

MATTERS TO BE FOLLOWED UP BY NPA EMANATING FROM
DELIBERATIONS OF PARLIAMENTARY PORTFOLIO COMMITTEE ON
JUSTICE AND CONSTITUTIONAL DEVELOPMENT ON 16 -17 AUGUST 2011

1. NPA'S PROPOSAL TO ADD NEW CLAUSES 1(2), (3) AND (4) AND
CURRENT CLAUSE 1 TO BECOME CLAUSE 1(1):

1.1 The NPA proposes the addition of the following new clauses 1(2) and (3) and the current clause 1 to become sub-clause (1):

“(2) For purposes of this Act a person is regarded as having knowledge of a fact if—

(a) that person has actual knowledge of the fact; or

(b) the court is satisfied that—

(i) the person believes that there is a reasonable possibility of the existence of that fact; and

(ii) the person has failed to obtain information to confirm the existence of that fact, and ‘knows’ or ‘knowing’ must be construed accordingly.

(3) For the purposes of this Act a person ought reasonably to have known or suspected a fact if the conclusions that he or she ought to have reached are those which would have been reached by a reasonably diligent and vigilant person having both—

(a) the general knowledge, skill, training and experience that may reasonably be expected of a person in his or her position; and

(b) the general knowledge, skill, training and experience that he or she in fact has.

(4) A reference in this Act to any act, includes an omission and “acting” must be construed accordingly.”.

1.2 The motivation for these proposals is as follows:

(a) The Bill contains references to “knowledge”, “knowledge of a fact”, “knowledge or suspicion” or “knows or ought reasonably to have known”. See for example clauses 6, 7, 8 and 13 of the Bill. Where these expressions appear in other pieces of South African legislation, the Legislature regarded it as appropriate to insert interpretation provisions to prescribe and explain these

expressions. These expressions are also utilised in, among others, the following pieces of legislation:

(i) **Subsections (2) and (3) of section 1 of POCA** read as follows:¹

“(2) For purposes of this Act a person has knowledge of a fact if—

(a) the person has actual knowledge of that fact; or

(b) the court is satisfied that—

(i) the person believes that there is a reasonable possibility of the existence of that fact; and

(ii) he or she fails to obtain information to confirm the existence of that fact.

“(3) For the purposes of this Act a person ought reasonably to have known or suspected a fact if the conclusions that he or she ought to have reached are those which would have been reached by a reasonably diligent and vigilant person having both—

(a) the general knowledge, skill, training and experience that may reasonably be expected of a person in his or her position; and

(b) the general knowledge, skill, training and experience that he or she in fact has.”. (Emphasis added)

(ii) The **Companies Act, 2008 (Act 71 of 2008)**,² contains the following definition in section 1:

“**knowing**”, “**knowingly**” or “**knows**”, when used with respect to a person, and in relation to a particular matter, means that the person either—

(a) had actual knowledge of that matter;

(b) was in a position in which the person reasonably ought to have—

(i) had actual knowledge;

(ii) investigated the matter to an extent that would have provided the person with actual knowledge; or

(iii) taken other measures which, if taken, would reasonably be expected to have provided the person with actual knowledge of the matter.”. (Emphasis added).

¹ A copy of the relevant provisions is attached hereto as **Annexure A**.

² A copy of the relevant provisions is attached hereto as **Annexure B**.

- (iii) **Subsections (1) and (2) of section 2 of the Prevention and Combating of Corrupt Activities Act, 2004 (Act 12 of 2004)**, contain an interpretation clause identical to the interpretation in the POCA, except for the addition of the words “*and ‘knowing’ shall be construed accordingly*”. (Emphasis added)³
- (iv) **Section 1(6) of the Protection of Constitutional Democracy Against Terrorist and Related Activities Act, 2004 (33 of 2004)**, contains identical provisions as provided for in the PCOA.⁴

1.3 See also the discussion in paragraph 3 hereunder relating to the element of “*intentionally*”. Unfortunately I did not have **Juta Stat** available to do research on the expression “*or suspected a fact*”. I shall supply the Committee with a further input in this regard.

2. ELEMENTS OF OFFENCE

2.1 The Committee requested the NPA to provide further motivation for the inclusion of the expression “**directly or indirectly**” as proposed in clause 3.

2.2 In accordance with Article 5(2)(c) of the **United Nations Protocol to Prevent, Suppress and Punish Trafficking in Persons (Protocol)**, the “*Organizing or directing (of) other persons to commit an offence established in accordance with paragraph 1 of this article*”, should also be criminalised. This requirement clearly relates to the situation where the perpetrator makes use of an intermediary or committing the act by one or other indirect manner. Therefore, the NPA is of the view that by inserting the expression “*directly or indirectly*”, the proposed legislation would comply with this requirement of the Protocol.

2.3 The Organisation for Economic Cooperation and Development (OECD) in 2010 reviewed South Africa’s compliance with the OECD Convention on Bribery of Foreign Public Officials in Business Transactions. In the OECD’s Report of June 2010, the Working Group on Bribery discussed the expression “**directly or indirectly**” as

³ A copy of the relevant provision is attached hereto as **Annexure C**.

⁴ A copy of the relevant provision is attached hereto as **Annexure D**.

contained in South Africa's corruption legislation. In paragraph 198 of the Report, the Working Group remarked as follows:

*“South African law does not address the liability of parent companies in general, nor does it specifically provide for the liability of parent companies for acts of bribery committed by intermediaries, including related legal persons such as their subsidiaries. Section 5 of the PRECCA uses the terms “directly or indirectly”, which have been interpreted by the Supreme Court of Appeal in **Shaik and Other v. S** [herein under Shaik] as encompassing —benefits obtained indirectly through another person or entity. Thus, the situation where a foreign subsidiary is used by a parent company to bribe a foreign public official may be covered through this provision.”.* (Emphasis added)

2.4 For similar provisions, the Committee is referred to following:

- The offences described in **section 1 and 4 of POCA**: In spite of this, section 2(1)(e) of POCA provides as follows:

“(e) whilst managing or employed by or associated with any enterprise, conducts or participates in the conduct, directly or indirectly, of such enterprise's affairs through a pattern of racketeering activity;”. (Emphasis added)

- The offences in **sections 3 to 16 and 18 of the Prevention and Combating of Corrupt Activities Act, 2004** all make use of the expression “*directly or indirectly*”: Following on the above sections are sections 20 and 21 dealing with accessory to and after the offence (section 20) and attempts, conspiracy, etc (section 21).

- In section 1 of the **Protection of Constitutional Democracy Against Terrorist and Related Activities Act, 2004 (33 of 2004)**, the following definition appears:

“engages in a terrorist activity”, with reference to sections 2 and 3, includes—

- (a) *the commission, performance or carrying out of;*
- (b) *the facilitation of, participation or assistance in, or contribution to the commission, performance or carrying out of;*
- (c) *the performance of an act in preparation for or planning of; or*
- (d) *instructing, directly or indirectly, the—*
 - (i) *commission, performance, carrying out of;*

- (ii) facilitation of participation or assistance in, or contribution to the commission, performance or carrying out of; or
- (iii) performance of an act in preparation for or planning of, a terrorist activity, and the expressions "to engage in a terrorist activity",.”.(Emphasis added)

2.5 As far as we are aware, all the international instruments relating to the criminalisation of specific offences require that an element be inserted in terms of which provision is made that the perpetrator may commit the crime through an intermediary or through another indirect manner. In this regard the NPA wishes to refer the Committee to the following instruments:

- **The United Nations Convention Against Corruption (UNCAC)**: South Africa has ratified the UNCAC. Articles 15 and 16 provide as follows:

“Article 15

Bribery of national public officials

Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

- (a) *The promise, offering or giving, to a public official, **directly or indirectly**, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties;*
- (b) *The solicitation or acceptance by a public official, **directly or indirectly**, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.”.*

“Article 16

Bribery of foreign public officials and officials of public international organizations

1. *Each State Party shall adopt such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the*

*promise, offering or giving to a foreign public official or an official of a public international organization, **directly or indirectly**, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties, in order to obtain or retain business or other undue advantage in relation to the conduct of international business.*

2. *Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the solicitation or acceptance by a foreign public official or an official of a public international organization, **directly or indirectly**, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.”. (Emphasis added)*

- **The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions:** South Africa is Party to this Convention. Article 1 of this Convention provides as follows:

“Article 1 - The Offence of Bribery of Foreign Public Officials:

1. *Each Party shall take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, **whether directly or through intermediaries**, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.*
2. *Each Party shall take any measures necessary to establish that **complicity in, including incitement, aiding and abetting, or authorisation of an act of bribery of a foreign public official shall be a criminal offence**. Attempt and conspiracy to bribe a foreign public official shall be criminal offences to the same extent as attempt and conspiracy to bribe a public official of that Party.”. Emphasis added)*

It is important to note that in spite of the fact that the offence in Article 1 above requires “indirectly”, the Convention in Article 2 provides for further offences relating to “complicity in, including incitement, aiding and abetting, or authorisation of an act of bribery”.

- **SADC Protocol Against Corruption:** Article 3(1)(a) of the SADC Protocol describes corruption as follows:

“The solicitation or acceptance, directly or indirectly, by a public official, of any article of monetary value, or other benefit, such as a gift, favour, promise or advantage for himself or herself or for another person or entity, in exchange for any act or omission in the performance of his or her public functions.”.

(Emphasis added) South Africa is Party to the Protocol.

- **AU Convention Preventing and Combating Corruption:** Article 4(1)(e) of the AU Convention contains an almost similar provision as SADC Protocol. This Article prohibits “the offering or giving, promising, solicitation or acceptance, directly or indirectly, of any undue advantage to or by any person who directs or works for, in any capacity, a private sector entity, for himself or herself or for anyone else, for him or her to act, or refrain from acting, in breach of his or her duties”. (Emphasis added) South Africa is a party to this Convention.

- **Article VI(1)(b) of the Inter-American Convention against Corruption** (adopted 29 March 1996) provides for the “*offering or granting, directly or indirectly*” of , among others, any benefit or advantage.

2.6 Attached is also a copy of the Annexure to the OECD Report on **TYPOLOGIES ON THE ROLE OF INTERMEDIARIES IN INTERNATIONAL BUSINESS TRANSACTIONS**. This Report indicates that most of the countries provide in their legislation for the inclusion of the expression “directly or indirectly” to cover for the commission of the act through intermediaries. (See **Annexure E**)

- 2.7 In South African law the expression “*directly or indirectly*” intended a wide and extended meaning. In *MV Heavy Metal: Belfry Marine v Palm Base Maritime SDN BHD*, 1999 (3) SA 1083 (SCA) at 1107D–F, Smalberger JA stated as follows:

"By using the words 'directly or indirectly' the legislator clearly intended to extend and not restrict the expression."

In *Shaik and Others v S* [2007] 2 All SA 150 (SCA) at paragraph [24], the Supreme Court of Appeal remarked as follows:

"We agree with counsel for the respondent that this is not the law. First, the definition of 'proceeds of unlawful activities in section 1(1) includes benefits received 'directly or indirectly', which in its ordinary meaning includes benefits obtained indirectly through another person or entity." (Emphasis added)

3. **Element of “intentionally:** The Committee also requested the NPA to provide further information regarding the requirement or not of the word “*intentionally*”. During South Africa’s Phase 1 evaluation in respect of South Africa’s compliance with the requirements of the OECD Convention on Bribery, the question of “*intentionally*” was specifically raised. In its final Report to the OECD Working Group on Bribery, South Africa provided the following input in respect of this requirement:

“Section 5(1) of the Act does not specifically indicate whether *mens rea* is an element of this statutory offence. Whether *mens rea* is an element of this statutory offence depends on the intention of the legislature. Presently, the law developed by the Appellate Division is "to recognise, more frequently than used to be the case, the need for *mens rea* to accompany" statutory offences.⁵

The basic approach that has emerged in South African case law is that, in accordance with the fundamental principle in the maxims *actus non facit reum, nisi mens sit rea* (the act does not render the perpetrator culpable unless he was conscious of its illegality) and *nulla poena sine culpa*, the legislature is presumed, unless there are clear

⁵ *S v Van Staden* 1976 (2) SA 685 (N) at 694.

and convincing indications to the contrary, not to have intended innocent violations of statutory prohibitions to be punishable.⁶

The considerations, which the court will take into account in order to determine whether strict liability or *mens rea* was intended, are—

- the language and context of the prohibition;
- the scope and object of the statute;
- the nature and extent of the penalty imposed;
- the ease with which the prohibition can be evaded if reliance could be placed on the absence of *mens rea*; and
- the reasonableness or otherwise of holding that *mens rea* is not an ingredient of the offence.

Without going into detail regarding these considerations, it can be accepted that the intention of the legislature was that *mens rea* is an element of the offence. Once it has been established that *mens rea* is an element of this statutory offence, the question arises as to what form of *mens rea* is required.⁷ In other words, is intentional wrongdoing (*dolus*) required or is negligence (*culpa*) sufficient? The South African case law deals in various judgements with this question.

If circumstances in a particular case are such that intent in the form of *dolus* (criminal intent) is required (as in cases of bribery), South African law requires that the perpetrator not only acted intentionally, but also with the knowledge that what he or she is doing is illegal. Proof that an accused person committed the prohibited act will create an inference that he or she acted with knowledge of the unlawfulness of his or her act.⁸ The inference will be dispelled by evidence that the accused person did not know that his or her act was contrary to the law or (what amounts to the same thing) was unaware that there was a statutory prohibition upon his or her conduct. **Knowledge of unlawfulness exists where the accused person is aware of the fact that what he or she intends doing is unlawful.** It is not essential that the accused person should be aware of the exact identity of the statutory provision that is being contravened, or

⁶ *S v Arenstein* 1964 (1) SA 361 (A) at 365, *S v De Blom* 1977 (3) SA 513 (A) at 532.

⁷ *S v Naidoo* 1974 (4) SA 574 (N) at 596.

⁸ *S v De Blom* 1977 (3) SA 513 (A) at 532.

whether there is a particular punishment for the contravention involved. There must, however, be some *nexus* between the accused person's awareness of unlawfulness and the charge he or she is facing.

Furthermore, it is not essential that an accused person should have actual knowledge that his or her conduct is unlawful. It is sufficient if he or she merely foresees the possibility that his or her act will be unlawful.⁹

An accused person will lack knowledge of unlawfulness where he acts under a *bona fide* ignorance of the law.¹⁰ Such ignorance may exist simply because the accused person has received incorrect advice as to the state of the law.”¹¹ (Emphasis added)

⁹ *S v De Blom supra* at 530; *S v Magidson* 1984 (3) SA 852 (T); *S v Hlomza* 1987 (1) SA 25 (A). **This in line with request of the NPA to include the deeming provisions in clause 1(2) and (3).**

¹⁰ *Attorney-General, Cape v Bestall* 1988 (3) SA 555 (A) at 567 D-E; *S v Potwane* 1983 (1) SA 868 (A) AT 871.

¹¹ *S v Rabson* 1972 (4) SA 574; *S v Zemura* 1974 (1) SA 584 (RA); *S v Bezuidenhout* 1979 (3) SA 1325 (T); *S v Reids Transport (Pty) Ltd* 1982 (4) SA 197 (E); *S v Barketts Transport (Pty) Ltd* 1986 (1) SA 706 (C) AT 712; *S v Longdistance (Pty) Ltd* 1986 (3) SA 437 (N).

ANNEXURE A (POCA PROVISION)

'unlawful activity' means conduct which constitutes a crime or which contravenes any law whether such conduct occurred before or after the commencement of this Act and whether such conduct occurred in the Republic or elsewhere.

[Definition of 'unlawful activity' inserted by s. 1 (c) of Act 38 of 1999.]

- (2) For purposes of this Act a person has knowledge of a fact if-
- (a) the person has actual knowledge of that fact; or
 - (b) the court is satisfied that-
 - (i) the person believes that there is a reasonable possibility of the existence of that fact; and
 - (ii) he or she fails to obtain information to confirm the existence of that fact.
- (3) For the purposes of this Act a person ought reasonably to have known or suspected a fact if the conclusions that he or she ought to have reached are those which would have been reached by a reasonably diligent and vigilant person having both-
- (a) the general knowledge, skill, training and experience that may reasonably be expected of a person in his or her position; and
 - (b) the general knowledge, skill, training and experience that he or she in fact has.

[Sub-s. (3) amended by s. 3 (d) of Act 24 of 1999.]

(4) Nothing in Chapters 2, 3 and 4 shall be construed to limit prosecution under any other provision of the law.

(5) Nothing in this Act or in any other law, shall be construed so as to exclude the application of any provision of Chapter 5 or 6 on account of the fact that-

- (a) any offence or unlawful activity concerned occurred; or
- (b) any proceeds of unlawful activities were derived, received or retained, before the commencement of this Act.

[Sub-s. (5) added by s. 1 (d) of Act 38 of 1999.]”

ANNEXURE B (COMPANIES ACT)(See shaded part)

CHAPTER 1

INTERPRETATION, PURPOSE AND APPLICATION

Part A

Interpretation

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

1. Definitions.—In this Act, unless the context indicates otherwise—

“**advertisement**” means any direct or indirect communication transmitted by any medium, or any representation or reference written, inscribed, recorded, encoded upon or embedded within any medium, by means of which a person seeks to bring any information to the attention of all or part of the public;

“**agreement**” includes a contract, or an arrangement or understanding between or among two or more parties that purports to create rights and obligations between or among those parties;

“**alterable provision**” means a provision of this Act in which it is expressly contemplated that its effect on a particular company may be negated, restricted, limited, qualified, extended or otherwise altered in substance or effect by that company’s Memorandum of Incorporation;

“**alternate director**” means a person elected or appointed to serve, as the occasion requires, as a member of the board of a company in substitution for a particular elected or appointed director of that company;

“**amalgamation or merger**” means a transaction, or series of transactions, pursuant to an agreement between two or more companies, resulting in—

- (a) the formation of one or more new companies, which together hold all of the assets and liabilities that were held by any of the amalgamating or merging companies immediately before the implementation of the agreement, and the dissolution of each of the amalgamating or merging companies; or
- (b) the survival of at least one of the amalgamating or merging companies, with or without the formation of one or more new companies, and the vesting in the surviving company or companies, together with such new companies, of all of the

assets and liabilities that were held by any of the amalgamating or merging companies immediately before the implementation of the agreement;

“amalgamated or merged company” means a company that either—

- (a) was incorporated pursuant to an amalgamation or merger agreement; or
- (b) was an amalgamating or merging company and continued in existence after the implementation of the amalgamation or merger agreement,

and holds any part of the assets and liabilities that were held by any of the amalgamating or merging companies immediately before the implementation of the agreement;

“amalgamating or merging company” means a company that is a party to an amalgamation or merger agreement;

“annual general meeting” means the meeting of a public company required by section 61 (7);

“audit” has the meaning set out in the Auditing Profession Act;

“Auditing Profession Act” means the Auditing Profession Act, 2005 (Act No. 26 of 2005);

“auditor” has the meaning set out in the Auditing Professions Act;

“Banks Act” means the Banks Act, 1993 (Act No.124 of 1993);

“beneficial interest”, when used in relation to a company’s securities, means the right or entitlement of a person, through ownership, agreement, relationship or otherwise, alone or together with another person to—

- (a) receive or participate in any distribution in respect of the company’s securities;
- (b) exercise or cause to be exercised, in the ordinary course, any or all of the rights attaching to the company’s securities; or
- (c) dispose or direct the disposition of the company’s securities, or any part of a distribution in respect of the securities,

but does not include any interest held by a person in a unit trust or collective investment scheme in terms of the Collective Investment Schemes Act, 2002 (Act No. 45 of 2002);

“board” means the board of directors of a company;

“business days” has the meaning determined in accordance with section 5 (3);

“Cabinet” means the body of the national executive described in section 91 of the Constitution;

“central securities depository” has the meaning set out in section 1 of the Securities Services Act, 2004 (Act No. 36 of 2004);

“close corporation” means a juristic person incorporated under the Close Corporations Act, 1984 (Act No. 69 of 1984);

“**Commission**” means the Companies and Intellectual Property Commission established by section 185;

“**Commissioner**” means the person appointed to or acting in the office of that name, as contemplated in section 189;

“**Companies Tribunal**” means the Companies Tribunal established in terms of section 193;

“**companies register**” means the register required to be established by the Commission in terms of section 187 (4);

“**company**” means a juristic person incorporated in terms of this Act, or a juristic person that, immediately before the effective date—

(a) was registered in terms of the—

(i) Companies Act, 1973 (Act No. 61 of 1973), other than as an external company as defined in that Act; or

(ii) Close Corporations Act, 1984 (Act No. 69 of 1984), if it has subsequently been converted in terms of Schedule 2;

(b) was in existence and recognised as an ‘existing company’ in terms of the Companies Act, 1973 (Act No. 61 of 1973); or

(c) was deregistered in terms of the Companies Act, 1973 (Act No. 61 of 1973), and has subsequently been re-registered in terms of this Act;

“**Competition Act**”, means the Competition Act, 1998 (Act No. 89 of 1998);

“**consideration**” means anything of value given and accepted in exchange for any property, service, act, omission or forbearance or any other thing of value, including—

(a) any money, property, negotiable instrument, securities, investment credit facility, token or ticket;

(b) any labour, barter or similar exchange of one thing for another; or

(c) any other thing, undertaking, promise, agreement or assurance, irrespective of its apparent or intrinsic value, or whether it is transferred directly or indirectly;

“**Constitution**” means the Constitution of the Republic of South Africa, 1996;

“**convertible securities**” means any securities of a company that may, by their terms, be converted into other securities of the company, including—

(a) any non-voting securities issued by a company and which will become voting securities—

(i) on the happening of a designated event; or

(ii) if the holder of those securities so elects at some time after acquiring them;

and

(b) options to acquire securities to be issued by the company, irrespective of whether or not those securities may be voting securities, or non-voting securities contemplated in paragraph (a);

“co-operative” means a juristic person as defined in the Co-operatives Act, 2005 (Act No. 14 of 2005);

“Council” means the Financial Reporting Standards Council established by section 203;

“director” means a member of the board of a company, as contemplated in section 66, or an alternate director of a company and includes any person occupying the position of a director or alternate director, by whatever name designated;

“distribution” means a direct or indirect—

(a) transfer by a company of money or other property of the company, other than its own shares, to or for the benefit of one more holders of any of the shares of that company or of another company within the same group of companies, whether—

(i) in the form of a dividend;

(ii) as a payment in lieu of a capitalisation share, as contemplated in section 47;

(iii) is consideration for the acquisition—

(aa) by the company of any of its shares, as contemplated in section 48; or

(bb) by any company within the same group of companies, of any shares of a company within that group of companies; or

(iv) otherwise in respect of any of the shares of that company or of another company within the same group of companies, subject to section 164 (19);

(b) incurrence of a debt or other obligation by a company for the benefit of one or more holders of any of the shares of that company or of another company within the same group of companies; or

(c) forgiveness or waiver by a company of a debt or other obligation owed to the company by one more holders of any of the shares of that company or of another company within the same group of companies,

but does not include any such action taken upon the final liquidation of the company;

“effective date”, with reference to any particular provision of this Act, means the date on which that provision came into operation in terms of section 225;

“electronic communication” has the meaning set out in section 1 of the Electronic Communications and Transactions Act;

“Electronic Communications and Transactions Act” means the Electronic Communications and Transactions Act, 2002 (Act No. 25 of 2002);

“employee share scheme” has the meaning set out in section 95 (1) (c);

“exchange” when used as a noun, has the meaning set out in section 1 of the Securities Services Act, 2004 (Act No. 36 of 2004);

“exercise”, when used in relation to voting rights, includes voting by proxy, nominee, trustee or other person in a similar capacity;

“ex officio director” means a person who holds office as a director of a particular company solely as a consequence of that person holding some other office, title, designation or similar status specified in the company’s Memorandum of Incorporation;

“external company” means a foreign company that is carrying on business, or non-profit activities, as the case may be, within the Republic, subject to section 23 (2);

“file”, when used as a verb, means to deliver a document to the Commission in the manner and form, if any, prescribed for that document;

“financial reporting standards”, with respect to any particular company’s financial statements, means the standards applicable to that company, as prescribed in terms of section 29 (4) and (5);

“financial statement” includes—

- (a) annual financial statements and provisional annual financial statements;
- (b) interim or preliminary reports;
- (c) group and consolidated financial statements in the case of a group of companies; and
- (d) financial information in a circular, prospectus or provisional announcement of results, that an actual or prospective creditor or holder of the company’s securities, or the Commission, Panel or other regulatory authority, may reasonably be expected to rely on;

“foreign company” means an entity incorporated outside the Republic, irrespective of whether it is—

- (a) a profit, or non-profit, entity; or
- (b) carrying on business or non-profit activities, as the case may be, within the Republic;

“general voting rights” means voting rights that can be exercised generally at a general meeting of a company;

“group of companies” means two or more companies that share a holding company or subsidiary relationship;

“holding company”, in relation to a subsidiary, means a juristic person or undertaking that controls that subsidiary;

“Human Rights Commission” means the South African Human Rights Commission established in terms of Chapter 9 of the Constitution;

“incorporator”, when used—

- (a) with respect to a company incorporated in terms of this Act, means a person who incorporated that company, as contemplated in section 13; or
- (b) with respect to a pre-existing company, means a person who took the relevant actions comparable to those contemplated in section 13 to bring about the incorporation of that company;

“individual” means a natural person;

“inspector” means a person appointed as such in terms of section 209;

“investigator” means a person appointed as such in terms of section 209;

“inter-related”, when used in respect of three or more persons, means persons who are related to one another in a series of relationships, as contemplated in section 2 (1) (d);

“juristic person” includes—

- (a) a foreign company; and
- (b) a trust, irrespective of whether or not it was established within or outside the Republic;

“knowing”, “knowingly” or “knows”, when used with respect to a person, and in relation to a particular matter, means that the person either—

- (a) had actual knowledge of that matter;
- (b) was in a position in which the person reasonably ought to have—
 - (i) had actual knowledge;
 - (ii) investigated the matter to an extent that would have provided the person with actual knowledge; or
 - (iii) taken other measures which, if taken, would reasonably be expected to have provided the person with actual knowledge of the matter;

“listed securities” has the meaning set out in section 1 of the Securities Services Act, 2004 (Act No. 36 of 2004);

“Master” means the person holding the office of that name in terms of the Supreme Court Act, 1959 (Act No. 59 of 1959);

“material”, when used as an adjective, means significant in the circumstances of a particular matter, to a degree that is—

- (a) of consequence in determining the matter; or
- (b) might reasonably affect a person’s judgement or decision-making in the matter;

“member”, when used in reference to a non-profit company, means a person who holds membership in, and specified rights in respect of, that non-profit company, as contemplated in item 4 of Schedule 1;

“Memorandum of Incorporation” means the document, as amended from time to time—

- (a) that sets out rights, duties and responsibilities of shareholders, directors and others within and in relation to a company, and other matters as contemplated in section 15; and
- (b) by which—
 - (i) the company was incorporated in terms of this Act, as contemplated in section 13; or
 - (ii) a pre-existing company was structured and governed before the later of—
 - (aa) the effective date; or
 - (bb) the date it was converted to a company in terms of Schedule 2;

“Minister” means the member of the Cabinet responsible for companies;

“nominee” has the meaning set out in section 1 of the Securities Services Act, 2004 (Act No. 36 of 2004);

“non-profit company” means a company—

- (a) incorporated for a public benefit or other object as required by item 1 (1) of Schedule 1; and
- (b) the income and property of which are not distributable to its incorporators, members, directors, officers or persons related to any of them except to the extent permitted by item 1 (3) of Schedule 1;

“Notice of Incorporation” means the notice to be filed in terms of section 13 (1), by which the incorporators of a company inform the Commission of the incorporation of that company, for the purpose of having it registered;

“official language” means a language mentioned in section 6 (1) of the Constitution;

“ordinary resolution” means a resolution adopted—

- (a) at a shareholders meeting, with the support of more than 50% of the voting rights exercised on the resolution, or a higher percentage as contemplated in section 65 (8); or
- (b) by holders of a company’s securities acting other than at a meeting, as contemplated in section 60;

“organ of state” has the meaning set out in section 239 of the Constitution;

“Panel” means the Takeover Regulation Panel, established by section 196;

“participant” has the meaning set out in section 1 of the Securities Services Act, 2004 (Act No. 36 of 2004);

“person” includes a juristic person;

“personal financial interest”, when used with respect to any person—

- (a) means a direct material interest of that person, of a financial, monetary or economic nature, or to which a monetary value may be attributed; but
- (b) does not include any interest held by a person in a unit trust or collective investment scheme in terms of the Collective Investment Schemes Act, 2002 (Act No. 45 of 2002), unless that person has direct control over the investment decisions of that fund or investment;

“personal liability company” means a company whose Memorandum of Incorporation states that the company is a personal liability company, as contemplated in section 8 (2) (c);

“pre-existing company” means a company contemplated in paragraph (a), (b) or (c) of the definition of ‘company’ in this section;

“pre-incorporation contract” means an agreement entered into before the incorporation of a company by a person who purports to act in the name of, or on behalf of, the company, with the intention or understanding that the company will be incorporated, and will thereafter be bound by the agreement;

“premises” includes land, or any building, structure, vehicle, ship, boat, vessel, aircraft or container;

“prescribed” means determined, stipulated, required, authorised, permitted or otherwise regulated by a regulation or notice made in terms of this Act;

“prescribed officer” means the holder of an office, within a company, that has been designated by the Minister in terms of section 66 (11);

“present at a meeting” means to be present in person, or able to participate in the meeting by electronic communication, or to be represented by a proxy who is present in person or able to participate in the meeting by electronic communication;

“private company” means a profit company that—

- (a) is not a company or a personal liability state-owned company; and
- (b) satisfies the criteria set out in section 8 (2) (b);

“profit company” means a company incorporated for the purpose of financial gain for its shareholders;

“public company” means a profit company that is not a state-owned company, a private company or a personal liability company;

“public regulation” means any national, provincial or local government legislation or subordinate legislation, or any licence, tariff, directive or similar authorisation issued by a regulatory authority or pursuant to any statutory authority;

“records”, when used with respect to any information pertaining to a company, means any information contemplated in section 24 (1);

“record date” means the date established under section 59 on which a company determines the identity of its shareholders and their shareholdings for the purposes of this Act;

“registered auditor” has the meaning set out in the Auditing Profession Act;

“registered external company” means an external company that has registered its office as required by section 23, and has been assigned a registration number in terms of that section;

“registered office” means the office of a company, or of an external company, that is registered as required by section 23;

“registered trade union” means a trade union registered in terms of section 96 of the Labour Relations Act, 1995 (Act No. 66 of 1995);

“registration certificate”, when used with respect to a—

(a) company incorporated on or after the effective date, means the certificate, or amended certificate, issued by the Commission as evidence of the incorporation and registration of that company;

(b) pre-existing company registered in terms of—

(i) the Companies Act, 1973 (Act No. 61 of 1973), means the certificate of incorporation or registration issued to it in terms of that Act;

(ii) the Close Corporations Act, 1984 (Act No. 69 of 1984), and converted in terms of Schedule 2 to this Act, means the certificate of incorporation issued to the company in terms of that Schedule, read with section 14; or

(iii) any other law, means any document issued to the company in terms of that law as evidence of the company’s incorporation; or

(c) registered external company, means the certificate of registration issued to it in terms of this Act or the Companies Act, 1973 (Act No. 61 of 1973);

“registry” means a depository of documents required to be kept by the Commission in terms of section 187 (4);

“regulated person or entity” means a person that has been granted authority to conduct business by a regulatory authority;

“regulation” means a regulation made under this Act;

“regulatory authority” means an entity established in terms of national or provincial legislation responsible for regulating an industry, or sector of an industry;

“related”, when used in respect of two persons, means persons who are connected to one another in any manner contemplated in section 2 (1) (a) to (c);

“relationship” includes the connection subsisting between any two or more persons who are related or inter-related, as determined in accordance with section 2;

“rules” and **“rules of a company”** means any rules made by a company as contemplated in section 15 (3) to (5);

“securities” has the meaning set out in section 1 of the Securities Services Act, 2004 (Act No. 36 of 2004), and includes shares held in a private company;

“share” means one of the units into which the proprietary interest in a profit company is divided;

“shareholder”, subject to section 57 (1), means the holder of a share issued by a company and who is entered as such in the certificated or uncertificated securities register, as the case may be;

“shareholders meeting”, with respect to any particular matter concerning a company, means a meeting of those holders of that company’s issued securities who are entitled to exercise voting rights in relation to that matter;

“solvency and liquidity test” means the test set out in section 4 (1);

“special resolution” means a resolution adopted—

- (a) at a shareholders meeting, with the support of at least 75% of the voting rights exercised on the resolution, or a lower percentage as contemplated in section 65 (10);
or
- (b) by holders of a company’s securities acting other than at a meeting, as contemplated in section 60;

“state-owned company” means an enterprise that is registered in terms of this Act as a company, and either—

- (a) falls within the meaning of “state-owned enterprise” in terms of the Public Finance Management Act, 1999 (Act No. 1 of 1999); or
- (b) is owned by a municipality, as contemplated in the Local Government: Municipal Systems Act, 2000 (Act No. 32 of 2000), and is otherwise similar to an enterprise referred to in paragraph (a);

“subsidiary” has the meaning determined in accordance with section 3;

“**Takeover Regulations**” means the regulations made by the Minister in terms of sections 120 and 223;

“**this Act**” includes the Schedules and regulations;

“**unalterable provision**” means a provision of this Act that does not expressly contemplate that its effect on any particular company may be negated, restricted, limited, qualified, extended or otherwise altered in substance or effect by a company’s Memorandum of Incorporation or rules;

“**uncertificated securities**” means any securities defined as such in section 29 of the Securities Services Act, 2004 (Act No. 36 of 2004);

“**uncertificated securities register**” means the record of uncertificated securities administered and maintained by a participant or central securities depository, as determined in accordance with the rules of a central securities depository, and which forms part of the relevant company’s securities register established and maintained in terms of Part E of Chapter 2;

“**voting power**”, with respect to any matter to be decided by a company, means the voting rights that may be exercised in connection with that matter by a particular person, as a percentage of all such voting rights;

“**voting rights**”, with respect to any matter to be decided by a company, means—

- (a) the rights of any holder of the company’s securities to vote in connection with that matter, in the case of a profit company; or
- (b) the rights of a member to vote in connection with the matter, in the case of a non-profit company;

“**voting securities**”, with respect to any particular matter, means securities that—

- (a) carry voting rights with respect to that matter; or
- (b) are presently convertible to securities that carry voting rights with respect to that matter; and

“**wholly-owned subsidiary**” has the meaning determined in accordance with section 3 (1) (b).

2. Related and inter-related persons, and control.—(1) For all purposes of this Act—

- (a) an individual is related to another individual if they—
 - (i) are married, or live together in a relationship similar to a marriage; or
 - (ii) are separated by no more than two degrees of natural or adopted consanguinity or affinity;

- (b) an individual is related to a juristic person if the individual directly or indirectly controls the juristic person, as determined in accordance with subsection (2); and
- (c) a juristic person is related to another juristic person if—
 - (i) either of them directly or indirectly controls the other, or the business of the other, as determined in accordance with subsection (2);
 - (ii) either is a subsidiary of the other; or
 - (iii) a person directly or indirectly controls each of them, or the business of each of them, as determined in accordance with subsection (2).

(2) ~~For the purpose of subsection (1), a person controls a juristic person, or its business, if—~~

~~(a) in the case of a juristic person that is a company—~~

~~(i) that juristic person is a subsidiary of that first person, as determined in accordance with section 3. (1) (a); or~~

~~(ii) that first person together with any related or inter-related person is—~~

~~(aa) directly or indirectly able to exercise or control the exercise of a majority of the voting rights associated with securities of that company, whether pursuant to a shareholder agreement or otherwise;~~
~~or~~

~~(bb) has the right to appoint or elect, or control the appointment or election of, directors of that company who control a majority of the votes at a meeting of the board.~~

~~(b) in the case of a juristic person that is a close corporation, that first person owns the majority of the members' interest, or controls directly, or has the right to control, the majority of members' votes in the close corporation;~~

~~(c) in the case of a juristic person that is a trust, that first person has the ability to control the majority of the votes of the trustees or to appoint the majority of the trustees, or to appoint or change the majority of the beneficiaries of the trust; or~~

~~(d) that first person has the ability to materially influence the policy of the juristic person in a manner comparable to a person who, in ordinary commercial practice, would be able to exercise an element of control referred to in paragraph (a), (b) or (c).~~

(3) With respect to any particular matter arising in terms of this Act, a court, the Companies Tribunal or the Panel may exempt any person from the application of a provision of this Act that would apply to that person because of a relationship contemplated in subsection (1) if the person can show that, in respect of that particular matter, there is sufficient evidence to conclude that the person acts independently of any related or inter-related person.

ANNEXURE C (CORRUPTION LEGISLATION)

- (xxii) "public body" means—
- (a) any department of state or administration in the national or provincial sphere of government or any municipality in the local sphere of government; or
- (b) any other functionary or institution when—
- (i) exercising a power or performing a duty or function in terms of the Constitution or a provincial constitution; or
- (ii) exercising a public power or performing a public duty or function in terms of any legislation; 5
- (xxiii) "public international organisation" means— 10
- (a) an organisation—
- (i) of which two or more countries are members; or
- (ii) that is constituted by persons representing two or more countries;
- (b) an organisation established by, or a group of organisations constituted by— 15
- (i) organisations of which two or more countries are members; or
- (ii) organisations that are constituted by the representatives of two or more countries; or
- (c) an organisation that is—
- (i) an organ of, or office within, an organisation described in paragraph (a) or (b); 20
- (ii) a commission, council or other body established by an organisation or organ referred to in subparagraph (i); or
- (iii) a committee or a subcommittee of a committee of an organisation referred to in paragraph (a) or (b) or of an organ, council or body referred to in subparagraph (i) or (ii); 25
- (xxiv) "public officer" means any person who is a member, an officer, an employee or a servant of a public body, and includes—
- (a) any person in the public service contemplated in section 8(1) of the Public Service Act, 1994 (Proclamation No. 103 of 1994); 30
- (b) any person receiving any remuneration from public funds; or
- (c) where the public body is a corporation, the person who is incorporated as such,
- but does not include any—
- (a) member of the legislative authority; 35
- (b) judicial officer; or
- (c) member of the prosecuting authority;
- (xxv) "sporting event" means any event or contest in any sport, between individuals or teams, or in which an animal competes, and which is usually attended by the public and is governed by rules which include the constitution, rules or code of conduct of any sporting body which stages any sporting event or of any regulatory body under whose constitution, rules or code of conduct the sporting event is conducted; and 40
- (xxvi) "valuable security" means any document—
- (a) creating, transferring, surrendering or releasing any right to, in or over property; 45
- (b) authorising the payment of money or delivery of any property; or
- (c) evidencing the creation, transfer, surrender or release of any such right, the payment of money or delivery of any property or the satisfaction of any obligation. 50

Interpretation

2. (1) For purposes of this Act a person is regarded as having knowledge of a fact if—
- (a) that person has actual knowledge of the fact; or
- (b) the court is satisfied that—
- (i) the person believes that there is a reasonable possibility of the existence of that fact; and
- (ii) the person has failed to obtain information to confirm the existence of that fact, 55
- and "knowing" shall be construed accordingly.

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- (2) For the purposes of this Act a person ought reasonably to have known or suspected a fact if the conclusions that he or she ought to have reached are those which would have been reached by a reasonably diligent and vigilant person having both—
- (a) the general knowledge, skill, training and experience that may reasonably be expected of a person in his or her position; and
 - (b) the general knowledge, skill, training and experience that he or she in fact has.
- (3) (a) A reference in this Act to accept or agree or offer to accept any gratification, includes to—
- (i) demand, ask for, seek, request, solicit, receive or obtain;
 - (ii) agree to demand, ask for, seek, request, solicit, receive or obtain; or
 - (iii) offer to demand, ask for, seek, request, solicit, receive or obtain,
- any gratification.
- (b) A reference in this Act to give or agree or offer to give any gratification, includes to—
- (i) promise, lend, grant, confer or procure;
 - (ii) agree to lend, grant, confer or procure; or
 - (iii) offer to lend, grant, confer or procure,
- such gratification.
- (4) A reference in this Act to any act, includes an omission and "acting" shall be construed accordingly.
- (5) A reference in this Act to any person includes a person in the private sector.

CHAPTER 2
OFFENCES IN RESPECT OF CORRUPT ACTIVITIES*Part 1: General offence of corruption*

General offence of corruption 25

3. Any person who, directly or indirectly—
- (a) accepts or agrees or offers to accept any gratification from any other person, whether for the benefit of himself or herself or for the benefit of another person; or
 - (b) gives or agrees or offers to give to any other person any gratification, whether for the benefit of that other person or for the benefit of another person, in order to act, personally or by influencing another person so to act, in a manner—
 - (i) that amounts to the—
 - (aa) illegal, dishonest, unauthorised, incomplete, or biased; or
 - (bb) misuse or selling of information or material acquired in the course of the, exercise, carrying out or performance of any powers, duties or functions arising out of a constitutional, statutory, contractual or any other legal obligation;
 - (ii) that amounts to—
 - (aa) the abuse of a position of authority;
 - (bb) a breach of trust; or
 - (cc) the violation of a legal duty or a set of rules;
 - (iii) designed to achieve an unjustified result; or
 - (iv) that amounts to any other unauthorised or improper inducement to do or not to do anything,
- is guilty of the offence of corruption.

Part 2: Offences in respect of corrupt activities relating to specific persons

Offences in respect of corrupt activities relating to public officers

4. (1) Any—
- (a) public officer who, directly or indirectly, accepts or agrees or offers to accept any gratification from any other person, whether for the benefit of himself or herself or for the benefit of another person; or
 - (b) person who, directly or indirectly, gives or agrees or offers to give any gratification to a public officer, whether for the benefit of that public officer or for the benefit of another person.

ANNEXURE D (TERRORISM LEGISLATION)

(3) For the purposes of paragraph (a)(vi) and (vii) of the definition of "**terrorist activity**", any act which is committed in pursuance of any advocacy, protest, dissent or industrial action and which does not intend the harm contemplated in paragraph (a)(i) to (v) of that definition, shall not be regarded as a terrorist activity within the meaning of that definition.

(4) Notwithstanding any provision of this Act or any other law, any act committed during a struggle waged by peoples, including any action during an armed struggle, in the exercise or furtherance of their legitimate right to national liberation, selfdetermination and independence against colonialism, or occupation or aggression or domination by alien or foreign forces, in accordance with the principles of international law, especially international humanitarian law, including the purposes and principles of the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the said Charter, shall not, for any reason, including for purposes of prosecution or extradition, be considered as a terrorist activity, as defined in subsection (1).

(5) Notwithstanding any provision in any other law, and subject to subsection (4), a political, philosophical, ideological, racial, ethnic, religious or any similar motive, shall not be considered for any reason, including for purposes of prosecution or extradition, to be a justifiable defense in respect of an offence of which the definition of terrorist activity forms an integral part.

(6) For the purposes of this Act a person has knowledge of a fact if—

(a) the person has actual knowledge of that fact; or

(b) the court is satisfied that—

(i) the person believes that there is a reasonable possibility of the existence of that fact; and

(ii) he or she fails to obtain information to confirm the existence of that fact.

(7) For the purposes of this Act a person ought reasonably to have known or suspected a fact if the conclusions that he or she ought to have reached, are those which would have been reached by a reasonably diligent and vigilant person having both—

(a) the general knowledge, skill, training and experience that may reasonably be expected of a person in his or her position; and

(b) the general knowledge, skill, training and experience that he or she in fact has.

ANNEXURE E

ANNEX TREATMENT OF BRIBERY THROUGH INTERMEDIARIES IN THE OECD ANTI-BRIBERY CONVENTION AND OTHER INTERNATIONAL LEGAL INSTRUMENTS

1. OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions

105. Article 1 of the OECD Anti-Bribery Convention expressly requires Parties to establish that it is a criminal offence for any person to intentionally “offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official”. However, the Convention and its Commentaries do not elaborate on the meaning of “directly or through intermediaries”.

106. The offences of roughly half of the Parties to the Convention expressly cover bribery through intermediaries, either with language similar to Article 1 or the words “directly or indirectly” (Argentina, Australia, Belgium, Brazil, Canada, France, Greece, Hungary, Ireland, Luxembourg, Mexico, New Zealand,¹⁴ Portugal, Slovak Republic, South Africa, Spain, Turkey, United States).

107. Of the Parties that do not expressly cover bribery through an intermediary in the offence, six rely on their Penal Code provisions on instigation and complicity (Austria, Bulgaria, Chile, Denmark, Germany, Poland, and Slovenia). The remaining Parties rely on its implicit coverage in the offence. Eleven submitted some supporting authority for their contention that it is indeed covered, be it domestic case law (Estonia, Germany, Italy, Japan, Korea, Netherlands, Sweden, and Switzerland), preparatory works and parliamentary discussions (Estonia, Netherlands, Norway) or legal literature (Czech Republic, United Kingdom). Two countries so far have not been able to provide supporting evidence of their contention that their offences cover foreign bribery through intermediaries (Finland and Iceland).

2. Other international legal instruments

108. Other international legal instruments expressly deal with foreign bribery through intermediaries with language similar to the OECD Convention, *e.g.* the Convention drawn up on the basis of Article K.3(2)(c) of the Treaty of the European Union on the fight against corruption involving officials of the European Communities or officials of Member States of the European Union.

109. Some instruments, however, use the words “directly or indirectly”, *e.g.* Article 16 of the United Nations Convention against Corruption, Articles 2 and 5 of the Council of Europe Criminal Law Convention against Corruption.¹⁵ Some instruments also use the “directly or indirectly” language *viz.* domestic bribery, *e.g.* the Inter-American Convention against Corruption and the African Union Convention on Preventing and Combating Corruption.