

# 4 ADDITIONAL AMENDMENT OUTSIDE THE SCOPE OF THE BILL

*Note: References to Sections refer to provisions in the Act, while Clauses refer to the Amendment Bill.*

*The Summary is the Summary of issues emerging from the submissions dated 3 February 2011.*

*The Response is the DTI's written response dated 28 January 2011.*

*The Proposal is the DTI's written proposal for consideration by the PC on Trade and Industry submitted on 15 February 2011.*

*The Second Response is the DTI's written response dated 10 February 2011.*

Clause	Issue	Committee's decision
1	<p><b>See p3-10 of Summary; p2-3 of Response; p2-3 of Proposal; p2-3 of Second response</b></p> <p>Definition of <u>financial statement</u> (Section 1 of the Act; p24 line 51)</p> <p>Definition of <u>juristic person</u> (Section 1 of the Act; p26 line 30)</p> <p>See NT proposal under Clause 80 on p42 of Summary</p> <p>Definition of <u>regulatory authority</u> (Section 1 of the Act; p30 line 43)</p>	
n/a	<p><b>See p 55 of Summary; p3 of Second response</b></p> <ul style="list-style-type: none"> <li>- Limit related persons to one degree of consanguinity</li> <li>- Clarify the term <u>affinity</u> (Section 2(1)(a)(ii); p32 line 51)</li> </ul>	
2	<p><b>See p55-56 of Summary; p3 of Second response</b></p> <ul style="list-style-type: none"> <li>- Obligation to apply IFRS standards/accounting records and financial statements for valuation purposes (Section 4(2)(a) and 4(2)(b)(ii); p36 line 26)</li> </ul>	

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10	<p><b>See p16-19 of Summary; p5 of Response; p4-5 of Proposal; p4 of Second response</b></p> <ul style="list-style-type: none"> <li>- Section 15(2)(a)(ii) (p54 line 54) permits the Memorandum of Incorporation to alter the effect of an "alterable provision" but does not stipulate that it is prohibited to alter the effect of an "unalterable provision".</li> <li>- Cost and capacity of SMEs to align their memorandums of incorporation and existing shareholders' agreements with the new Act (Section 15(7); p56 line 37)</li> </ul>	
13	<p><b>See p56-57 of Summary; p4 of Second response</b></p> <p>Limit the ability of shareholders to ratify <i>ultra vires</i> actions undertaken by directors that were outside the scope of their authority and power under the memorandum of incorporation (Section 20(2); p62 line 37)</p>	
n/a	<p><b>See p 57-61 of Summary, p5-6 of Response; p6 of Proposal</b></p> <p>Confusion as reckless trading is not clearly defined to trading under commercial insolvent circumstances (Section 22(1)(b); p66 line 5)</p>	
17	<p><b>See p61-62 of Summary; p6-7 of Second response</b></p> <p>Consider changing the period for changes in the financial year end to no later than 18 months (Section 27(4)(c); p72 line 41)</p>	
18	<p><b>See p21-23 of Summary; p7 of Response; p7 of Proposal</b></p> <ul style="list-style-type: none"> <li>- Financial reporting standards should include interpretations of</li> </ul>	

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	<p>financial reporting standards (Section 29(4)(a) (p76 line 1) and Clause 18(b) (p19 line 21)</p> <p>- Insert the words 'fail in a material way' in subsections 29(6)(b)(i) and (ii) (p76 line 17), similarly to the amendment made in Clause 18(c) (p19 line 27)</p>	
19	<p><b>See p23-27 of Summary; p4 of Second Response</b></p> <p>- Delete "future directors" (Clause 19(e) (p20 line 10), Section 30(6)(e) (p78 line 41) and Section 30(6)(g) (p78 line 47))</p>	
n/a	<p><b>See p20 of Summary; p8 of Response; p8 of Proposal</b></p> <p>Amendment to Clause 16(c) has made contravention of Section 31 an offence (Section 31; p80 line 8)</p>	
20	<p><b>See p27 of Summary; p8 of Response; p8 of Proposal</b></p> <p>Also delete Section 32(7) as it is now obsolete (p81 line 50)</p>	
28	<p><b>See p30-31 of Summary; p9 of Response, p5 of Second response</b></p> <p>- To allow for cash management arrangements: insert a subsection (iv) to clarify that financial assistance does not include intercompany loans made or to be made under or pursuant to any netting or set-off arrangement entered into by any company [*and/or its subsidiaries] in the ordinary course of its banking arrangements for the purposes of netting debit and credit balances in its[*their] bank accounts. (Section 45(1)(b); p98 line 9)</p> <p>- Defining a <u>company's net worth</u> (Section 45(5)(a); p98 line</p>	

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	42)	
n/a	<b>See p62-63 of Summary</b> Clarify whether the redemption of preference shares, which constitutes a distribution also constitutes an <u>acquisition</u> according to Section 48 (Section 46; p100 line 8)	
41	<b>See p63 of Summary; p5 of Second response</b> Clarify whether remuneration of directors applies to only non-executive directors or also to executive directors (Section 66(8) and (9); p132 line 47)	
44	<b>See p64 of Summary</b> Defer implementation of social and ethics committee to 2012 (Section 72(4), p142 line 27)	
n/a	<b>See p64 of Summary; p11 of Response</b> Amend section to address a situation where minutes are being disputed (Section 73(8); p 144 line 31)	
45	<b>See p35 of Summary; p5-6 of Second response</b> Apply the same amendment of the definition of a director (sub-clause (a); p28 line 56) in: <ul style="list-style-type: none"> <li>• Section 69 (Ineligibility and disqualification of persons to be director or prescribed officer);</li> <li>• Section 76 (Standards of directors conduct);</li> <li>• Section 77 (Liability of directors and prescribed officers); and</li> <li>• Section 78 (Indemnification and directors' insurance) – but keeping the reference to past director in the section 78 definition.</li> </ul>	

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n/a	<p><b>See p64 of Summary; p6 of Second response</b></p> <p>A full audit would be required for an auditor to give his/her assurance that a company that is voluntarily winding-up has no debts (Section 80(3)(b)(ii); p156 line 52)</p>	
50	<p><b>See p35-36 of Summary; p11-12 of Response; p12 of Proposal</b></p> <ul style="list-style-type: none"> <li>- The term of service of an auditor or designated auditor should be measured from the date of the auditor's first appointment or re-appointment after the date on which the 2008 Act takes effect (Section 92(1); p172 line 22 and Schedule 5)</li> </ul>	
52	<p><b>See p36 and p64 of Summary; p12 of Response</b></p> <ul style="list-style-type: none"> <li>- Where a company opts to be audited voluntarily, only section 90(2)(b)(i) should apply as a disqualification for the appointment of an auditor (Section 90(2)(b); p170 line 9).</li> </ul>	
n/a	<p><b>See p64-65 of Summary</b></p> <ul style="list-style-type: none"> <li>- The term "designated auditor" should be defined (Section 92(1) and (2); p172 line 22).</li> </ul>	
54	<p><b>See p65 of Summary; p12 of Response; p12-13 of Proposal</b></p> <ul style="list-style-type: none"> <li>- Add a reference to the ability of the board to elect to appoint an audit committee in accordance with section 95 (Section 94(2); p174 line 21).</li> <li>- Including the audit committee's report in the annual report rather than in the annual financial statements (Section 94(7);</li> </ul>	



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	<p>p176 line 10)</p> <ul style="list-style-type: none"> <li>- The audit committee's role is oversight and not to carry out the functions of management, removal of performance of certain management functions, such as risk management (Section 94(7)(i); p176 line 26)</li> </ul>	
n/a	<p><b>See p65 of Summary; p12 of Response; p13 of Proposal</b></p> <p>Change the words 'memorandum of incorporation' to 'founding documents' for foreign companies (Section 99(1)(b); p184 line 19)</p>	
65	<p><b>See p65 of Summary</b></p> <p>Excluding the passing of mortgage bonds and notarial bonds or any other security interest from the ambit of Sections 112 and 115 of the Companies Act.</p>	
67	<p><b>See p38-39 of Summary; p13 of Response</b></p> <ul style="list-style-type: none"> <li>- Section 115 should exclude a trust or a foreign company, as these are unable to pass special resolutions as holding companies in South Africa (Section 115(2)(b); p208 line 10)</li> </ul>	
68	<p><b>See p39-40 of Summary; p6 of Second response</b></p> <p>Allow for similar regulation of mergers and amalgamations by the Financial Services Board, as given to the Banks Act (Section 116(4)(iii); p210 line 48 and Section 116(9); p212 line 33)</p>	
77	<p><b>See p40-41 of Summary; p6 of Second Response</b></p> <p>The definition of "financially distressed" companies should specifically distinguish between factual insolvency and</p>	

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	<p>commercial insolvency and the former should be excluded from the definition (Section 128(1)(f)(ii); p230 line 46)</p> <p><b>See p66 of Summary</b></p> <ul style="list-style-type: none"> <li>- Definition of <u>business rescue practitioner</u>: There is no provision in Chapter 6 for a joint appointment, remove reference to more than one person (Section 128(1)(d); p230 line 27)</li> <li>- Definition of <u>court</u>: Delete <u>subsection (3)</u>; designated courts and judges would be essential for the success of the BR process (Clause 128(1)(e) and (3); p230 line 34 and p232 line 6).</li> </ul>	
78	<p><b>See p41-42 of Summary; p13 of Response</b></p> <p>Provision for extension of the commencement of the business rescue process should be omitted (Section 129(3); p232 line 20)</p> <p>Add <u>in the prescribed manner</u> (Section 129(4)(b) and 129(7); p 232 line 29 and 46)</p>	
n/a	<p><b>See p66-68 of Summary; p13 of Response</b></p> <ul style="list-style-type: none"> <li>- Allow that applications for objections to company resolution regarding the business rescue process may also be made to the Companies Tribunal established in terms of Section 193 of the Companies Act and that the matter may be decided by a single member of the Tribunal as contemplated in Section 195(2)(a) (Section 130; p232 line 52).</li> <li>- Notice be given to the Commission and to the business rescue practitioner who must give notice to affected persons</li> </ul>	

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	(Section 130(3); p234 line 21)	
n/a	<b>See p68 of Summary; p6 of Second response</b> Remove the failure to pay over any employment-related obligations or debts as grounds for the business rescue process (Section 131(4)(a)(ii); p236 line 10)	
80	<b>See p42-43 of Summary; p14 of Response; p14 of Proposal</b> <ul style="list-style-type: none"> <li>- Amend Section 133(1) (p238 line 14) to clarify that business rescue would not prevent regulators from initiating or continuing regulatory actions in terms of their legislation; as well as employees' tax, UIF, other withholding taxes and VAT be specifically excluded from the moratorium in line with the provisions of section 133(1)(e) (p238 line 25).</li> <li>- Include the relevant regulator with the definition of an "affected party" in section 128(1)(a) (p230 line 7) of the Act</li> <li>- Amend subsection (2) to add that the business rescue practitioner may also provide written consent to a guarantee or surety (p238 line 27)</li> <li>- Amend subsection (3) to refer to prescription rather than a time limit (p238 line 31)</li> </ul>	
81	<b>See p43 of Summary; p14 of Response</b> Require that the person with the security interest to be held liable for the costs of realising the property, by deducting these from the sale proceeds (Section 134(3)(b)(i); p240 line 29)	
82	<b>See p44 of Summary; p6 of Second response</b>	



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	<p>The success of the entire BR process depends to a large extent on post-commencement finance being obtained. It is possible that there might be very little or no collateral security available to any potential financier that considers making post-commencement finance available. Due to the inherent risk associated with post-commencement finance, it is possible that the pricing of this finance could place it out of reach for many companies, especially SMEs that are in distress.</p>	
83	<p><b>See p44-47 of Summary; p14-15 of Response; p14 of Proposal; p6 of Second response</b></p> <ul style="list-style-type: none"> <li>- Provide that supplies during business rescue proceeding would be paid for on a "cash on delivery" basis.</li> <li>- The liquidator should have the same preference as the practitioner for remuneration and costs. Section 136(4) (p242 line 4) should be deleted and a new section 135(5) is proposed.</li> </ul>	
n/a	<p><b>See p15 of Proposal</b> Add requirement that relevant regulatory authorities must be notified by the practitioner (after Section 140(1); p246 line 5)</p>	
n/a	<p><b>See p68-69 of Summary; p15 of Response; p15 of Proposal</b> The business rescue practitioner should have discretion whether voidable transactions should be referred to management or not (Section 141(2)(c); p246 line 50)</p>	
86	<p><b>See p48 of Summary; p15 of Response; p15-16 of Proposal</b></p>	

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	Amend to exclude records held in terms of a search warrant or other statutory authority (Section 142(4); p248 line 29)	
87	<b>See p69 of Summary; p15 of Response; p16 of Proposal; p6-7 of Second response</b> - Consider revising the fees of the practitioner to allow minimal fees during rehabilitation and the possibility of a bonus payment if the process was successful (Section 143(1); p248 line 33).	
88	<b>See p69 of Summary; p15-16 of Response</b> limitations on both the amounts and periods of preferent claims of employees should be implemented similar to those in the case of insolvency or the winding up of companies (Section 144(2); p250 line 20)	
n/a	<b>See p 70 of Summary; p7 of Second response</b> The voting interest of any creditor who would be subordinated should be appraised and not only the voting interest of a concurrent creditor (Section 145(4)(b); p252 line 32)	
n/a	<b>See p70 of Summary; p7 of Second response</b> the practitioner should be able to either admit or reject proof of claims by creditors (Section 147(1)(a)(ii); p254 line 18)	
91	<b>See p70-71 of Summary; p16 of Response</b> Clarify whether the intention of subsection 2 is to allow: – The company of affected person rejecting the business	

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	<p>rescue plan to give notice at the meeting if an application to the court will be made to set aside the vote.</p> <ul style="list-style-type: none"> <li>- The meeting to be adjourned for five business days if such notice is given.</li> <li>- The applicant five business days to make the application. If the application is made, the matter is adjourned further until the court has disposed of the application. If the application is not made within the five business days the meeting is closed. (Section 153(2); p262 line 17)</li> </ul>	
92	<p><b>See p48 of Summary</b> Amend to include "a person performing the function of internal audit" (Section 159(3)(a); p270 line 1)</p>	
97	<p><b>See p48-50, 71 of Summary; p16 of Response; p7 of Second response</b></p> <ul style="list-style-type: none"> <li>- Whether shareholders by agreement can contract out of the rights under Section 164.</li> <li>- Exclusion of payments to a shareholder exercising appraisal rights under section 164 from the solvency and liquidity tests may prejudice the other stakeholders in the company who would otherwise be protected by the test (Section 164(19); p286 line 15)</li> <li>- The introduction of the appraisal right be deferred until the end of the 2 year moratorium.</li> </ul>	
99	<p><b>See p50 of Summary; p17 of Response</b></p> <ul style="list-style-type: none"> <li>- Consequential change in Section 169(1)(b), according to the</li> </ul>	

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	amendment of Section 166(1)(c).	
n/a	<b>See p71 of Summary; p7 of Second response</b> Special measures should be introduced to restore confidence in the ability of CIPRO to fulfil its role. (Section 185; p308 line 41)	
105	<b>See p16 of Proposal</b> Additional clause to provide the term of service for members of the Tribunal and to allow these to serve a second term.	
113	<b>See p51-53, 71-72 of Summary; p17 of Response; p18 of Proposal; p7 of Second response</b> - The wide application of this provision might give rise to vexatious claims and unsubstantiated malicious claims being initiated against directors and officers (Section 218(2); p340 line 13)	
118	<b>See p53-54 of Summary; p17-18 of Response; p18-19 of Proposal</b> - Clarify that the conversion of par value shares to non-par value shares is voluntary - Delete Item 6(2) and (3) (p384 line 34 and line 38) - Amend to provide that a conversion from par to non-par value shares not be permitted to vary the rights of shareholders immediately prior to the conversion (Schedule 5 Item 6(3); p384 line 38) - Provision should be made that any notices given, resolutions passed or approvals granted prior to the effective date will be	

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	valid and the provisions of Act 71 of 2008 should not apply thereto, provided that the subject matter is implemented within 6 months of the effective date.	
n/a	<b>See p75 of Summary</b> A specific section dealing with the appointment of an independent accounting professional to perform the review should be introduced in the Act.	