude a person from eligibility as an auditor of a company, as that person had 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 subsection. Section 90(2)(b)(iv) - The current wording is considered unnecessarily prescriptive. It is recommended that this sub-section is reworded to reflect the current wording of the Corporate Laws Amendment Act, 2006 (24 of 2006).	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 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 by himself or his partner or employee habitually or regularly performs the duties of secretary or bookkeeper of the company (v) a person related to a person contemplated in subparagraphs (i) to (iv); and…'
49.	92	This section states that an auditor's resignation is effective when the notice is filed. It is unclear whether the company or the auditor should file such a notice and to whom the filing should be made.	We recommend that both the auditor and the company have the responsibility of issuing the notice referred to in the section and that the Commission should be the party to whom the notice is sent.
50.	93(1)(b)	This section allows the auditor of a holding company access to "any information and explanations" in connection with	We recommend that "documents" also be included to ensure the auditors scope is not unintentionally restricted by

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		the financial statements of those entities.	legislation.
51.	94(7)(f)(iii), 94(7)(i)	The requirement for an audit committee to comment in the financial statements, per section 94(7)(f)(iii) is inappropriate. Any comment on the appropriateness of the financial statements, the accounting practices and the internal financial control of the company should be expressed by the board of directors. The requirements included in section 94(7)(i), describing other functions to be performed by the audit committee, includes tasks which should be performed by the board of directors. It would not be appropriate to impose a duty on the audit committee to perform these functions as it is the responsibility of the board, in conjunction with management, to set the risk strategy policies. This recommendation is consistent with the governance guidelines of King II, which outline that "the Board should set the risk strategy policies in liaison with the executive directors and senior management."	Section 94(7)(f)(iii) should be deleted. Section 94(7)(j) should be reworded as follows: 'to perform other functions determined by the board'.
52.	S94(8)(a)(ii)	Reference is made to subsection 6(d) which does not exist.	We recommend that the correct reference should be included.
Chapter 4			
53.	95(1)(d)	We question the necessity of part (i) in the definition of expert. Specific experts are mentioned, but the list is not exhaustive. We believe that part (ii) would be sufficient to cover all experts mentioned in (i). Secondly, part (ii) is very wide as it includes any person who professes to be an expert.	We recommend rewording the definition as follows: 'any person who has extensive knowledge or experience, or to exercise special skill which gives or implies authority to a statement made by that person'.
54.	95(1)(k)	The definition of "registered prospectus" includes an "or" between parts (i) and (ii). We	We recommend that the "or" be changed to "and".

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		believe it should be an “and” as both items are required in the current Act.	
55.	97(1)	This section makes reference to Sections 44(2)(c)(i) and 45(2)(c)(i) which does not exist.	We recommend that the correct reference be included.
56.	98(3)(a)	The section states that an advertisement drawing attention to an offer to the public is not required to be filed or registered with an exchange. We do not believe that this is sufficient.	We recommend that as a minimum the offer should be filed on JSE Ltd’s SENS.
57.	99(1)(b)	This section requires a foreign company to file a copy of its Memorandum of Incorporation before an offer to the public is made, but a Memorandum of Incorporation might not be used by foreign entities.	We recommend that the wording be changed to “founding documents”.
58.	101(2)(b)	This section does not clarify to whom a written statement to accompany a secondary offer to the public, when a prospectus is not available, should be provided or the timeframe in which it must be done.	We recommend that a timeframe and to whom it must be sent should be included.
59.	104, 105, 106	The term “responsibility” as apposed to “liability” is used in these sections.	We recommend that consistent terminology be used in these sections.
Chapter 5			
60.	115	The heading appears to be incomplete. We believe is should refer to Part A.	We recommend that the heading be completed.
61.	115(2), (3)	Section 115(2) read with Section 115(3) appear to require at least 85% super majority approval for a disposal, amalgamation or merger. A special resolution with 75% approval appears to be inadequate as the approval of the court is still required if holders of 15% of voting rights are opposed to the resolution.	Therefore, in line with the objectives of minority protection, we recommend that it would be clearer to require a super majority of 85% approval for the transactions contemplated in this section.
62.	116(3)(b)(ii)	We are concerned that the required filing of a notice of amalgamation or merger, subject to the order of the court could take a long time and delay	We recommend that an alternative to the “court” should be provided in this section, for example, The Companies Ombud.

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		proceedings drastically.	
63.	118(1)(c)	As a private company's shares may not be offered to the public and there must be restrictions on the transfer of its shares, it seems inappropriate that private companies should fall under the jurisdiction of the Takeover Regulations as this requirement adds a compliance burden on a private company.	Section 118(1)(c)(i) should be deleted.
Chapter 6			
64.	128(f)	We believe that the words 'and its liabilities exceed its assets' in part (i) may not be practical and should be removed. Alternatively, the entire definition should be clarified as to whether the solvency test in Section 4 bears any relevance to whether a company is financially distressed.	We recommend the deletion of 'and its liabilities exceed its assets' or that the definition be clarified. We further recommend that the 6 month period in part (ii) and (iii) of the definition be increased to 12 months.
65.	130(2)	We are concerned with the time delays if a court should remove a supervisor from office.	We recommend that there should be a mechanism that an affected person could request the removal of a supervisor through another regulatory body instead of the court, for example, the Companies Ombud.
66.	132(1)(c) & (7)	We noted that inconsistent terminology is used in these two sections i.e.: "proceedings to enforce any security against the company" and 'proceedings to enforce a security interest'.	We recommend that consistent terminology should be used.
67.	132(2)(c)(ii)	The word substantial in 'substantial implementation' is not defined.	We recommend that the word should either be defined or replaced with 'material'.
68.	133(1)	We noted that there is no 'or' after (a), (b) and (c) and that (e) does not start with a verb.	We recommend that the word "or" should be included after (a), (b) and (c). We recommend that (e) should start with 'for'.
69.	134(3)(a)	This section does not refer to obtaining the prior consent in writing.	We recommend that the word 'written' should be included.

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70.	136	Section 136(2) and (3) - Subject to Sections 35A and 35B of the Insolvency Act, 1936 (Act No. 24 of 1936), despite any provision of an agreement to the contrary, during business rescue proceedings, the supervisor may cancel or suspend entirely, partially or conditionally any provisions of an agreement to which the company is a party at the commencement of the business rescue period, other than an agreement of employment. Any party to an agreement that has been suspended or cancelled, or any provision of which has been suspended or cancelled, in terms of subsection (2) may assert a claim against the company only for damages 136(4) - If liquidation proceedings have been converted into business rescue proceedings, the liquidator is a creditor of the company to the extent of any outstanding claim by the liquidator for any remuneration due for work performed, or compensation for expenses incurred, before the business rescue proceedings began.	We believe that powers given to the supervisor to cancel or suspend any provisions of agreement, are excessive and erode the certainty of enforceability of business agreements. We believe that the remuneration of the liquidator and costs of the liquidation rank equally with the fees and costs of business rescue proceedings.
71.	138	This section sets out the qualifications of persons who may be appointed as the supervisor of a company, subject to regulations prescribed by the Minister. The demands on the supervisor, especially in the early stages of a business rescue, are considerable. The supervisor's responsibilities include maintaining stability, conducting his investigations and reporting to affected parties and the court. The range of skills and experience required of the	We recommend that this is borne in mind when prescribing regulations for qualifications for the "supervisor"

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		supervisor should not be underestimated as the supervisor is required to have not only significant business acumen, influence and authority but also the financial and legal expertise to manage complex group structures in a business rescue. Currently, very few organizations, let alone individuals, have the necessary breadth of skills and experiences, making the option of a business rescue a costly exercise, especially if the risks of failure of rescue proceedings are also factored into the equation.	
72.	140(1)(c)(i)	This section provides that the supervisor may remove from office any person who forms part of the pre-existing management of the company. This seems extreme and perhaps would infringe on the Labour Relations Act.	We recommend that the following be added to this section: "with due cause and in compliance with other relevant employment legislation".
73.	141(1)	This section states that as soon as practicable after being appointed, a supervisor must investigate the company's affairs etc. This contradicts Section 147(1)(a) – First meeting of creditors – which states 'within 10 business days after being appointed'.	We recommend that the wording should be changed in one of these sections to ensure that there is no conflict.
74.	142	We believe that it should not only be the directors, but any person who knows where other books and records relating to the company are being kept, that must inform the supervisor.	We recommend the following change: "any director and/or other officer of a company".
75.	142(3)(b)	We believe that the term 'including enforcement proceedings' is unclear.	We recommend that the term should be further clarified, or should be reworded.
76.	142(3)(f)	We believe that it is unclear what is included in "rights of creditors".	We recommend rewording part (f) to 'any creditors, stating any rights that they might have'.
77.	143(2)	This section provides for contingency fees to the	We recommend the removal of all references to "contingency fee" in

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		supervisor. It is unclear how contingency fees will work without protracted negotiations and how it applies to sub-contractors and other parties used by the supervisor.	this section.
78.	147	We believe that the 10 business day period allowed in this section may be inadequate for the supervisor to form a view on the prospects of rescue of the business, especially for complex group structures. In addition, as creditors will only be submitting their claims at this meeting, the supervisor will likely only have a more realistic perspective on the claims of creditors after this meeting.	We recommend that the 10 business days be increased.
79.	150(2)(b)(v)	We believe that Section 150(2)(b)(v) is a repetition of 150(2)(a)(ii).	We recommend the removal of Section 150(2)(b)(v).
80.	152(1)(c)	The reason for only allowing an opportunity for the employees' representatives to address the meeting is unclear.	We recommend that the sections should be reworded to: "…the supervisor must provide an opportunity for the employees or employee's representatives…"
81.	152(5)	We believe that the words "attempt to" in this section is unnecessary.	We recommend the removal of the words "attempt to" as it reads better.
82.	153(1)(b)(ii)	The term "independently and expertly determined" is unclear.	We recommend the following wording "a value determined by an independent expert".
83.	155(2) & (6)	We believe that the arrangement should be extended to third parties as well and not just the creditors. The meaning of "or every member of the relevant class of creditors" is unclear as is the exclusion of shareholders.	We recommend rewording the section to: "The board of a company, the liquidator, or any other relevant third party…"
84.	155(3)(a)(ii)	S155(3)(a)(ii) requires: "A complete list of the creditors of the company as of the date of the proposal, as well as an indication as to which creditors would qualify as secured, statutory	We recommend the correct term is used.

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		preferment, and concurrent in terms of the laws of insolvency, and an indication of which of the creditors have proved their claims". Is the term "preferment" correct or should it be "preferred"?	
Chapter 7			
85.	159(3)	Disclosure to the internal audit division of a company should also be protected.	Section 159(3)(a) should be amended to include 'a person performing the function of internal audit.'
86.	159(4)(a)	The term 'qualified privilege' is unclear.	We recommend that the term should be defined.
87.	162(10)(d)(ii)	We do not agree with the exemption of Private Companies as, even though there may be fewer shareholders, there are other stakeholders such as employees and creditors who require protection.	We recommend that the exemption should be removed.
88.	163(2)(d)	The term 'unanimous shareholder agreement' is unclear and we question why the court's power is limited to this.	We recommend the following wording "any agreement amongst shareholders".
89.	164(17)	We believe that the word 'pays' should be 'pay'	We recommend that the word be changed.
Chapter 8			
90.	187(3)	We believe that the promotion of the reliability of financial statements is an onerous obligation for the Commission.	We recommend that this function should be carried out by the Financial Reporting Standards Council or another regulatory body.
91.	205(2)(b)	Section 205(2)(b) appears to be in conflict with Section 206 as it states that a person may not be a member of the Companies Ombud, Panel, or the Council, if that person has a personal financial interest, while Section 206 permits the person to remain a member and merely precludes that person from being involved, in any manner, in the matter under consideration. We consider the latter to be sufficient.	We recommend that Section 205(2)(b) should be deleted. Section 206(1) should be reworded as follows: 'A member of the Companies Ombud, the Panel or the Council, must promptly inform the Minister in writing after that person or a related persons acquires a personal financial interest that is, or is likely to become, an interest that may conflict or interfere with the proper performance of the duties of a member of the

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			Ombud, Panel or Council.' Subsequent references to 205(b)(2) should be amended to 206(1).
92.	205	We believe that a person who has been found guilty of an offence and sentenced to imprisonment without the option of a fine, should not be allowed to be a member of the Companies Ombud, the Panel and the Council.	We recommend that this disqualification should be inserted into section 205 of the Bill.
93.	206(5)	The overriding allowance in Section 206(5) nullifies the requirements of section 206(1) to 206(3). Members with a financial interest should not be allowed to influence proceedings with no consequence.	Section 206(5) should be reworded as follows: '(5) Proceedings of the Companies Ombud, the Panel, or the Council, any decisions taken by majority of the members present and entitled to participate in those decisions are valid unless- (a) a member failed to disclose an interest as required by subsection (3); or (b) a member who had such an interest attended those proceedings, participated in them in any way, or directly or indirectly influenced those proceedings.'
94.	212	The section should contain a rebuttable presumption that information concerning companies should be available to the public unless there is a compelling case to the contrary.	If the intention is to highlight that information is available then a specific section should be added; however the current wording indicates, by implication, if a ruling is not obtained the information will be available to the public. This is in contrast to Section 31 and 26 which only allows access to financial statements, related information and company records to shareholders and judgement creditors.
Chapter 9			
95.	221(1)	We question the fairness of Section 221(1) that states that the person who kept the false information must be presumed to have made the statement, entry,	We recommend that this provision be removed from the Bill.

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		record or information, unless the contrary is proved.	
Schedule 3			
96.	Schedule 3 Part B	We believe that the reference in the subheading is incorrect.	We recommend that it should refer to 4(2)(c)(i).
97.	Schedule 3 Part C	We believe that the reference in the subheading is incorrect.	We recommend that it should refer to 4(2)(c)(ii). This reference is also incorrect in Section 30 of Schedule 3.
Schedule 7			
98.	Schedule 7 Paragraph 7(6)	This section states that "Approval of any distribution, financial assistance, and insider share issues, or options, are subject to this Act, even if any such action had been approved by a company's shareholders before the effective date, despite anything to the contrary in the company's Memorandum of Incorporation". It is not clear how far the retrospective application of this section will be required.	We recommend that this section be clarified and that a cut-off date be added so that it is clear as to how long before the implementation of this Bill, the requirements of this section should be applied.
99.	Paragraph 6(1) Paragraph 7(6)	The term “treasury shares” is not defined. The term “insider share issues” is not defined.	Both terms should be defined in the Bill.