2008 08 20 pc Trade + Industry Committee

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REPUBLIC OF SOUTH AFRICA

Companies Bill, 2008

RESPONSES TO STAKEHOLDER ORAL & WRITTEN SUBMISSIONS
DATE: 20/22 August 2008

Zodwa Ntuli – DDG: CCRD (dti)
Fungai Sibanda – CD: Policy & Legislation (CCRD)
MacDonald Netshitenzhe – D: Commercial Law & Policy (CCRD)
Desmond Ramabulana – DD: Commercial Law & Policy (CCRD)
Rory Voller – D : Legal and Regulatory Services (CIPRO)
Flip Dwinger – Legal Consultant (CIPRO)

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Purpose

- The purpose of this presentation is to provide the committee with the dti's initial response to issues raised by stakeholders during public hearings

2

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Statistics on registrations

Registered Entities	Number	Percentage (% registered)
Close Corporations	1,276,157	40.51% (75%)
Private Companies	412,233	13.09% (24%)
Public Companies	3,757	0.12% (0.2%)
Incorporated Companies (Professional)	7,976	0.25% (0.5%)
External Companies	1,056	0.03% (0.06%)
Total Registered Entities	1,701,179	54%
Unregistered Entities	**Number**	**Percentage**
Informal economy	749,500	23.8%
Sole proprietorships	699 166	22.2%
Total Enterprises in Economy	3,149,845	100%

3

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Need for a review of the existing company law regime

- Outdated company legislation
- Globalisation and advent of democracy
- Scourge of company scandals
- Developments in the field of financial reporting standards
- Easing regulatory burden especially for small businesses
- Increasing market transparency
- Simplification of company registration

4

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Underpinnings of the reformed law

(1) The repeal of the current Companies Act, 61 of 1973 and the introduction of the new core Company legislation.

(2) Simplification of company law in regards to the registration, maintenance, regulatory and institutional frameworks

(3) (a) The abolition of the concept of par value and nominal capital

(b) the introduction of the equity solvency and balance sheet solvency tests to determine proper protection of creditors

(c) the provision of financial assistance for the purpose of or in connection with the purchase or acquisition of shares in the company

(4) The introduction of an enhanced regime for the protection of shareholders, particularly minority shareholders

5

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Underpinnings of the reformed law

(5) The introduction of the non exclusive concepts concerning the duties and obligations of directors towards companies

(6) The reform of the mergers and acquisition regime and the introduction of proper mergers in the proposed legislation

(7) The introduction of a business rescue regime in the Companies Act

(8) Decriminalization, where appropriate, of the company legislation and the establishment of appropriate bodies and institutions for the effective enforcement of the proposed legislation

6

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Scope of the Bill

The Scope of the Bill focuses on fourteen broad areas:

1. **Chapter 1**
   - **Doctrine of Substantial Compliance**
   - **Types of companies**
2. **Chapter 2**
   - **Incorporation and Registration**
   - **Company Names**
   - **Corporate Finance**
   - **Corporate Governance**
   - **Transparency and Accountability**
3. **Chapter 3**
   - **Enhanced Transparency and Accountability**
4. **Chapter 4**
   - **Public Security Offerings**

7

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Scope of the Bill cont..

5. **Chapter 5**
   - **Fundamental Transactions**
6. **Chapter 6**
   - **Business Rescue**
7. **Chapters 7 & 9**
   - **Enforcement**
8. **Chapter 8**
   - **Institutions and Agencies**
9. **Chapters 8 & 9**
   - **Commissions Functions**
10. **Transitional arrangements Relationships**

8

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Chapter 1

- Comments:
  - Individuals are regarded as related if they are separated by not more than 3 degrees of consanguinity - Clause 1 and 2
  - Group of companies confusing in terms of consanguinity in relation to individuals – Clause 1
  - State Owned Enterprise should not be dealt with in Bill– Clause 1
  - The timing of application of the Solvency and Liquidity test is questioned – Clause 4
  - When there is inconsistency between the Bill and other relevant legislation eg, Banks Act etc – Clause 1 and 5
- DTI Response
  - DTI agrees that the relationship up to the 2nd degree of consanguinity is sufficient
  - Group of companies be defined in terms of the relationship between companies and not persons
  - Bill applies to State Owned Companies that are registered as Companies in terms of Bill – Definition to be amended accordingly
  - Principle of Solvency and Liquidity test has not been challenged through comment, but rather its application. Act is clear that the test should be performed at timing of event eg, when passing resolution to buy back shares
  - In cases of a conflict between the Bill and other legislation, they both apply concurrently. If inconsistency persists other legislation will prevail, provided that stricter criteria is encompassed within that legislation. Banks Act to be included in list under 5 (4)(b)(i)

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Chapter 2

- Comments:
  - Access to Company records in terms of s26 is not sufficiently wide and that outside parties eg, the Public , media etc should also have access
  - Court relief if information is withheld is financially costly and time consuming
  - Concerns raised that the Bill does not require all companies to prepare annual financial statements
  - Concerns raised in relation to compulsory Audit and review
  - If there is no quorum , shareholders present will not be deemed to form a quorum and court relief will be required
  - Concern that 50% of directors be appointed by shareholders; not clear what the rationale is and who the other stakeholders are
  - A nominee director should act in the best interest of the nominee company or the company on which he/she sits as director, if that interest is not in conflict with fiduciary duty owing to the elected company

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Chapter 2

DTI response

- The ambit of the section should be extended to provide access to the register of members and directors of the company as in s 113 of the current Act
- More power for the Commission and/or Ombud to adjudicate on access to information request not met
- Annual Financial Statements must be prepared by only those companies required to do so in terms of the Bill. AFS have implications for audits and reviews as well as enforcement
- All public companies Annual Financial statements to be audited. All other companies must either be audited if so required by rules of the Commission, or voluntarily or independently reviewed.
- A meeting which is not properly quorated, must be adjourned and the members present at the adjourned meeting shall be deemed to form a quorum at the next meeting.
- Unless Memo of Incorporation provides otherwise, 100% of Directors should be appointed by shareholders.
- Directors duty is to the company to which he/she is appointed.

11

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Chapter 3

- Comments
  - The cooling off period on the rotation of Auditors of five years is too long
  - Concern raised on the limitation of liability of Auditors
  - Concerns raised in relation to the appointment of the Audit Committee by the shareholders

DTI Response

- The cooling off period to be reduced to two years as per the Corporate Laws Amendment Act
- Provision of Auditor liability is provided for under Auditing Profession Act and there must be no contracting out on liabilities through this Bill
- Shareholders must appoint the Audit Committee as a sub-committee of the Board. Furthermore the Audit Committee report must be included in the Directors report to the AGM

12

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Chapter 4 and 5

- Comments:
  - No substantial concerns received

13

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Chapter 6

- Comments
  - Concerns were raised concerning the definition of Financial Distress that it could be equated to Insolvency
  - The Supervisor is given excessive powers to conduct the business rescue specifically regarding the suspension of contracts
  - Supervisor should be given more powers for Business Rescue to be effective
  - Which profession should be the appropriate one to be appointed as Supervisors
  - Concerns raised that Business Rescue should fall under Insolvency legislation
  - Period for Business Rescue should extend to up to a 12 months

DTI Response

- The Bill is not intended to deal with insolvency and to the extent that this is not clear, the definition of financially distressed companies should therefore be amended by the deletion of para f(i) of s128
- The Supervisor must be given sufficient power to suspend transactions for a limited period including Lease agreements.
- It is agreed that the issue of Business rescue is a new concept and therefore in SA there is not a single Profession that can claim that they would be best suited for the task. It is a multi – disciplinary issue and a crop of practitioners will have to evolve.
- Business rescue is best placed in the Companies Bill and should not be under the Insolvency Act

14

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Chapter 7

Comments:

- The whistleblower provisions should provide protection for disclosure to the media, Trade Unions, Professional Bodies
- No definition of what information constitutes confidential information

DTI Response

- The list as contained in the section is sufficient because they are groups that can take appropriate action on the information in relation to the protection of the whistleblower
- Certain legislation does provide for the definition of confidential information and therefore guidance can be sought from such legislation. Definition of confidential information will thus be inserted in the Bill

15

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Chapter 8

Comments

- The Financial Reporting Standards Council must independently develop, establish and issue standards as envisaged in the Corporate Laws Amendment Act
- Ombuds function is substantially that of a Tribunal

DTI Response

- The FRSC should develop, establish and consult on standards and ultimately the Minister will issue the Standards. This is consistent with the Corporate Laws Amendment Act
- The term 'Ombud' requires review to deal with confusion created

16

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Miscellaneous

- DTI Comments:

- Regulations to be drafted and consulted widely prior to the Act being put into operation
- Amendment of Schedule 1 and 3 should fall within the domain of the Minister to be changed by way of notice in the Govt Gazette
- Provision should be made for the registration of defensive names
- Proper requirements for Foreign companies to register as External companies should be put in place
- The funding of agencies should be provided for in the Bill

17

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THANK YOU