



**the dti**

Department:  
Trade and Industry  
REPUBLIC OF SOUTH AFRICA

## WRITTEN RESPONSES TO THE PORTFOLIO COMMITTEE ON TRADE AND INDUSTRY

### DOCUMENT TITLE : GAPS BETWEEN ISSUES RAISED AND THE DTI RESPONSE

### COMPANIES AMENDMENT BILL, 2010

**10 FEBRUARY 2011**

*the dti has responded to all main issues raised by stakeholders. The issues noted below include matters that were not on the table for consideration in this processed. Most of the issues relate to matters outside the Bill but we have given the responses in an attempt to provide clarity.*

Clause of Bill	Section of Act and heading	Party or remarks	Comment	the dti response
1	1. Definitions		<p><u>Definition of "all of the greater part of the assets or undertaking"</u></p> <p>Whether the term "fair market values" or "fairly valued" should be used and defined.</p> <p><u>Definition of "Holding Company"</u></p> <p>DTI fails to give a position on this definition.</p> <p><u>Definition of "inter-related"</u></p> <p>The definition is unclear.</p> <p><u>Definition of "special resolution"</u></p> <p>Definition seems to have differing applications to various types of entities such as co-operatives or close corporations</p> <p><u>Definition of "State – owned company"</u></p> <p>Implication on subsidiaries of State-owned company</p>	<p><b>the dti</b> agrees. Jurisprudence around these expressions do not warrant either of them to be defined as it is well known in accounting field. However for consistency, the expression "fairly valued" should be used. The FRSC may issue a practice note on determining fair value. Therefore we propose that the definition be amended</p> <p><b>the dti</b> does not agree. The definition in the Act is sufficient and no amendment to definition is required.</p> <p><b>the dti</b> disagrees. Definition is clear.</p> <p><b>the dti</b> disagrees. The differentiation is intended</p> <p><b>the dti</b> disagrees. Subsidiaries are normal SA companies subject to the Companies Act .</p>

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			<p><u>Definition of "Annual financial Statements"</u></p> <p>Define to avoid confusion</p> <p><u>Definition of "Juristic person"</u></p> <p>Effect of including trusts within definition</p>	<p><b>the dti</b> disagrees. There is sufficient jurisprudence to define such expressions. S30 also deals fully with AFS and their content and form.</p> <p><b>the dti</b> disagrees. It is intended that Trusts should be included in definition for purposes of this Act. It is specially important for the definition of holding company which is based on the definition of juristic person and the effect would be that a trusts who owns all the shares of the company maybe the holding company for a group of companies.</p>
2	4. Solvency and liquidity test		<p>Where assets equal liabilities this represents break even and should not be defined as insolvent</p> <p>The focus on financial records may limit the determination of the fair value of assets and liabilities</p>	<p><b>the dti</b> disagrees. S4(1)(a) states that if the assets of the company equal or exceed...solvency and liquidity test have been met.</p> <p><b>the dti</b> disagrees. Section contains provision that other valuations may be considered.</p>
New issues	S2(1)(a)(ii)		Limit related persons to one degree of affinity	<b>the dti</b> disagrees. In the section Parliament concluded that third degree will be appropriate. Should not be tampered with. Issue is sufficiently covered when section is read as a whole
4	6. Anti-avoidance, exemptions and		Clause 6(f) and 9(c) should revert back to	<b>the dti</b> agrees with the comment.

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	substantial compliance		Pty(Ltd)	
7	S12 of act		Amend wording in page 12 , line 17	<b>the dti</b> agrees. The amending clause in clause 7 c will be rectified.
9	S14 of act		Amend wording in page 14, line 30	<b>the dti</b> agrees. The amending clause in clause 9 e will be rectified
15	S10 of act		Time period of seven years might be too short.	<b>the dti</b> disagrees. Period is sufficient.
New section	S15(7) of act		Costs and capacity for SME's to review their shareholder agreements and MOI	<b>the dti</b> disagrees. Number of SME's with Shareholder agreements is not voluminous. Only conflicting provisions require amendment in MOI within a two year period. Cost is minimal.
19	30. Annual financial statements		Mechanism for reportable irregularities for independent reviews should be included.  Reference to Future Director is unclear	<b>the dti</b> agrees. Will be included in Amendment Bill at s30.  <b>the dti</b> disagrees. It's an appointment made by the company subject to the appointment coming into effect at a future determined date.
New Section	S20(2) of act		The possible removal of the ability to ratify actions by directors beyond scope of the companies MOI	<b>the dti</b> disagrees. This provision is in order as it provides the necessary flexibility for the shareholders of the company by way of a special resolution to ratify any unauthorized act of the company or directors.
New section	S27 of the act		Time frames between changes in financial year ends and annual general meetings. Removing the ability to consider changes in financial year	<b>the dti</b> disagrees. Companies must be allowed to amend financial year ends.

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			ends	
24	S 38 of act		Addition of a 60 day grace period to retrospectively authorise the issuance of excess shares	the dti disagrees. A limit on retroactively authorising irregularly issued shares is by this amendment limited to 60 days. The current provision places no time limit and for good corporate governance purposes, a time limit is required.
New section	S39(4)		Grammar error.Subscribe "for " fewer shares.	the dti agrees. Add word "for" after subscribe
New section	S40(1)(a)		What is adequate consideration in context of section	the dti disagrees. It's a board decision to determine what is adequate and case law will define it further. Including a list of factors will invite litigation henceforth.
New section	S45(5)(a)		Define net worth.	the dti disagrees. It's a common term found in accounting field
New section	S62(3)(d)(i)		Forced inclusion of a summarised form of financial statements in AGM	the dti disagrees. Financials must be presented at AGM in any form. Duty of every company to prepare financial statements. For preparation of AGM, shareholders will be in possession of financials.
New section	S64(9)		Removal of provision to allow a decision to be made when only one shareholder with voting rights is present at a meeting	the dti disagrees. This is for flexibility and to ensure that decisions in a company are timely made.
New Section	S66(8) and (9)		Split between remuneration for executive and non executive directors	the dti disagrees. Section allows full discretion for company to determine remuneration to directors.
New section	S72(4)		Deference of requirement to implement a social and ethics committee	the dti disagrees. Parliament has pronounced on issue that same must be implemented.
45	S75 of act		Application of same definition of a director to other sections in the Act	the dti disagrees. The definition of director in this section is restricted to s75. The definition of director here is for a



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				specific purpose at this section and is wider than the general definition of a director.
New section	S80(3)(b)(ii)		Requirement for an auditor to determine that a company has no debts	<b>the dti</b> disagrees. An independent report is required for the protections of creditors
67	S115 of act		Time period for launching of an application	Comment is not understood. But <b>the dti</b> thinks that it is appropriate.
New section	S116(4)(iv)(aa)		The FSB's legislative obligation to approve amalgamations or mergers within the financial services industry	<b>the dti</b> disagrees. Industry specific requirement that will always have to be complied with. Legislation is not in conflict but is over and above requirements
New section	S118(1)(c)(i)		Test for an affected transaction or offer in a private company should consider the number of shareholders	<b>the dti</b> disagrees. The percentage shareholding applicable is the ultimate and overriding requirement.
77	S128 of act		The distinction between commercial and technical.	<b>the dti</b> disagrees. There is sufficient jurisprudence regarding these expressions and how they relate in the financial sector.
New section	S131(4)(a)(ii)		Deletion of justification to place a company under business rescue proceedings if it has failed to pay over any amount related to employment matters	<b>the dti</b> disagrees. It's a discretionary power of the court to consider various criteria including the non payment of labour related contracts
New section	S135(1)(a)		Access to post commencement finance may be limited due to the inherent risks of such financing and the availability of collateral security	<b>the dti</b> disagrees. In this context post commencement finance is not problematic but is only in reference to non payment of employees expenses.
83	S136 of act		The protection of certain agreements such as clearing and settlement agreements and securing payments for ongoing services.	<b>the dti</b> disagrees. It is within the discretion of the practitioner to determine whether these contracts should be honoured or suspended.
New section	S143		Revising payments to business rescue practitioners to allow a minimal monthly fee	<b>the dti</b> disagrees. Issue to be dealt with in the regulations nonetheless the regulations may come with a differential

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n			with a bonus payment upon successful rehabilitation to accommodate SME's	remuneration for practitioners.
New section	S145(4)(b)		A creditor that would have been subordinated under a liquidation should be appraised and not concurrent creditor	<b>the dti</b> disagrees. This matter was debated by NEDLAC. <b>the dti</b> proposed to Parliament and it was adopted when the Bill was processed in 2008.
New section	S147(1)(a)(ii)		The practitioner should have the option to reject claims from creditors	<b>the dti</b> disagrees. This section only deals with procedures at first meeting of creditors with the practitioner. Dealing with claims will be dealt with during the rescue process.
New section	S164		Defer the introduction of the appraisal rights until after the two year moratorium for companies to amend their constitutions to avoid inadvertently triggering these	<b>the dti</b> disagrees. The transitional arrangement which provides for the amending of the MOI is for the alignment with the provisions of the new Companies Act. To defer appraisal rights has no justification herein and would revert to the previous company law regime.
New section	S185		Introduce measures to ensure that CIPC will be able to carry out its functions	<b>the dti</b> disagrees. Question relates to the implementation of the Commission and is therefore a practical issue and not a legislative one.
New section	S218(2)		The application of this section is too wide and may lead to vexatious and unsubstantiated malicious claims, which may require the use of scarce financial resources by SME's for legal costs	<b>the dti</b> disagrees. The court can reject frivolous claims.