

Committee's Recommendations for amendments to the Companies Amendment Bill [B40-2010]

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 presented on 9 February 2011.

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

Clause	Issue	Committee's decision
INTERPRETATION OF THE ACT		
1	<p>See p3-10 of Summary; p2-3 of Response; p2-3 of Proposal; p2-3 of 2nd Response</p> <p>Definition of <u>accounting records</u> (Clause 1(1)(a); p5 line 23)</p> <p>Definition of <u>all of the greater part of the assets or undertaking</u>, when used in respect of a company (Clause 1(1)(b); p5 line 35) – See Section 112(4) in principal Act</p> <p>Definition of <u>asset</u> (Clause 1(1)(d); p5 line 51)</p> <p>Definition of <u>audit</u> (Clause 1(1)(e); p6 line 2)</p> <p>Definition of <u>creditor</u> (Clause 1(1)(j); p6 line 33)</p> <p>Definition of <u>holding company</u> (Clause 1(1)(n); p7 line 3)</p> <p>Definition of <u>liability</u> (Clause 1(1)(t); p7 line 27)</p> <p>Definition of <u>Master</u> (Clause 1(1)(u); p7 line 27)</p> <p>Definition of <u>member</u> (Clause 1(1)(v); p7 line 38)</p> <p>Definition of <u>Memorandum</u> (Clause 1(1)(w); p7 line 63) – See p72 of Summary</p>	

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	<p>Definition of <u>private company</u> (Clause 1(1)(bb); p8 line 34)</p> <p>Definition of <u>securities</u> (Clause 1(1)(dd); p8 line 45)</p> <p>Definition of <u>special resolution</u> (Clause 1(1)(ff); p8 line 59)</p> <p>Definition of <u>state-owned company</u> (Clause 1(1)(gg); p9 line 13)</p> <p>Definition of <u>material</u> (Section 1 of Act; p26 line 47) – replace “judgement” with “judgment” – See p72 of Summary</p>	
2	<p>Insolvency and liquidity tests</p> <ul style="list-style-type: none"> – Testing groups of companies rather than individual entities (Clause 2(a); p9 line 22) – See p10-11 of Summary; p3 of Response; p3 of Proposal – Excluding the situation where assets = liabilities (break-even) (Clause 2(a); p9 line 23) – See p10-11 of Summary; pg 3 of 2nd Response 	
3	<p>See p11-13 of Summary; p3 of Response and p3 of Proposal; pg 3-4 of 2nd Proposal</p> <ul style="list-style-type: none"> – Inclusion of additional Acts whose provisions will prevail where there are inconsistencies with the Companies Act. These include the Municipal Finance Management Act, National Payment Systems Act and laws on the supervision of financial institutions by the Financial Services Board and the Registrar of Banks (Clause 3(a); p9 line 42) – The more stringent requirements in the JSE Listings should apply to listed public companies and not be deemed to be in conflict with the Companies Act (Clause 3(b); p9 line 51) 	
4	<p>Clause 4(d) (p10 line 21) – See p72 of Summary</p> <p>Replace “the Act” with “this Act” in the new Section 6(15)(b)</p>	

Clause	Issue	Committee's decision
PURPOSE AND APPLICATION OF THE ACT		
5	No issues raised	
RESERVATION AND REGISTRATION OF COMPANY NAMES		
6	<p>See p13-15 of Summary; p4 of Response; p3 of Proposal; pg 4 of 2nd Proposal</p> <ul style="list-style-type: none"> – Limit use of language to the official languages (Clause 6(a); p11 line 1) – Inclusion of symbols in companies' names (Clause 6(b); p11 line 6) – Maintaining "(Proprietary) Limited" and "(Pty) Ltd" (Clause 6(f); p11 line 60) 	
7	<p>See p15 of Summary; pg 4 of 2nd response; pg 4 of 2nd Proposal</p> <p>"Clause 7(b) and (c) (p12 line 17): 7(b) by the substitution in subsection (3) for <u>the words preceding</u> paragraph (a) of the following words:</p> <p>7(c) by the substitution in subsection (3)(b) for <u>the words preceding</u> paragraph (b) of the following words:"</p> <p>OR See p72 of Summary</p> <p>Clause 7(c) (p12 line 20): The expression "...subsection (3)(b)" should read "subsection (3)"</p>	
INCORPORATION AND LEGAL STATUS OF COMPANIES		
8	<p>See p15 of Summary; p5 of Response; p4 of Proposal</p> <p>Consistent use of the term "domesticated company" in the Section (Clause 8(d); p14 line 1)</p> <p>See p72 of Summary</p> <p>Replace "exists" with "to exist" (Clause 8(d); p12 line 52)</p> <p>See p73 of Summary</p> <p>Replace reference to "subsections (5) and (9)" with "subsections (5) and (10)" (Clause 8(d); p13 line 58)</p>	

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9	<p>See p15 of Summary Change Clause 9(e) and (f) (p14 line 30) to read: “(e) by the substitution in subsection (3) for <u>the words preceding paragraph (a) of the following words:</u>” “(f) by the substitution in subsection (3) for <u>the words preceding paragraph (b) of the following words:</u>”</p> <p>See p4 of Proposal – Delete Clause 9(c) (p14 line 18); pg 5 of 2nd Proposal</p>	
10	<p>See p16-19 of Summary; p5 of Response; p4-5 of Proposal; pg 5 of 2nd Proposal</p> <ul style="list-style-type: none"> - Widen the use of restrictive or procedural requirements to include restrictions on the powers, purpose and activities of a company (Clause 10(b); p14 line 44) - Clarify whether provisions that do not specifically state that they are “alterable provisions” are unalterable. 	
11	<p>See p19 of Summary; p5 of Response Include the phrase “and time” after “the date” in section 16(9)(b)(ii) (Clause 11(a); p15 line 29)</p>	
12	No issues raised	
TRANSPARENCY, ACCOUNTABILITY AND INTEGRITY OF COMPANIES		
14	<p>See p19 of Summary; p6 of Response Clarify the intention to “continually engage in business ... within the Republic” (Clause 14(b); p16 line 43)</p>	
15	<p>See p19-20 of Summary</p> <ul style="list-style-type: none"> - Clarify the phrase “any other public regulation” (Section 24(1); p68 line 24) - A company's memorandum of incorporation, rules, financial statements, minutes and resolutions should be retained indefinitely until a company is deregistered (Section 24(1)(b); 	

Clause	Issue	Committee's decision
	<p>p68 line 28)</p> <p>See p73 of Summary Replace "required" with "compiled" (Clause 15(a); p17 line 35)</p>	
16	<p>See p20-21 of Summary; p6 of Response; p6 of Proposal Allow for alternative routes to accessing the securities registers of companies besides PAIA (Clause 16(a); p18 line 49)</p> <p>Remove references to Section 31 from these provisions and spell this out in Section 31 (Clause 16(c); p19 line 3)</p> <p>Restrict access to securities registers to either shareholders only or only allow for public access to information in public companies</p> <p>See p73 of Summary Insert "[3]" at beginning of line (Clause 16(a); p18 line 49)</p>	
18	<p>See p21-23 of Summary; p7 of Response; p6 of Proposal</p> <ul style="list-style-type: none"> - Limit application of IFRS to public companies and companies deemed to be in the public interest (Clause 18(b); p19 line 21) - Financial reporting standards should include interpretations of financial reporting standards and Clause 18(b) (p19 line 21) 	
19	<p>See p23-27 of Summary; p7-8 of Response; p7 of Proposal</p> <ul style="list-style-type: none"> - Clarify the restriction regarding the audit and review exemption to private companies where natural persons hold all the shares, or have all the beneficial interest in the shares, and are also the directors, as well as whether a company that should be audited according to Section 30(2) (p76 line 27) with only one shareholder as director would still require to be audited (Clause 19(d); p20 line 2) - Add a clause to allow wholly owned subsidiaries of audit or 	

Clause	Issue	Committee's decision
	<p>independent review except holding companies to also e exempted.</p> <ul style="list-style-type: none"> - The exemption in terms of the proposed section 30(2A) (p20 line 2 of A/B) be restricted to the requirement of section 30(3)(d) (p 78 line 1 of Act) that the AFS be presented to the first shareholders' meeting after approval by the board. - Delete "future directors" (Clause 19(e) (p20 line 10), - Allow for auditing of direct subsidiaries of offshore companies that would have been required to have its AFS audited were they located in South Africa. - Regulation of independent auditors including introducing a mechanism for reporting reportable irregularities uncovered. 	
21	No issues raised	
22	<p>See p27-29 of Summary; p8 of Response</p> <ul style="list-style-type: none"> - Removal of Clause 22 (p20 line 35) as it is rendered superfluous by the amendment of Section 84 of the Act. - The requirement to have an audit should not necessarily also include the requirement that the company must have an audit committee and a company secretary as contemplated in Chapter 3. 	
CAPITALISATION OF PROFIT COMPANIES		
23	<p>See p29-30 of Summary; p8-9 of Response; p8 of Proposal</p> <ul style="list-style-type: none"> - Application should be limited to uncertified shares - The phrase "company's securities register" should be replaced with "<u>uncertificated securities register or as determined in accordance with the rules of the central securities depository</u>" (Clause 23(b); p20 line 49) 	
24	<p>See p30 of Summary</p> <p>Removal of 60 day grace period for the retroactive authorisation of shares issued (Clause 24; p21 line 8)</p>	

Clause	Issue	Committee's decision
n/a	See p62 of Summary Insert <u>for</u> between the words <u>subscribe</u> and <u>fewer shares</u> (Section 39(4)(a); p88 line 33)	
25	See p62 of Summary Guidance around what is meant by the phrase "for adequate consideration to the company, as determined by the board" in relation to the issuing of shares (Section 40(1)(a); p88 line 41)	
26	No issues raised	
27	No issues raised	
28	See p30-31 of Summary; p9 of Response - Whether the new "fair and reasonable" requirement introduced in the Amendment Bill, is aligned with the commercial reality that loans are frequently made between group companies and that these are normally "softer" loans with less onerous terms than third party loans (Clause 28(a); p21 line 53) -	
29	See p31 of Summary; p9 of Response; p8-9 of Proposal - Omission of new Section 48(8)(b) (p2 line 32 of A/B)	
SECURITIES REGISTRATION AND TRANSFER		
30	No issues raised	
31	No issues raised	
32	No issues raised	
33	See p73 of Summary Replace reference to "subsections (9) to (11)" with "subsections (9) to (10)" (Clause 33(c); p23 line 17)	
GOVERNANCE OF COMPANIES		
34	No issues raised	
35	No issues raised	
36	No issues raised	

Clause	Issue	Committee's decision
37	See p63 of Summary Allow the notice for annual general meetings to include either financial statements or summarised financial statements (Section 62(3)(d)(i); p124 line 9)	
38	No issues raised	
39	See p63 of Summary Removal of the provision (Section 64(9); p 128 line 26)	
40	See p31-32 of Summary; p9 of Response; p9 of Proposal <ul style="list-style-type: none"> - Add sections 41(3), 48(8)(a), 81(1) and 164(9)(c) of the Act as amended by the Amendment Bill (Clause 40(d); p26 line 33) - Add an additional matter to the list which provides that the MOI can indicate specific matters to be decided by special resolution (Clause 40(d); p26 line 33) See p73 of Summary Change "section 13" to "section 82(5)" (Clause 40(d); p26 line 53)	
41	See p32-33 of Summary; p10 of Response; p10 of Proposal Clarify the minimum number of directors a company is obliged to have (Clause 41(a); p27 line 1)	
42	No issues raised	
43	See p34 of Summary; p10-11 of Response; p10 of Proposal Delete the exclusion provided for persons disqualified from becoming directors or restrict it to only the smallest companies (Clause 43(b); p27 line 40)	
44	See p34 of Summary; p11 of Response Provide clear and unambiguous guidelines regarding the process to appoint, the required composition and the statutory duties and functions of the social and ethics committee (Clause 44(a); p28	

Clause	Issue	Committee's decision
	lines 5-8)	
46	No issues raised	
47	No issues raised	
WINDING-UP OF SOLVENT COMPANIES AND DEREGISTERING COMPANIES		
48	See p64 of Summary; p11 of Response; p11 of Proposal Replace the word <u>it's</u> with <u>its</u> (Section 82(3)(b)(i); p162 line 9)	
49	No issues raised	

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

Clause	Issue	Committee's decision
APPLICATION AND GENERAL REQUIREMENTS IN TERMS OF ENHANCED ACCOUNTABILITY AND TRANSPARENCY		
50	See p35-36 of Summary; p11-12 of Response; p12 of Proposal <ul style="list-style-type: none"> Companies which are audited voluntarily should not be required to comply with Chapter 3 except to the extent that their memorandum of understanding provides (Clause 50(b); p31 line 9) 	
COMPANY SECRETARY		
51	No issues raised	
AUDITORS		
52		
53	See p36-37 of Summary; p12 of Response <ul style="list-style-type: none"> Spell out the provisions in the relevant section 91 (Clause 53; p32 line 9) 	
n/a		
AUDIT COMMITTEES		
54		
PUBLIC OFFERINGS OF COMPANY SECURITIES		
55	See p37 of Summary; p12 of Response <ul style="list-style-type: none"> Definition of "employee share scheme", delete the term "<u>and other persons closely involved in the business</u>" and consider widening the definition to include share schemes involving the secondary trading in shares (Clause 55(a); p32 line 3) 	

Clause	Issue	Committee's decision
	See pg 73 of Summary Add: "(8) Sections 104, 105 and 106, each read with the changes required by the context, apply to a rights offer contemplated in section 96 (1)(d), and to any document issued in respect of such a rights offer." (Clause 55(c); p33 after line 5)	
56	No issues raised	
57	No issues raised	
58	No issues raised	
59	No issues raised	
60	No issues raised	
61	No issues raised	
62	No issues raised	
63	No issues raised	
64	No issues raised	
APPROVAL OF CERTAIN FUNDAMENTAL TRANSACTIONS		
65	See p38 of Summary; p12-13 of Response <ul style="list-style-type: none"> - The word "ratifies" should be reinstated in Section 112(5) (Clause 65(b); p35 line 36). - Define <u>fair market value</u> and refer to the accounting framework or other framework in which this should be determined (Clause 65(b); p35 line 31). 	
66	No issues raised	
67	See p38-39 of Summary; p13 of Response <ul style="list-style-type: none"> - Rename subsection (4A) to (5) and spell out Section 117(1)(b): <u>"(5) In subsection (4) 'act in concert' means any action pursuant to an agreement between or among two or more persons, in terms of which any of them co-operate for the purpose of entering into or proposing an affected transaction or offer;"</u> (Clause 67(f); p36 line 57) - From a mergers and acquisitions perspective, the concept 	

Clause	Issue	Committee's decision
	that a company must be required to take the passing of a special resolution on review or for a dissenting shareholder to take the matter on review is still problematic, given that such applications may take years to be resolved by our courts(Clause 67(g); p37 line 3)	
68		
AUTHORITY OF PANEL AND TAKEOVER REGULATIONS		
69	See p66 of Summary; p6 of Second response Test for an affected transaction or offer in a private company should take the number of shareholders into account (Clause 69; p37 line 47).	
70	No issues raised	
REGULATION OF AFFECTED TRANSACTIONS AND OFFERS		
71	No issues raised	
72	No issues raised	
73	See p13 of Proposal	
74	No issues raised	
75	See p40 of Summary; p13 of Response; p13-14 of Proposal The word "reacquires" should read "re-acquires" in line 6.	
BUSINESS RESCUE PROCEEDINGS		
76	No issues raised	
77		
78		
79	No issues raised	
80		
81		
82		
83	See p44-47 of Summary; p14-15 of Response; p14 of Proposal; p6 of Second response	

Clause	Issue	Committee's decision
	<ul style="list-style-type: none"> - Adding protection to the trading of financial instruments from cancellation by the court (Clause 83(b); p41 line 28) - The practitioner should either accept a contract or reject it as a whole, and this should not be subject to a court order (Clause 83(a) and (b); p41 line 8 and 23). 	
PRACTITIONER'S FUNCTIONS AND TERMS OF APPOINTMENT		
84	<p>See p73-74 of Summary</p> <p>"(a) is—</p> <p>(i) a member in good standing of a legal, accounting or business management profession that is subject to regulation by a regulatory authority; or</p> <p>(ii) licensed by the Commission in terms of subsection (2) to serve as a practitioner." (Clause 84; p41 line 40-44)</p> <p>Insert "as a business rescue practitioner", after "to practice". (Clause 84; p41 line 57)</p>	
85	No issues raised	
86		
87	<p>See p69 of Summary; p15 of Response; p16 of Proposal; p6-7 of Second response</p> <ul style="list-style-type: none"> - Remove the word "egregiously" as it is uncommon (Clause 87; p42 line 43) 	
RIGHTS OF AFFECTED PERSONS DURING BUSINESS RESCUE PROCEEDINGS		
88		
DEVELOPMENT AND APPROVAL OF BUSINESS RESCUE PLAN		
89	<p>See p of Summary; p16 of Response</p> <p>Insert a comma between "plan" and "in" (Clause 89; p43 line 9)</p>	
90	No issues raised	
91		

Clause	Issue	Committee's decision
GENERAL PRINCIPLES IN TERMS OF REMEDIES AND ENFORCEMENT		
92		
RIGHTS TO SEEK SPECIFIC REMEDIES		
93	No issues raised	
94	No issues raised	
95	No issues raised	
96	No issues raised	
97	<p>See p48-50, 71 of Summary; p16 of Response; p7 of Second response</p> <ul style="list-style-type: none"> - Clarify whether a demand related to a notice for appraisal rights should also be delivered to the Takeover Regulation Panel (Clause 97(a); p45 line 35) - With the inclusion of the reversal of an adopted resolution through the passing of a special resolution, amend affected time periods in Section 164(7) onwards (Clause 97(b); p45 line 39); These time periods should also take into account the possibility that regulatory approvals may be required for transfers in terms of section 164. 	
98	No issues raised	
VOLUNTARY RESOLUTION OF DISPUTES		
99	<p>See p50 of Summary; p17 of Response</p> <ul style="list-style-type: none"> - Define the accreditation required for "any other person" (Clause 99; p46 line 29) 	
COMPLAINTS TO COMMISSION OR PANEL		
100	No issues raised	
101	No issues raised	
102	No issues raised	
103	No issues raised	
COMPANIES AND INTELLECTUAL PROPERTY COMMISSION		
104	No issues raised	

Clause	Issue	Committee's decision
COMPANIES TRIBUNAL		
105		
106	No issues raised	
TAKEOVER REGULATION PANEL		
107	No issues raised	
108	No issues raised	
FINANCIAL REPORTING STANDARDS COUNCIL		
109	<p>See p50-51 of Summary; p17 of Response; p16-17 of Proposal</p> <p>Change "body governing the regulation of the accounting professions" to "Accounting Practices Board" (Clause 109; p49 line 3)</p>	
ADMINISTRATIVE PROVISIONS APPLICABLE TO AGENCIES		
110	No issues raised	
111	No issues raised	
OFFENCES AND PENALTIES		
112	<p>See p74 of Summary; p18 of Proposal</p> <p>Replace "business" with "company" (Clause 112(a); p49 line 24)</p>	
MISCELLANEOUS MATTERS		
113	<p>See p51-53, 71-72 of Summary; p17 of Response; p18 of Proposal; p7 of Second response</p> <ul style="list-style-type: none"> - This provision creates uncertainty about whether other areas that the Act determines to be void, is actually void and relies on a court to rule these provisions as void (Clause 113; p50 line 4) 	
SCHEDULE 1: PROVISIONS CONCERNING NON-PROFIT COMPANIES		
114		
SCHEDULE 2: CONVERSION OF CLOSE CORPORATIONS TO COMPANIES		
115		
SCHEDULE 3: AMENDMENT OF LAWS		

Clause	Issue	Committee's decision
116		
SCHEDULE 4: LEGISLATION TO BE ENFORCED BY COMMISSION		
117		
SCHEDULE 5: TRANSITIONAL ARRANGEMENTS		
118	<p>See p53-54 of Summary; p17-18 of Response; p18-19 of Proposal</p> <ul style="list-style-type: none"> – Clause 118 is incorrectly numbered- It jumps from 118 (1) to 118 (3). Clause 118 (2) is unaccounted for (p50 line 47 and p51 line 34) <p>See p72 and 74 of Summary</p> <ul style="list-style-type: none"> • Replace "irrespective whether" with "irrespective of whether" (Schedule 5, item 7(4); p386 line 12) • The expression "(1)(d)" should be changed to read "(1)(d)(i) and (ii)" (Clause 118(4)(a); p51 line 43) • (Clause 5(b); p52 line 24): Replace with "(b) by the substitution for sub-item (3) of the following sub-item: '(3) The Minister, in consultation with the member of cabinet responsible for national financial matters, must make regulations, to take effect as of the general effective date, providing for the transitional status and conversion of any nominal or par value shares, [treasury shares,] and capital accounts of a pre-existing company[, but any such regulations must— (a) preserve the rights of shares holders associated with such shares, as at the effective date, to the extent doing so is compatible with the purposes of this item; or (b) provide for the company to compensate its shareholders for the loss of any such rights].' " • (Clause 118(10); p52 line 62): The clause has to grant two powers: "(a) to the Commission, to exercise the functions of the Minister or the Registrar under the 1973 Act; and (b) to the Panel to exercise the functions of the former SRP 	

Clause	Issue	Committee's decision
	under the 1973 Act."	
SHORT TITLE AND COMMENCEMENT		
119	<p>See p55 of Summary; p19-20 of Proposal (Clause 119; p53 line 5)</p> <ul style="list-style-type: none"> - A staggered or phased-in approach to the Act to allow companies and government sufficient time to prepare for the implementation of the Act. - "The Act will become effective on a date determined in the Companies Amendment Act, which date may not be earlier than six months after the President assented to the Companies Amendment Act". - Different dates may be fixed in respect of different sections to accommodate the deferral of the appraisal right and any other deferrals which may prove necessary. 	

In the interest of uniformity, clarity and simplicity, renumber the following sections so that there are no repealed subsections within or subsections with an A in them:

- Section 32 (Use of company name and registration number) – consider changing subsection 7 to subsection 6;
- Section 84 (Application of Chapter);
- Section 90 (Appointment of auditor); and
- Section 136 (Effect of business rescue on employees and contracts).

Clarification that unalterable provisions of the Companies Act 2008 (the "Act") may be altered by the addition of more stringent requirements:

Webber Wentzel: Clarification is required on whether a company can include more stringent obligations over and above the basic requirements in the Act in its MOI. This permeates the entire Act in terms of the unalterable provisions. Furthermore, Section 15(2)(a)(ii) permits the MOI to alter the effect of an "alterable provision" but does not specifically prohibit a company from altering the effect of an "unalterable provision". There is also no clarification on which provisions are explicitly unalterable. It is also unclear whether or not an additional requirement would contravene the anti-avoidance provisions in section 6(1) which prohibit any agreement, resolution or provision of the MOI that is "*primarily or substantially intended to defeat or reduce the effect of a prohibition or requirement established by or in terms of an unalterable provision*" (our emphasis). This point needs to be clarified for there to be certainty on how the Act should be interpreted and its provisions applied to ensure a "predictable and effective regulatory environment".