Statucor

COMPLIANCE GOVERNANCE SECRETARIAL

DIRECTORS GUIDE

INDEX

DIRECTOR'S ROLE AMIDST THE COVID 19 PANDEMIC

The director's role has without a doubt become more onerous amidst the Covid 19 pandemic. However the Companies Act makes provision for operating in a virtual world, which includes, inter alia:

- A signature or an initial on a document may be made by or on behalf of a person by the use of an electronic signature or an advanced electronic signature.
- Proxy forms, annual financial statements, prospectuses and annual reports may be lawfully created, signed, retained and sent electronically.
- Meetings of shareholders and directors respectively may be conducted entirely by electronic communication.
- The definition of "present at a meeting" includes a "virtual presence" or representation by electronic proxy.

The information contained in this guide is a summary of some of the key issues affecting directors and officers of companies, and provides an overview of relevant legislation. Directors and officers are required to be cognisant of corporate legislation pertaining to their office, and have a duty to ensure that the company complies with all other applicable laws, industry or sector specific legislation.

Directors are required to ensure that managers and employees are aware of the legislation, and that all within the company are committed to act honestly, with integrity, and a high level of competence and knowledge. Adherence to nonbinding rules, codes and standards of good corporate governance is considered to be key to the effective management and control of a company.

THE COMPANIES AMENDMENT BILL, 2018

The Amendment Bill was published for public comment on the 21 September 2018 in Government Gazette no. 41913 of 2018. At the date of publication hereof, it has not yet been signed into law, however once it is, it will come into operation on a date to be fixed by the President by proclamation in the Gazette. Its main purpose is to review and identify all the problematic areas arising from the Act, and to align the Act with modern international corporate trends.

The proposed amendments contained in the Amendment Bill are **written in red text** in this guide, for easy reference. Please note that these are proposed amendments. The final document signed into law may not include all the legislative adjustments that could be made in the interim. In addition, and due to the limitations in length of the guide, we have not included all the proposed amendments, but only those deemed most relevant to directors and officers of companies in South Africa.

THE MANDATORY COMPLIANCE CHECKLIST

The Companies and Intellectual Property Commission (hereinafter referred to as "the Commission") is tasked with ensuring, monitoring and enforcing compliance with the Act. In pursuance of this function, the Commission issued Notice 52 of 2019 dated 13 August 2018, which came into effect from 1 January 2020. The Notice announced that a new mandatory Compliance Checklist would be required to be completed and submitted by all categories of companies as listed on page 5 (but not a Close Corporation or "CC"). The Checklist had to be submitted to the Commission before the relevant company's Annual Return could be submitted.

The Commission then issued Notice 9 of 2020, dated 3 March 2020, which has amended Notice 52. This new Notice provides that as from 5 March 2020, the Checklist will still apply to those companies who fall into the categories as per page 5 but only if their annual financial statements are audited or independently reviewed. The Checklist still does not apply to a CC. This is now a standalone service, and must be completed by the applicable company within 30 business days after the anniversary of the company's date of incorporation. The period for which the company declares its compliance is to be known as its "Compliance Year", and is aligned to the anniversary date of its incorporation.

The Checklist requires that the company declare its compliance status to certain Sections, Regulations and Schedule 1 of the Act, as follows:

- **Section 4:** Solvency and Liquidity
- **Section 15:** Memorandum of Incorporation (MOI), shareholder agreements and rules
- **Section 26:** Access to company records
- **Section 27:** Financial year of company
- **Section 28:** Accounting records
- **Section 29:** Financial Statements
- **Section 30:** Annual Financial Statements
- **Section 32:** Use of company name and registration number
- **Section 33:** Annual Return
- **Section 44:** Financial assistance for subscription of securities
- **Section 45:** Loans or other financial assistance to directors
- **Section 50:** Securities Register and numbering
- **Section 61:** Shareholders meeting
- **Section 66:** Board, directors and prescribed officers
- **Section 69:** Ineligibility and disqualification of persons to be director or prescribed officer
- **Section 70:** Vacancies on board
- **Section 72:** Board committees
- **Section 86:** Mandatory appointment of company secretary
- **Section 90:** Appointment of auditor
- **Section 92:** Rotation of auditor
- **Section 94:** Audit committees
- **Regulation 21:** Registered office of the company
- **Regulation 43:** Social and Ethics Committee
- **Schedule 1:** Provisions concerning Non-Profit companies

These Sections, Regulations and Schedule 1 are expanded on throughout this guide, and are **indicated with a green arrow** ⇨ to indicate that they are applicable to the Checklist.

It is ultimately the responsibility of the directors to ensure compliance and completion of the Checklist. Any person who completes it incorrectly or fraudulently can be held responsible, as follows:

Section 215(2)(e): a person commits an offence who knowingly provides false information to the Commission

Section 216((b): any person convicted of an offence is liable to a fine or to imprisonment for a period not exceeding 12 months, or to both a fine and imprisonment.

CATEGORIES OF COMPANIES

The Act provides for two categories of companies, namely profit companies and non-profit companies as follows:

PROFIT COMPANIES	■ State-owned company (SOC Ltd)
	■ A private company (Pty) Ltd if: ◆ it is not a state-owned company ◆ its MOI prohibits it offering any of its securities to the public and restricts the transferability of its securities ◆ Must have at least one director*
	■ A personal liability company (Incorporated or Inc.) if: ◆ it meets the criteria for a private company ◆ its MOI states that it is a personal liability company ◆ Must have at least one director*
	■ A public company, (Ltd) in any other case ■ Must have at least 3 directors* **The minimum number of incorporators is reduced from 7 to 1**
One or more persons, or an organ of state, may incorporate a profit company.	
NON-PROFIT COMPANIES	Name to be followed by suffix "NPC" Incorporated for a public benefit or an object relating to one or more cultural or social activities, or communal or group interests Can be incorporated with or without members. If there are no members, the MOI must set out the basis on which directors are to be appointed by its board, or other persons Must have at least three directors
An organ of state, a juristic person, or 3 or more persons acting in concert may incorporate a non-profit company.	

*The MOI may provide for a higher number in substitution for the minimum number of directors than those required by the Act.

CLOSE CORPORATIONS (CC'S)

A CC is governed by both the Close Corporations Act, no 69 of 1984 and the Companies Act, no 71 of 2008. It is similar to a private company, having its own legal personality and perpetual succession. It has no share capital and therefore no shareholders. The owners of a CC are the members, holding a membership interest in the CC. The mandatory Compliance Checklist required to be submitted to the Commission annually does not apply to CC's.

Financial Statements and Accounting Records of CC's

The same requirements of maintaining accurate and complete accounting records, satisfying the financial reporting standards and preparing annual financial statements (AFS) applies to CC's. Accounting officers are still required to be appointed. The AFS of a CC must be prepared within six months of the financial year end. These may be required to be audited (in the event that the criteria of Regulation 28 of the Act applies to the CC, one of these criteria being its Public Interest Score at the end of the financial year). Members of CC's may voluntarily apply the enhanced accountability and transparency provisions contained in the Act, and may also elect to have their financials audited or independently reviewed on a voluntary basis – the members' decision to do so being guided by various factors such as industry requirements or financial institution requirements.

Conversion of a CC to a Company

Since the implementation of the Act in 2011, no new CC's may be registered. A conversion from a company to a CC is no longer possible. However, a CC may convert to a company.

Some effects of conversion, include (but are not limited to) the following:

- Every member of a converted CC is entitled to become a shareholder of the company but the shares to be held in the company by the shareholders individually need not necessarily be in proportion to the members' interests as stated in the CC's founding statement
- Directors (previously members) will enjoy the Section 76(4) business judgement rule as a possible defence against liability
- The entity will be required to meet the Solvency and Liquidity test – ensuring that the company is solvent, liquid and economically viable.

KING IV™

Since 1994, there have been several versions of the King Report. Each version has been built on the underlying principles of the previous report. The latest version, King IV™ is effective in respect of financial years commencing on or after 1 April 2017, and completely replaced King III™.

King IV™ recognises that good corporate governance and ethical leadership are essential in society today, irrespective of the size or nature of the entity.

King IV™ is a simplified and more user-friendly version. It is an essential tool for successful, responsible and effective corporate governance, and takes the form of a report which includes the Code, and separate sector supplements for SME's, NPO's, State-Owned Entities, Municipalities and Retirement Funds (thus encouraging a broader participation by all industry sectors).

King IV™ is voluntary (unless prescribed by law or by a Stock Exchange listings requirement). Some of the principles have been legislated. If a conflict occurs, the law prevails. The King IV™ Code provides 17 principles, as well as a large number of recommended practices, to help governing bodies and organisations achieve 'good corporate citizen' status and governance outcomes.

Unlike the previous reports which were rules-based and followed a 'tick-box' approach, it encourages organisations to have a more 'hands-on' approach to principles, so that practices can be clearly linked to outcomes in an "apply and explain" approach. This gives governing bodies more flexibility when implementing the recommended practices, but requires them to be transparent when disclosing how they achieved their goals.

The 2008 Companies Act has many features which result in an alignment with international best practices and the governance principles of the King Code and Reports.

Key Concepts of King IV™

Organisations do not function in isolation, but operate within the wider context of the economy, society and the environment.

Integrated thinking, where the board of directors considers all issues affecting the organisation when making decisions, is fundamental to the long-term sustainability of the organisation through the sustained creation of value for stakeholders. It reinforces the way

Source:
The King IV Report on Corporate Governance for South Africa 2016, Institute of Directors S.A.
For more information, see http://www.iodsa.co.za/?page=AboutKingIV"

the company operates as an integral part of society, underpins sustainable development, corporate citizenship, integrated reporting and the stake-holder inclusive approach.

Sustainable Development – an approach to development which balances the different, and often competing needs of the company against an awareness of the environmental, social and economic limitations of society. The board should develop a strategy which includes accounting for sustainability issues and reporting these to stakeholders.

Corporate Citizenship – the company should be a responsible "citizen", involved with social, environmental and economic issues, respect for human rights, effective management of stakeholder relationships, resource management with an eye on future needs, and ensuring a positive impact on the community within which it operates.

Stakeholder-Inclusive Approach – the board should consider and balance the legitimate needs, interests and expectations of all stakeholders in making decisions in the best interests of the company. Active stakeholders play a crucial role in the governance process because they are entitled to hold the board and the company accountable for their actions and disclosures.

King IV™ Principles of Good Governance

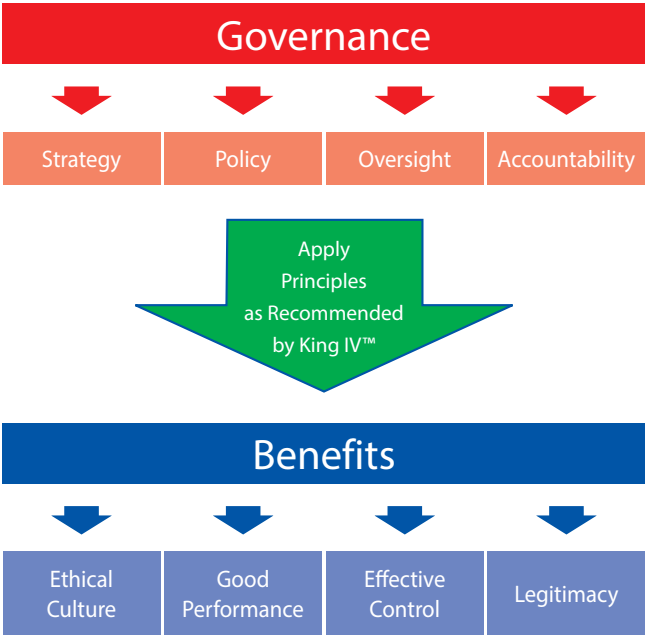
The board of directors should:

- Lead ethically and effectively
- Govern ethics and establish an ethical culture
- Ensure responsible corporate citizenship
- Appreciate that the company's core purpose, its risks and opportunities, strategy, business model, performance and sustainable development are all inseparable components of the value creation process
- Ensure that reports allow stakeholders to make informed assessments about the organisation's performance and its short, medium and long-term prospects
- Serve as the focal point and custodian of corporate governance
- Have the appropriate balance of knowledge, skills, experience, diversity and independence
- Delegate within the board to promote independent judgement, and assist with the balance of power and effective discharge of duties
- Evaluate board's performance and support continued improvement and effectiveness
- Appoint and delegate to management in a way that contributes to role clarity and the effective exercise of authority and responsibilities
- Govern risk in line with strategic objectives

Source:
The King IV Report on Corporate Governance for South Africa 2016, Institute of Directors S.A.
For more information, see http://www.iodsa.co.za/?page=AboutKingIV"

- Govern information and technology in line with strategic objectives
- Comply with applicable laws and adopted, non-binding rules, codes and standards
- Remunerate fairly, responsibly and transparently
- Use assurance services and functions to enable an effective control environment which supports the integrity of information
- Adopt a stakeholder-inclusive approach
- Practise responsible investment which promotes good governance and the creation of value (applies to institutional investor organisations).

King IV™ in a Nutshell



Source:
The King IV Report on Corporate Governance for South Africa 2016, Institute of Directors S.A.
For more information, see http://www.iodsa.co.za/?page=AboutKingIV"

NATURE AND DEFINITION OF A DIRECTOR

Nature of a Director

The directors of a company are the key people entrusted by law with the function of administering the company and are central to ensuring good corporate governance in the company.

The director functions as both a trustee and a consultant:

- A director is required to have the experience, skill, time and ability necessary to carry out his functions effectively, and should place the interests of the company first, similar to that of a "consultant"
- At common law, directors owe fiduciary duties and obligations of care and skill to the company, which are similar to that of a "trustee".

Definition of a Director

The Act extends the definition of "director" to include others, which has particular impact in regard to duties, potential liability and responsibility of directors and officers.

The definition of "director" in the Act includes a member of a board of a company, or an alternate director of a company, and includes any person occupying the position of a director or alternate director, by whatever name designated.

The definition is extended to include a prescribed officer, a person who is a member of a committee of a board of a company, or the audit committee of a company (irrespective of whether or not the person is also a member of the company's board).

For purposes of Section 69 (qualification and eligibility), Section 76 (standards of directors' conduct), Section 77 (directors' liability), Section 78 (indemnification and directors' insurance), the definition of "director" is extended to include an alternate director, prescribed officer, a person who is a member of a committee of a board of a company, or is a member of the audit committee of a company (irrespective of whether or not the person is also a member of the company's board).

With reference to indemnification and directors' insurance, the definition also includes former director(s). Section 75 also extends the definition of director to certain persons, as more clearly defined on page 27.

Those designated officers as described above are subject to the same standards of conduct, duties of care, skill and diligence and fiduciary duties as directors, and will be held jointly and severally liable with directors. The MOI and any additional rules are also specifically binding between the company and such officers.

THE PRESCRIBED OFFICER

A prescribed officer is anyone who fulfils the role of a director but who is operating (intentionally or otherwise) under a different designation. He is therefore typically an executive who is in a position to influence the management of the company or one of its significant divisions, and who regularly participates to a material degree in the exercise of general effective control over and management of the whole or a significant portion of the business and activities of the company.

A company secretary, may, for example, fall within the definition of a prescribed officer in terms of the Act, even although he may not be a director appointed to the board of the company.

Prescribed officers are bound by the same codified duties and liabilities of directors which are referred to in numerous sections of the Act.

It is very important that the board is able to identify who the prescribed officers are. Equally important is that the prescribed officers know who they are, and that they understand their responsibilities in terms of the Act. Not doing so puts both the board and the prescribed officer at risk of non-compliance with the Act, which in turn could lead to activities that may result in personal liability.

APPOINTMENT AND ELECTION OF DIRECTORS

Section 66(2): The board must comprise:

- In the case of a private or personal liability company: at least one director, or
- In the case of a public company or a non-profit company: at least three directors –

in addition to the minimum number of directors that the company must have to satisfy any requirement, whether in terms of the Act or its MOI, to appoint an audit committee, or a social and ethics committee.

The MOI may provide for a higher number in substitution for the minimum number of directors than those required by the Act.

Section 66(4)(a) provides that the MOI may:

- Provide for the direct appointment and removal of one or more directors, by any person named who is named in, or determined in terms of, the MOI, and
- May also provide for a person to be an ex officio director as a consequence of that person holding some other office, title, designation or similar status (subject to him being eligible and qualified to do so in terms of Section 69)
- The appointment or election of alternate director(s) to the company.

- **Section 66(4)(b):** A profit company (other than a SOC Ltd) must provide for the election by shareholders of at least 50% of the directors, and 50% of any alternate directors.
- **Section 66(11):** A failure by a company at any time to have the minimum number of directors does not limit or negate the authority of the board or invalidate anything done by the board or the company.
- **Section 66(12):** Save as otherwise provided elsewhere in the Act, or in the company's MOI, any particular director may be appointed to more than one committee and when calculating the minimum number of directors required for a company, any such director who has been appointed to more than one committee must be counted only once.
- **Section 66(5)(b):** A person who holds office or acts in the capacity of an ex officio director of a company has all the powers and functions of any other director of the company and is subject to all of the liabilities, of any other director of the company (unless otherwise stated in the company's MOI).

Election of Directors of Profit Companies

Section 68(1): Each director of a profit company must be elected by the persons entitled to exercise voting rights in such an election, to serve for an indefinite term, or for a term as set out in the MOI.

Section 68(2): Unless a profit company's MOI provides otherwise, the election is to be conducted as a series of votes each of which is on the candidacy of a single individual to fill a single vacancy with the series of votes continuing until all vacancies on the board at that time have been filled.

Section 68(3): Unless the MOI of a profit company provides otherwise, the board may appoint a person who satisfies the requirements for election as a director to fill any vacancy and serve as a director of the company on a temporary basis.

- **Section 66(7):** A person becomes entitled to serve as a director when he has been appointed or elected in accordance with the provisions of the Act, or holds an office, title, designation or similar status as ex officio director in terms of these provisions, and is not ineligible or disqualified in terms of Section 69, and has delivered to the company a written consent to serve as its director.

Prior to accepting an appointment, a director should carefully consider whether he has the necessary expertise to act as a director, given the size, nature and complexity of the company.

NON-ELIGIBLE AND DISQUALIFIED DIRECTORS

Section 69 states that a person who is ineligible or disqualified, must not be appointed or elected as a director of a company, or consent thereto, or act as such. The election or appointment is a nullity if, at the time of the election or appointment, that person is ineligible or disqualified. A company may, in its MOI, impose additional grounds of ineligibility or disqualification, and set out minimum qualifications to be met by directors of the company. A company must not knowingly permit an ineligible or disqualified person to serve or act as a director, and the Commission must maintain a public register of persons who are disqualified. A person who becomes ineligible or disqualified while serving as a director of a company ceases to be entitled to continue to act as a director immediately, subject to Section 70(2).

A person is **ineligible** if the person is a juristic person, an unemancipated minor or under similar legal disability, or does not satisfy any qualification set out in the MOI.

The Act Sets Out Disqualifications as Follows:

Section 69(8)(a): a court has prohibited that person to be a director, or declared the person to be delinquent (Section 162). A person under probation cannot serve as a director for the period of probation.

Section 69(8)(b):

(i) An unrehabilitated insolvent (ii) a person prohibited in terms of any public regulation (iii) any person removed from an office of trust due to dishonesty, or (iv) any person convicted of offences in the Republic or elsewhere and imprisoned without the option of a fine, or fined more than the prescribed amount, for fraud, theft, forgery, perjury or a specific offence involving fraud, misrepresentation or dishonesty, or in regard to the forming or managing of a company, or in terms of the Companies Act, Insolvency Act, or Financial Intelligence Centre Act.

Where a director is disqualified in terms of (iii) and (iv) above, he may nevertheless act as a director of a private company if he is the sole shareholder or the shares are held by a person/s related to that disqualified person, and each such person has consented in writing to that disqualified person being a director of the company. In addition, Section 69(9) provides that such a person's disqualification will end after five years under certain circumstances set out in that Section, and that the court may also, in certain circumstances extend the disqualification time frame of disqualification of such a person if it is necessary to protect the public, having regard to the conduct of the disqualified person up to the time of the application.

TERMINATION OF OFFICE

A Director's Term of Office may terminate when:

- It has expired as per the MOI (where applicable)
- The director resigns
- The death of the director
- If he is declared delinquent or becomes disqualified
- If he is removed by a shareholders' resolution or the board or a court order.

Resignation

Directors may resign by tendering a letter of resignation.

Removal by the Shareholders

Section 71(1): A director may be removed by an ordinary resolution adopted at a shareholders meeting by the persons entitled to exercise voting rights in an election of that director. Before the shareholders may consider such a resolution, the director concerned must be given notice of the meeting and the resolution (at least equivalent to that which a shareholder is entitled to receive), and must be afforded a reasonable opportunity to make a presentation in person or through a representative to the meeting, before the resolution is put to vote.

Removal by the Board

Section 71: Under certain specific circumstances, the board (provided the company has more than two directors) may remove a director without shareholder approval. Section 71 cannot be amended in a company's MOI.

The board of directors may remove a director from office if there are two or more directors, and one of the following applies:

- The director has become disqualified or ineligible to act
- The director has become incapacitated to the extent that the director is unable to perform the functions of a director, and is unlikely to regain that capacity within a reasonable time
- The director has neglected or been derelict in performance of his duties.

When one of the above assertions has been made in relation to a director, the board (other than the director concerned) must determine the matter by resolution, and may then begin proceedings to remove the director.

The board must call a meeting of directors to determine the matter. The director must be given notice of the meeting and the proposed removal, including a copy of the proposed resolution and a statement stating reasons for the resolution, with sufficient specificity to reasonably permit the director to prepare and present a response. He must be given a reasonable chance to make presentation personally (or by a representative) at the meeting before the resolution is put to a vote.

Removal by the Companies Tribunal

A director may be removed from the board by the Companies Tribunal. Where there are fewer than three directors, and in any circumstances similar to those set out in Section 71(3), the Companies Tribunal must determine the removal of the director on application by any shareholder or director.

Removal of Director During Business Rescue Proceedings

At any time during business rescue proceedings, the business rescue practitioner may apply to a court for an order removing a director from office on the grounds set out in Section 137(5)(a) and (b). This is in addition to any right of a person to apply to a court for an order contemplated in Section 162 (a declaration of delinquency).

Compensation

A person who is removed from office as director in terms of Section 71 may have a right at common law or other right that a person may have to apply to a court for damages or other compensation for loss of office as a director, or loss of any other office as a consequence of being removed as a director.

Section 70: Vacancies on the Board

Where there is a vacancy on the board in circumstances as described above, such vacancy must be filled by a new appointment or new election, which would either be conducted at the next Annual General Meeting (AGM) of the company (if applicable), or in any other case, within 6 months of the vacancy, at a shareholders meeting called to elect him or her or by a poll of persons entitled to exercise voting rights in an election of a director.

DUTIES AND RESPONSIBILITIES OF DIRECTORS

Overview of Directors' Responsibilities

Common Law Duties and Partially Codified Duties (Section 76)

- Fiduciary duties:
  - to act bona fide in the interests of the company
  - to exercise powers for their proper purpose
  - to exercise independent judgement in decision making
  - not to use corporate property information or opportunities for personal profit
- Duty to disclose any conflict of interest
- Duty to position and use information for company's benefit, and not for his own private advantage or the advantage of any other person other than the company or a wholly owned subsidiary of the company
- Duty to disclose material information [unless he reasonably believes the information is immaterial to the company or generally available to the public or known to other directors or is bound not to disclose the information by legal or ethical obligation of confidentiality]
- Duty to perform duties in good faith, in the best interests of the company and with due care, skill and diligence that would reasonably be expected of a person carrying out the same functions in relation to the company as those carried out by that director, and having the general knowledge skill and experience of that director

Duties in Terms of Strategy and Conduct

- Duty to comply with the Act in relation to different types of companies (Section 8)
- Duty to comply with the company's MOI (Section 13, 15 and 16)
- Duty to manage the business affairs of the company [Section 66(1)]
- Duty to carry on the business without trading recklessly or under insolvent conditions (Section 22)
- Duty to comply with Solvency and Liquidity Test (Section 4)
- Duty to implement business rescue proceedings if necessary

Duties Relating to the Board,Shareholders and Administration

- Duty to appoint board committees (Section 72)
- Duty to appoint an audit committee where applicable (Section 94)
- Duty to appoint a company secretary where applicable (Section 84 & 86)
- Duty to facilitate shareholders' meeting (Section 61)
- Duty to facilitate directors' meetings (Section 73)
- Duty to enable shareholders to exercise their voting powers and rights [Section 2(2) & 58]
- Duty to operate in the best interest of the shareholders [Section 20(6) & (7) & 76(3)]

Duties Relating to Keeping of Records and Audit

- Duty to keep company records (Section 24)
- Duty to keep accounting records (Section 28)
- Duty to provide for the Proper Conduct of Audit or Independent Review where applicable (Sections 90 & 92)

Duties Relating to Accountability, Transparency and Disclosure

- Duty to prepare financial/ annual financial statements (Section 29 & 30)
- Duty to prepare a directors' report [Section 30(3)]
- Duty to issue a prospectus (Section 100)
- Duty to disclose director's remuneration information (Section 30)
- Duty to disclose director's financial Interests (Section 75)
- Duty to file an annual return (Section 33)

Other Duties and Responsibilities

- Duty to operate within the framework of King IV™ (Corporate Governance, Ethical Leadership and Corporate Citizenship)
- Duty to comply with all other legislation

Main Objectives of the Board

The main "best interest" objectives of the board, are:

- To operate in the best interests of the shareholders
- To operate in the best interests of the company.

These objectives may be achieved by implementing a framework of corporate strategy and good corporate governance.

The board is responsible for determining the company's strategic direction, which includes determining:

- The business model, which entity to trade through, the capital structure and strategic planning.

Corporate governance is the implementation and execution of the corporate strategy, as managed by the board of directors in terms of conformance and performance standards.

Directors have a duty to operate in the best interest of the shareholders at all times. Directors have numerous administrative duties within the company, such as facilitating meetings of the shareholders and the board, and a duty to make sure that shareholders are able to exercise their voting rights.

Structure of the Board

The "board" refers to the collective word used to designate directors when they act together as a group.

When determining the structure of the board, the company should take cognisance of factors such as the nature of the business, needs of the company, structure of committees, quorum requirements and the skills and knowledge required to make decisions. The Act does not prescribe how the board should be structured, save to state that at least three non-executive directors must be appointed to the audit committee of a public company or State owned company. However, good governance principles and the King Reports recommend that a balanced board of non–executive, independent non-executive and executive directors be elected, so as to ensure a clear separation of ownership from control and reward structures and that the board operates independently and is not an extension of the day to day management of the company. It is recommended that the board structure be reviewed on an annual basis.

Executive*	■ Salaried, he may enter a fixed term service agreement with the company ■ Involved with the day to day running of the company
Non-Executive*	■ Does not have any day-to-day management role ■ Usually only attends board meetings and are paid directors fees for their service ■ May be a shareholder in the company
Non-Executive Independent*	■ Has limited or no financial interest in the organisation, or any interests that could influence the company ■ Not a representative of a controlling shareholder
Alternate	■ Defined in the Act ■ Acts on behalf of a director when he cannot personally fulfil his duties
Ex Officio	■ Defined in the Act ■ Director as a consequence of that person holding some other office, title, designation or similar status

* Not defined in the Act.

Delegation of Authority

The board may delegate to the committee any of the authority of the board.

The creation of a committee, delegation of authority or action taken does not alone satisfy or constitute compliance by a director with the required duty of a director to the company.

While many of the directors' duties may be delegated to management, the directors retain overall responsibility over management, and have a duty to monitor management's performance.

Section 73(1): Board Meetings

A director authorised by the board of a company, may call a board meeting at any time. A board meeting is obligatory if called for by:

- At least two of the directors, or
- 25% of the directors where board comprises 12 or more directors. (The MOI may specify a different number or percentage.)

The board may determine from time to time the requirement for notice for meetings, as long as this complies with the MOI or rules and no meeting may be convened without notice to all the directors subject to certain exceptions.

Board meetings may be held with certain or all the directors using electronic communication (EC), as long as the EC facility enables all persons participating in that meeting to communicate concurrently with each other without an intermediary and to participate effectively in that meeting (and as long as the MOI allows for it).

A majority of the directors must be present in person or by electronic communication before a vote may be called at the meeting.

Each director has one vote on a matter before the board, and a majority of votes cast on a resolution is sufficient to approve that resolution. In the case of a tied vote, the chair may cast a deciding vote if he has not previously voted. In all other instances the motion is not carried. Properly executed minutes of directors meetings are important to record decisions made and thereby manage the liability of holding the office of director.

Board Committees

Unless the MOI provides otherwise, the board may appoint any number of committees of directors, or may consult with or receive advice from any person.

The board may appoint non-directors to a committee (as long as they are not disqualified or ineligible). Such persons shall not have a vote on a matter to be decided by the committee, but may nevertheless incur the same liabilities as directors in terms of the Act.

Regulation 43: Social and Ethics Committee

The Minister has prescribed that a listed public company or SOC Ltd or any other company that has in any two of the previous five years achieved a Public Interest Score above 500 points is obliged to have a social and ethics committee, which must be appointed at each AGM, unless exempted in terms of Regulation 43(2). **The Amendment Bill proposes that this requirement also apply to all public companies (not only listed public companies) and SOC Ltd's.**

Section 61: Shareholders' Meetings

Directors have a duty to call and convene shareholders' meetings.

In general, there are two types of shareholders' meetings, the annual general meeting (AGM) and ordinary general meetings.

Proper notice of the meeting must be given of the date, place and purpose of the shareholders' meeting. The notice periods for calling of meetings are: fifteen business days for public companies, and ten business days for private companies.

In order to conduct business at a shareholders' meeting, a quorum (minimum number of members) must be present. Where a quorum is not present, the meeting must be adjourned.

In terms of Section 61(3), the board is required to convene a shareholders' meeting on receipt of one or more written and signed demands.

The board can determine the location for the meeting, which can either be within South Africa's borders, or located overseas.

If a company is unable to convene a meeting because it has no directors, or because all of its directors are incapacitated, then any other person authorised by the company's MOI may convene the meeting.

If no person has been authorised, then the Companies Tribunal, on a request by any shareholder, may issue an administrative order for a shareholders' meeting to be convened.

If a company fails to convene a meeting for any reason other than the above, the Act allows the Court to call a shareholders' meeting.

A public company is required to have an AGM which must take place within eighteen months after incorporation, and then every calendar year, within fifteen months of the last meeting. The Act does not require a private company to have an AGM. However, the board is required to approve the AFS, and these are required to be presented to the first shareholders meeting after they have been so approved (there is no time frame stipulated), unless exempted.

At the AGM (where applicable), the following business is required to be transacted: Presentation of the directors' report, audited financial statements for the immediately preceding financial year, an audit committee report, the election of directors, to the extent required by this Act or the company's MOI, the appointment of (i) an auditor for the ensuing financial year; and (ii) an audit committee; and (d) any matters raised by shareholders, with or without advance notice to the company.

The Amendment Bill proposes amendments to Section 61 by requiring the Social and Ethics Committee Report and Remuneration Report to be presented at the shareholders meeting (where applicable).

RIGHTS AND POWERS OF DIRECTORS

Rights

- To discharge their duties without interference from co-directors
- To receive reasonable notice of meetings
- To claim reimbursement for expenses incurred
- To inspect the company's accounting records, assisted by an accountant
- To take independent professional advice at the expense of the company
- To participate in the strategic management of the company and attend and vote at board meetings.

Powers

Listed below are some of the Sections in the Act which empower directors.

Section 66(1): To exercise unfettered powers: The board has the authority to exercise all of the powers and perform any of the functions of the company, except to the extent that the Act or the MOI of the company provides otherwise.

Section 15: Every company must have a MOI, which is binding between the company and each shareholder, as well as between and amongst the shareholders, and also between the company and each director and prescribed officer and any other person who serves on a commitee of the board, regarding their functions in the company. The MOI must be consistent with the Act, and will be void to the extent that it contravenes or is inconsistent with the Act. It may be tailored specifically by the company (per the alterable provisions of the Act), as long as it does not change any of the unalterable provisions of the Act - unless such a change will impose a higher standard/greater restriction or longer period of time than would otherwise apply to the company in the unalterable provision. In addition, and provided the MOI does not provide otherwise, the board of directors can make,amend and/or repeal any rules relating to governance of the company in regard to matters that are not in the MOI or the Act, and must publish (to shareholders) and file these rules with the Commission (if applicable). These rules must be consistent with the Act and the MOI and will be void to the extent they are inconsistent with them. The shareholders may also enter into a shareholders agreement, and again, this agreement cannot be inconsistent with the Act or the MOI of the company, and to the extent that the shareholders agreement is inconsistent with them, is void to the extent of that inconsistency.

The Amendment Bill proposes to amend Section 16 (which deals with the amendment of the MOI), by providing that any amendments to the MOI of a company will take effect 10 business days after receipt of the notice of amendment, if the Commission, after the expiry of the 10 business days, has not endorsed the notice of amendment sooner, or has failed to reject the amendment with reasons.

Section 21: To ratify Pre-Incorporation contracts.

Section 38: To issue shares: (but only within the classes, and to the extent, that the shares have been authorised by or in terms of the company's MOI, in accordance with Section 36).

Section 129: To resolve to institute business rescue proceedings.

Section 44–45: To authorise the provision of financial assistance for subscription of securities and loans or other financial assistance to directors, provided certain conditions are met.

Section 46: To authorise distributions provided all requirements of the Act have been complied with.

Section 48: To acquire company or subsidiary shares in terms of the Act. The Section requires that where the board has resolved that the company is to acquire a number of its own shares, the decision must be approved by special resolution of the shareholders of the company if any shares are to be acquired by the company from a director or prescribed officer of the company, or a person related to a director or prescribed officer of the company, and is subject to the requirements of Sections 114 and 115, if, considered alone, or together with other transactions in an integrated series of transactions, it involves the acquisition by the company of more than 5% of the issued shares of any particular class of the company's shares. **The Amendment Bill proposes that no special resolution will be required when the company is implementing a pro-rata share buy-back where the shareholders affected are also the directors of the company.**

ACCOUNTABILITY, TRANSPARENCY AND DISCLOSURE

Retention of Records

Any documents, accounts, books, writing, records or other information that a company is required to keep in terms of the Act or any other public regulation must be kept in written form, or in a form or manner that allows the documents and information that comprise the records to be convertible into written form within a reasonable time for a period of at least seven years or any longer period of time specified in any other applicable public regulation.

Section 24(3) states that every company must maintain –

(a) A copy of its MOI, any amendments or alterations to it, and any rules of the company.

(b) A record of its directors including (i) the information required in respect of each current director at any particular time and (ii) with respect to each past director which information must be retained for seven years after the past director retired from the company [including, in respect of each director, that persons full name, former names, identity number or date of birth, (if not a South African, then passport number and nationality), occupation, date of most recent election as director, name and registration number of every other company or foreign company of which the person is a director, and the nationality of the foreign company (if applicable), and any other prescribed information].

(c) Copies of (i) reports presented at an AGM of the company (for a period of seven years after the date of any such meeting), (ii) annual financial statements (for seven years after the date on which each such particular statements were issued), and (iii) accounting records required by the Act, for the current financial year (and for the previous seven completed financial years of the company).

(d) Notice and minutes of shareholders/members meetings including (i) all resolutions adopted by them and (ii) any document made available by the company to the holders of securities in relation to each such resolution (for seven years after the date each such resolution was adopted).

(e) Copies of any written communications sent generally by the company to all holders of any class of the company's securities and in the case of a non-profit company, any communication to members (for a period of seven years after the date on which each such communication was issued).

(f) Minutes of all meetings and resolutions of directors, directors committees or the audit committee, if any (for a period of seven years after the date of (i) each such meeting or (ii) which each such resolution was adopted).

In addition to the above, Section 24(4) states that a company must also maintain:

(a) A securities register or its equivalent as required by Section 50, in the case of a profit company, or a member's register in the case of a non-profit company that has members, and

(b) the records required in terms of Section 85, if that Section applies to the company, namely a maintaining a record of its company secretary and auditor/s.

A company must notify the Commission of the location or of any change in the location of any company records that are not located at its registered office.

Section 26: Access to Information

Section 26 of the Act states that a person who holds or has a beneficial interest in any securities issued by a profit company or who is a member of a non-profit company has a right to inspect and copy without any charge for any such inspection or upon payment of no more than the prescribed maximum charge for any such copy, the information contained in the records of the company, as per Section 24(3)(a), (b), (c)(i) and (ii), (d) and (e) and Section (24)(4)(a) above.

Any other person has a right to inspect or copy the securities register of a profit company, or the members register of a non-profit company that has members, or the register of directors upon payment of an amount not exceeding the prescribed maximum fee for any such inspection (currently set at R100), and upon request to do so.

Any such right of access may be exercised only in accordance with The Promotion of Access to Information Act, no 2 of 2000. In addition to the information rights set out above, a company's MOI may establish additional information rights of any person, with respect to any information pertaining to the company, but no such right may negate or diminish any mandatory protection of any record required by or in terms of Part 3 of the Promotion of Access to Information Act.

The Amendment Bill proposes that any other person (i.e. not just a shareholder or member) should also be allowed access to the records as per Section 24(3)(a), (b), (c)(i) and (ii), (d) and (e) and Section (24)(4)(a) above. It also proposes reducing the time period that a company has to comply with such a request from 14 business days to 5 business days.

In addition, with respect to each director, the company must keep a record of addresses for service, and, in the case of a company that is required to have an audit committee, any professional qualifications and experience of the director.

If a company receives a request for access, it must within 14 business days comply with the request. It is an offence for a company to fail to accommodate or impede any reasonable request. This also applies in the case of access to financial statements. **The Amendment Bill proposes amendments to Section 31 by extending this existing statutory offence (for refusing access to financial statements) to a director or an officer of the company.**

Regulation 21: Registered Office

Every company and external company must have a registered office at which their documents are maintained. This office must be indicated on the Notice of Incorporation.

Subject to the requirements of the MOI, a Notice of Change of Registered Office must be filed with the Commission where applicable.

Section 33: Annual Returns

Annual returns must be submitted by every category of company including external companies in the prescribed form with the prescribed fee and within 30 business days after the anniversary date of its date of incorporation (in the case of a company that was incorporated in the Republic, or the date that its registration was transferred to the Republic, in the case of a domesticated company). A CC is required to file its annual return within the anniversary month of its incorporation up until the month thereafter.

An annual return is a statutory return in terms of the Act and therefore must be complied with. Failure to do so will result in the Commission assuming that the company is not doing business, and may lead to deregistration. Companies which are required in terms of the Act to have their financial statements audited must file a copy of the latest approved audited financial statements together with their annual return, in iXBRL format.

Notice 67 of 2019 issued by the Commission states that Companies (and CC's) that are required to produce audited AFS's are those that fall within the following categories:

- All public companies and State-Owned companies
- Companies that have an explicit stipulation in their MOI that they should audit or voluntarily audit their AFS's
- Companies whose Public Interest Score is 350 or more
- Companies that in the ordinary course of their primary activities, hold assets in a fiduciary capacity for person who are not related to them, and the aggregate value of such assets held at any time during the financial year exceeds R5 million

The Act also requires that the following companies are required to be audited: A Non-Profit Company created by the State, or for the State, and a Company whose Public Interest Score is between 100-349, and whose annual financial statements have been internally compiled.

iXBRL involves a digital file format for the reporting of a company's AFS, and replaces the PDF document. It makes it easier for companies to report their financial information in an electronic format, and for the Commission to analyse the data submitted, as the iXBRL format creates uniformity amongst all financial reports. The Commission mandated the digital reporting system for all qualifying entities from 1 July 2018.

A company that is not required to have its annual financial statements audited, may elect to file a copy of its audited or reviewed statements together with its annual return, however this is not compulsary.

A company that is not required to file annual financial statements and does not elect to file a copy of its audited or reviewed annual financial statements must file a financial accountability supplement (FAS) with its annual return. Companies that voluntarily audit their AFS based on a board or shareholder resolution, and those that have theirs independently reviewed are also not obliged to submit their AFS in the iXBRL format, but may do so if they wish.

Each year, in its annual return, every company must designate a director, employee or other person who is responsible for the company's compliance with the transparency and accountability provisions in the Act.

The Amendment Bill proposes that a company will be required to file a copy of its latest AFS and will also be required to file a copy of its securities register as required in terms of Section 50, with the Commission each year along with its Annual Return.

Section 32: Use of Registered Name and Number

A company or external company must:

- Provide its full registered name or registration number on demand
- Not misstate its name or registration number in a manner likely to mislead or deceive any person.

The company's registered name and registration number must be clearly displayed in legible characters on all forms, notices and correspondence, electronic or otherwise.

This requirement applies to all bills of exchange, promissory notes, cheques and orders for money or goods and in all letters, delivery notes, invoices, receipts and letters of credit of the company.

It is an offence to mislead the public in this regard. **The Amendment Bill proposes to amend Section 160 relating to disputes around company names. It is proposed that where a company has been ordered to change its name by the Companies Tribunal, and it fails to do so, the Commission may substitute its registration number as the name of the company in question.**

Section 75: Disclosure of Personal Financial Interests

Based on a director's fiduciary relationship with the company, directors have a duty to disclose their personal financial interests in the business of the company.

Section 75 applies to an extended definition of 'director' and includes:

- An alternative director, prescribed officer and board committee member (irrespective of whether the person is also a member of the company's board);
- Related persons when used in reference to a director, as defined in Section 1 (including a second company or CC of which a director or related person is a director or member).

In terms of the Act, "personal financial interest" comprises a direct material interest of a financial, monetary or economic nature, or to which a monetary value may be attributed, but does not include any interest held by a person in a unit trust or collective investment scheme unless that person has direct control over the investment decisions of that fund or investment.

A director is not only obliged to disclose his own personal financial interests but also those of parties related to him (including natural and juristic persons).

A director must disclose his interest in advance, before it is considered by a meeting of the board and must recuse himself by leaving the meeting, without taking part in the discussion.

A director is required to deliver a written notice to the board (or shareholders where there is only one director, but a number of holders of beneficial interest in issued securities) setting out the nature and extent of that interest, to be used generally for the purposes of this section until changed or withdrawn by further written notice from that director.

Consequences of non-disclosure

- The resolution and the transaction is void
- Director could be personally liable for losses, damages or costs sustained by the company, shareholders or third parties.

Section 75 will not apply where:

- The sole director is also the sole holder of all the company's securities (including shares)
- Where decisions generally affect all of the directors in their capacity as such
- Where the decision relates to a class of persons even if that director belongs to that class (exceptions apply)
- Where there is a proposal to remove a fellow director from office.

LENDING AND FINANCIAL ASSISTANCE TO DIRECTORS

"Financial assistance" in Sections 44 and 45 excludes lending money in the ordinary course of business by a company whose primary business is the lending of money, and additionally in re Section 45, includes the lending money, guaranteeing a loan or other obligation and securing any debt or obligation, but excludes an accountable advance to meet company-related legal expenses or anticipated expenses to be incurred by the person on behalf of the company or an amount to defray the person's expenses from removal at the company's request.

Section 44: Financial Assistance for Subscription of Securities

Unless a company's MOI provides otherwise, the board may authorise the company to provide financial assistance by way of a loan, guarantee, the provision of security or otherwise to any person for the purpose of or in connection with the subscription of any

option, or any securities, issued or to be issued by the company or a related or inter-related company or for the purchase of any securities of the company or a related or inter-related company (subject to certain conditions), which are outlined below*.

Section 45: Loans or Other Financial Assistance to Directors

Unless a company's MOI provides otherwise, the board may authorise the company to provide direct or or indirect financial assistance to a director or prescribed officer of the company or of a related or inter-related company, or to a related or inter-related company or CC, or to a member of a related or inter-related CC, or to a person related to any such company, CC, director, prescribed officer or member, subject to specific conditions as per below*.

If the board adopts a resolution to provide financial assistance, written notice must be given to all shareholders (unless every shareholder is also a director of the company), and to any trade union representing its employees:

- Within ten business days after the board adopts the resolution, if the total value of all loans, debts, obligations or assistance together with any previous such resolution during the financial year, exceeds one-tenth of 1% of the company's net worth at the time of the resolution, or
- Within 30 business days after the end of the financial year, in any other case.

The Amendment Bill proposes that Section 45 be amended in that the heading be changed to "Financial assistance to directors and group of companies". The Section presently provides that any financial assistance granted by a company to its subsidiary must be authorised by the board and the shareholders by way of a special resolution. The Bill proposes that the special resolution requirement should not apply where a company gives financial assistance to its own subsidiary, which eases the burden of companies providing financial assistance to their own subsidiaries and having to apply all the requirements of this Section.

* **Conditions to be met (Sections 44 and 45):**
The provision of financial assistance is only possible where the board has authorised it by way of resolution, but the board may not pass such a resolution unless it is pursuant to an employee share scheme that satisfies the requirements of S97, OR – in any other case – the financial assistance (e.g a loan) has been approved first by the shareholders by way of a special resolution (which either names a specific recipient or a specific class of recipients in general, and which was adopted or adopted within the previous 2 years by the shareholders), and the specific recipient falls within that category, and that immediately after providing the finanical assistance, the board is satisfied that the solvency and liquidity test will be met, as well as a confirmation that the terms are fair and reasonable to the company, and that any specific conditions or restrictions respecting the granting of financial assistance set out in the company's MOI have been satisfied.

FINANCIAL YEAR, ACCOUNTING RECORDS, FINANCIAL STATEMENTS AND AUDITS

Section 27: Financial Year

A company's financial year end is set in its incorporation documents, and the first financial year begins on the date of registration of the company. A company can change its year end only once per annum. It is also not allowed to backdate a year end change (the newly established year end must be later than the date on which the notice to change is filed). After the change, the following year end should not be more than 15 months after year end of the preceding financial year.

Section 28: Maintaining and Keeping of Accounting Records

It is the duty of directors to ensure that the company keeps accurate and complete accounting records in one of the official languages of RSA at its registered office.

The accounting records must be kept in the prescribed manner and form and must provide adequate information to enable the company to satisfy all reporting requirements applicable to it and to provide for:

- The compilation of financial statements
- The proper conduct of an audit or independent review of its annual financial statements (where applicable).

Electronic records must comply with the requirements of the Act.

Non-profit companies must maintain adequate records of all revenue received from donations, grants and member's fees, or in terms of funding, contracts or arrangements with any party.

Regulation 25(3) sets out what is required to be included in the accounting records of a company.

Records which must be kept include:

- A record of the company's assets and liabilities including but not limited to:
  - a register of company's non-current assets
  - a record of any loan by the company to a shareholder, director, prescribed officer, employee or any related person
  - a record of any liabilities and obligations of the company
- A record of any property held by the company in a fiduciary capacity or in any capacity or manner contemplated in Section 65(2) of the Consumer Protection Act 2008

- A record of company's revenue and expenditure
- A record of inventory and stock in trade where the company trades in goods.

It is an offence for a company to fail to keep accurate or complete accounting records with the intention of deceiving or misleading any person or to falsify its accounting records.

Sections 29 and 30: Financial Statements & Annual Financial Statements (AFS)

It is the duty of directors to cause the financial statements or annual financial statements of the company to approved by the board and signed by an authorised director, and be presented to the first shareholders meeting after the statements have been approved by the board. If a company provides any financial statements including annual financial statements to any person for any reason, these must satisfy the requirements set out in Section 29.

Financial statements must not be false, misleading or incomplete in any material respect. Summaries must comply with prescribed requirements for summaries.

It is an offence to prepare or be party to the preparation, approval, dissemination or publication of any financial statement including any annual financial statements knowing that those statements fail in a material way to comply with the requirements of the Act, or are materially false or misleading. The Act places increased onus and liability on preparers of financial statements.

Audit and Independent Review

Directors are obliged to comply with Sections 28–30 of the Act. They have a duty to ensure that the company has an effective and independent audit committee (where applicable).

Section 30 provides that all companies must produce AFS each year within six months after the end of their financial year, and must determine whether it must be audited. AFS of all public companies and state-owned companies must be audited.

In the case of any other profit or non-profit company:

- AFS must be audited if so required by the regulations made in terms of sub-section 7, taking into account inter alia whether it is desirable in the public interest, having regard to the economic or social significance of the company as indicated by any relevant factors including its annual turnover, the size of its workforce and the nature and extent of its activities
- AFS can be either audited voluntarily if the company's MOI or a shareholders' resolution so requires or if the company's board has so determined, or independently reviewed in terms of sub-section 7.

Regulation 26(1)(d) relating to "Independent Review", states the minimum requirement for a professional person to conduct an independent review.

Exemption of Owner-Managed Companies

If every person in a particular company both holds, or has a beneficial interest in, any securities issued by that company and is also a director of that company, then that company is exempt from the requirement to have its annual financial statements audited or independently reviewed. This exemption:

- Does not apply to the company if it falls into a class of company that is required to have its annual financial statements audited in terms of the regulations contemplated in sub-section 7(a), and
- Does not relieve the company of any requirement to have its financial statements audited or reviewed in terms of another law or in terms of any agreement to which the company is a party.

The AFS must include an auditors report if the statements are audited, and a report by the directors with respect to the state of affairs, the business and profit or loss of the company or group of companies (if the company is part of a group) including any matter considered material in enabling the shareholders to appreciate the company's state of affairs, and any prescribed information, and be approved by the board and signed by an authorised director, and be presented to the first shareholders meeting after the statements have been approved by the board. If required to be audited, the AFS must include particulars regarding remuneration and benefits received by each director or individual holding any prescribed office, amount of any pensions or compensation paid out and the number and class of securities issued to a director or prescribed officer and consideration paid for them, as well as details of all director or prescribed officer's service contracts.

The Amendment Bill proposes to clear the confusing wording of this section, and states the particulars applicable to remuneration should apply to prescribed officers as well, and that it will be a requirement that each individual is named. The proposed insertion of Section 30A provides that, in line with King IV ™, public companies will be required to prepare a remuneration report with details of the remuneration and benefits awarded to individual directors, for approval by the board and presented to the shareholders at the AGM. The amendment sets out what must be included in this report.

Regulation 26 sets out the criteria for determining the Public Interest Score (PIS) which must be calculated at the end of the financial year by every company. The PIS of a company determines the financial reporting standards that must be adopted and also determines whether the company is required to appoint a Social and Ethics Committee (whether or not that company is listed).

ENHANCED ACCOUNTABILITY REQUIREMENTS

The Act contains provisions aimed at enhancing the self-regulation and accountability of certain companies.

These 'Chapter Three Provisions' are binding on:

- Public companies
- State-owned companies (SOC Ltd)
- Private, personal liability and non-profit companies which are required to have their annual financial statements audited under the Act; and
- Private, personal liability and non-profit companies where their MOI requires it

The above categories of companies must appoint:

- A person to serve as a company secretary
- A person to serve as an auditor
- An audit committee
- Every SOC Ltd company and every listed public company, and any other company that has in any two of the previous five years, scored above 500 points must also appoint a Social and Ethics Committee (unless exempted).

Section 86: The Company Secretary

It is compulsary for a public company or state-owned company to appoint a company secretary, upon its incorporation or within 40 business days of its incorporation either by the incorporators or subsequently by the directors of the company or through an ordinary resolution of the shareholders. It is not compulsary for a private company to appoint a company secretary. The company secretary must be permanently resident in South Africa, have the requisite knowledge and experience to perform duties as set out in the Act, and is accountable to the board.

Duties of a company secretary include:

- Providing the directors of the company with guidance
- Making directors aware of relevant laws and any failure to comply
- Recording minutes as required by the Act
- Certifying in the AFS of the company that the company has lodged all returns required of a public company in terms of the Act
- Ensuring that the company's AFS are distributed to every person who is entitled thereto
- Filing information returns in terms of the annual transparency and accountability report.

Section 90: Appointment of Auditor

Public and state-owned companies must appoint an auditor upon incorporation and each year at the annual meeting. Where the audit of any other company is required in the public interest (as indicated by prescribed criteria in any financial year), those annual financial statements must be audited.

The Amendment Bill proposes an amendment to Section 90 by removing the requirement for auditors to be appointed at the AGM, and that auditors can rather be appointed at a shareholders meeting at which the requirement first applies to the company, and annually at a general meeting of shareholders thereafter.

The auditor must be a registered auditor and must be acceptable to the company's audit committee as being independent of the company.

The auditor must not be:

- A director, prescribed officer, or employee or consultant of the company
- Anyone who was or has been engaged for more than one year in the maintenance of any of the company's financial records or the preparation of any of its financial statements
- A director, officer or employee of a person appointed as company secretary or of the person performing the secretarial work for the company
- A person who is disqualified in terms of Section 69(8) to serve as a director of any particular company
- A person who, alone or with a partner or employees, habitually or regularly performs the duties of accountant or bookkeeper of the company, and related secretarial services, or is related to any such person
- A person who at any time during the five consecutive financial years immediately preceding the date of appointment was a person contemplated above.
  The Amendment Bill proposes that this period be reduced to two years.

Section 92: Rotation of Auditor

The same individual may not serve as the auditor or designated auditor for more than five consecutive financial years.

If an individual has served as auditor or designated auditor for two or more consecutive financial years and then ceases to be the auditor or designated auditor, that individual may not be appointed again until after the expiry of at least two further financial years. If a company has appointed 2 or more persons as joint auditors, the company must manage the rotation in such a manner that all of the joint auditors do not relinquish office in the same year.

Section 93 sets out the rights and restricted functions of auditors who may not perform any services that would place him in a conflict of interest as determined by the Independent Regulatory Board for Auditors (IRBA) in terms of the Auditing Profession Act or any other services determined by its audit committee.

Section 94: Election of an Audit Committee

At each AGM, a SOC Ltd, public company or one that is required only by its MOI to have an audit committee must elect an audit committee. The shareholders and not the board of directors must elect an audit committee for the following financial year (subject to certain exemptions).

The audit committee must have at least three members who must also be independent non-executive directors of the company. In terms of the Act, members of the audit committee must also meet specific qualifications.

At least one third of the members of a company's audit committee at any particular time must have academic qualifications or experience in, economics, law, corporate governance, finance, accounting, commerce, industry, public affairs or human resource management.

The audit committee is required to comply with specific statutory duties as are clearly set out in the Act in Section 94(7), in respect to each financial year for which it is appointed.

The audit committee is required to report on the processes that were followed in appointing auditors and in carrying out their responsibilities, which includes determining the fees to be paid to the auditor and the auditor's terms of engagement.

They are also must comment on the annual financial statements and the policies and procedures that were followed by the company and the appointed auditors, detailing whether the audit process was conducted independently.

A company must pay all expenses reasonably incurred by its audit committee including the fees of any consultant or specialist engaged by the committee to assist it with its duties (if the audit committee considers it appropriate).

If a holding company has an audit committee, the subsidiary does not require one, if the audit committee of the holding company will perform the functions required under this section on behalf of that subsidiary company.

Additional Sections in Act relating to Enhanced Accountability and Transparency Requirements

Section 159: Protection of Whistle-Blowers

A public company or SOC Ltd company must directly or indirectly –

- Establish and maintain a system to receive confidential disclosures of any person as contemplated in Section 159 and act on them, and
- Routinely publicise the availability of that system to directors, secretaries, other officers, employees, registered trade unions of the company, a supplier of goods or services to a company or an employee of such a supplier
- Any provision of a company's MOI or an agreement is void to the extent it purports to limit or negate Section 159.

Regulation 43: Appointment of a Social and Ethics Committee

This is compulsory for those companies prescribed by the Regulation 43 to have a Social and Ethics Committee [listed public company or SOC Ltd or any other company that has in any two of the previous five years achieved a Public Interest Score above 500 points], unless:

- It is a subsidiary of another company that has a social and ethics committee which will perform the functions required by the regulation on behalf of that subsidiary company, or
- Has been exempted by the Tribunal on application. (Revocable exemptions for five years at a time are allowed on grounds of redundancy or no basis for public interest considering the company's activities or because the company already has a formal mechanism within its structures that substantially performs the same functions).

Regulation 43 sets out the composition, election of committee members and their functions in detail.

The committee must comprise not less than three directors or prescribed officers of the company, at least one of whom must be a director who is not involved in the day-to-day management of the company's business, and must not have been so involved within the previous three financial years.

A company required to have a Social and Ethics Committee is required to elect members to that Committee at each AGM of the company.

The board must appoint an advisory panel to the committee who represent the community and public interest having regard to the location and nature of the company's activities. **The Amendment Bill proposes that Section 61 be amended by requiring, inter alia, the presentation of a Social & Ethics Committee Report to shareholders at the AGM (where applicable).**

THE SOLVENCY AND LIQUIDITY TEST

Section 4: Directors have a duty to monitor the company's financial position and ensure that the company meets the solvency and liquidity test.

Solvency relates to the net worth or net asset value of the business, where assets are valued on the basis of their market values and realisable values. The balance sheet should reflect the solvency position of the business.

Liquidity is used to describe how easily the assets can be converted into cash, and to describe the relationship between a company's liquid assets and short-term financial obligations, when and as they become due.

The solvency and liquidity test is an accounting exercise. The Act states how the various values are to be calculated and what assets and liabilities are to be taken into account.

Some of the transactions that will require that the solvency and liquidity test be satisfied include:

- The provision of financial assistance to third parties for the acquisition of the company's own shares – for example, where the company lends money to a person to enable the latter to acquire the company's shares (Section 44)
- Loans or other financial assistance to related parties, including subsidiary companies, holding companies and directors (Section 45). **The Amendment Bill proposes that the provision of financial assistance by a company to its subsidiary does not need the adoption of a special resolution**
- Dividends or other "distributions" (as defined in Sections 1 and 46)
- The issuing of capitalisation shares on terms whereby the recipient can choose whether to take the shares or to take cash (Section 47)
- Share buy-backs – in other words, where the company buys back its own shares (Section 48). **The Amendment Bill proposes an amendment to Section 48 requiring that no special resolution has to be adopted when the company is implementing a pro-rata share buy-back where the shareholders affected are also the directors of the company**
- An amalgamation or merger with another company (Section 113).

In order to remain compliant with the Act, directors must constantly monitor whether a transaction that the company proposes to enter into will require that the statutory liquidity and solvency test be satisfied as well as the additional provisions of each particular section of the Act.

Directors must then take account of the necessary information to enable them to make the requisite determination of the company's solvency and liquidity.

In terms of the Act, a director will be personally liable for any loss, damage or costs sustained by the company if the director acquiesced in the conduct of the business of the company in insolvent circumstances, or otherwise failed to vote against a resolution to which the solvency and liquidity test was applicable in circumstances where the company did not satisfy that test.

Such personal liability extends not only to board members but also to prescribed officers.

Liability is joint and several with any other person who may be liable for the same act or omission. Being present at a meeting means that the director is required to either vote for or against the proposed resolution, for example, the declaration of a dividend or distribution. The recording of the vote should be minuted, for record purposes.

A court, on application, can also place such a director on probation in terms of Section 162(7)(a)(i).

A director could also be seen to be engaging in reckless trading as per Section 22, and incur consequences as per that Section.

A company satisfies the solvency and liquidity test at a particular time if, considering all reasonably foreseeable financial circumstances of the company at that time:

- The assets of the company as fairly valued, equal or exceed the liabilities of the company, as fairly valued, and
- It appears that the company will be able to pay its debts as they become due in the course of business for a period of twelve months after the date on which the test is considered, or in the case of a distribution, twelve months following that distribution.

Any financial information to be considered concerning the company must be based on:

- Accounting records which satisfy requirements of Section 28
- Financial statements which satisfy requirements of Section 29.

RECKLESS TRADING

A company must not carry on its business recklessly, with gross negligence with intent to defraud any person or for any fraudulent purpose.

If the Commission has reasonable grounds to believe that a company is engaging in reckless conduct or is unable to pay its debts as they become due and payable in the normal course of business, it may issue a notice to the company, to show cause why the company should be permitted to continue carrying on its business, or to trade, as the case may be.

The company is required to provide information to the Commission within 20 business days of having received the notice. If the company fails to satisfy the Commission that it is not engaging in prohibited conduct or that it is able to pay its debts as they become due and payable in the normal course of business, the Commission may issue a compliance notice to the company requiring it to cease carrying on its business or trading.

The Commission could also accept the information and confirm the company's right to continue carrying on business.

If a person to whom a compliance notice has been issued fails to comply with the notice, the Commission or the Executive Director (in the case of the Take-over Regulation Panel), as the case may be, may either:

- Apply to a court for the imposition of an administrative fine, or
- Refer the matter to the National Prosecuting Authority for prosecution as an offence in terms of Section 214(3), but may not do both in respect of any particular compliance notice
- A director could still be subject to significant civil liabilities for any loss, damage or cost suffered by the company as a result of a contravention of Section 22
- Directors have a duty to initiate voluntarily Business Rescue Proceedings where it seems the company will become insolvent, so as to avoid the serious consequences contemplated in this Section.

PROBATION AND DELINQUENCY

Directors must understand the serious impact of Section 162 of the Act (declaration of delinquent directors) which states that a director may be declared delinquent, or placed on probation, if that person is, or was, a director within two years of the court application.

The Act introduces a remedy to shareholders and other stakeholders (namely the company, a shareholder, director, company secretary, prescribed officer, a registered trade union that represents employees of the company or other representative of the employees) to hold directors accountable by an application to Court, to declare a person delinquent (and thus prohibited from being a director) or under probation (and restricted from serving as a director in terms of the conditions of the probation).

The director in question must be a current director or within the twenty-four months immediately preceding the application, have been a director of the company, and the Commission must keep a register of all those persons declared delinquent or on probation.

A director may also face civil claims and potential criminal liability.

Grounds for Probation

- Was present at a meeting and failed to vote against a resolution despite the inability of the company to satisfy the solvency and liquidity test
- Acted in a manner materially inconsistent with the duties of a director
- Acted in or supported a decision of the company to act in a manner that was oppressive or unfairly prejudicial
- Within ten years after the effective date (1 May 2011), was a director of more than one company or a managing member of more than one close corporation (concurrently, sequentially or at unrelated times), and during that time two or more of those companies or close corporations failed to fully pay all of their creditors or meet all their obligations (except under a business rescue plan resulting from a board resolution or a compromise with creditors).

Grounds for Delinquency

- Acted as a director or prescribed officer whilst ineligible or disqualified by the Act or by the Close Corporations Act
- Acted as a director in a manner that contravened a probation order
- Grossly abused the position of director
- Took personal advantage of information or an opportunity, or intentionally or by gross negligence inflicted harm on the company or a subsidiary of the company

- Acted in a manner which reflects “wilful misconduct” or a “breach of trust” – (unauthorised acts, reckless trading or fraud)
- Was repeatedly subject to a compliance notice or similar enforcement mechanism
- Was personally convicted, at least twice, of an offence or subjected to an administrative fine or penalty in terms of any legislation
- Within a period of five years, acted as a director of one or more companies or was a managing member of one or more close corporations (CC’s), or controlled or participated in the control of a juristic person (irrespective of whether concurrently, sequentially or at unrelated times) that was convicted of an offence or subjected to an administrative fine or similar penalty in terms of any legislation.

All references to director apply equally to members of CC’s who are participating in its management regarding probation and delinquency, and all references to a company applies equally to CC’s.

Effect of Delinquency or a Probation Order

The effect of an order of delinquency is that a person is disqualified from being a director of a company. The order may be conditional and subsist for seven years or longer, as determined by the court. Under certain circumstances the order may be unconditional and subsist for the lifetime of the delinquent director.

A person who has been placed under probation may not serve as a director, except to the extent permitted by the order of probation. The probation order may be subject to any conditions the court considers appropriate and generally subsists for up to five years.

A court may order as a condition applicable to the declaration that the person undertake a designated program of remedial education relevant to the conduct of a director and/or do community service and/or pay compensation to any person adversely affected by his conduct as a director/member (to the extent that such a victim does not otherwise have a legal basis to claim compensation).

Application to Suspend or Set Aside a Delinquency or Probation Order

Where a director has been declared delinquent for consenting to serve as a director or for acting in the capacity of a director while ineligible or disqualified, or on account of contravening a probation order there is no relief, the declaration of delinquency subsists for his lifetime and it may not be suspended or set aside.

However, in other instances, three years after the order of delinquency is made, the delinquent director may apply to court to suspend the order, and substitute an order of probation (with or without conditions).

If the order of delinquency is suspended, the court may, on application, set it aside after two years of suspension.

A person subject to an order of probation may apply to court to set aside the order at any time two years after it is made.

LIABILITY OF DIRECTORS

Generally, the directors are not personally liable for the debts of the company.

In a personal liability company (incorporated), the directors and past directors are jointly and severally liable together with the company for the debts and liabilities of the company that were contracted during their respective terms of office.

Directors may be exposed to personal liability in the event that they do not discharge their duties properly.

When a company becomes financially distressed or is trading in insolvent circumstances, it is the duty of directors to take legal and financial advice and if necessary place their company into either business rescue proceedings or into liquidation, or to cease trading.

Should the company continue to incur debts, where in the opinion of a reasonable businessman, there would be no reasonable prospect of creditors receiving payment when due, it could be inferred that the company is being carried on recklessly or negligently, and the provisions of Section 22 may come into play.

The Act sets out the circumstances in which a director can be held liable for loss, damages or costs of the company, incur civil liability to shareholders and third parties and/or criminal sanctions.

Criminal Liability

The Act aims to de-criminalise sanctions where possible and rather to enforce company law administratively via appropriate bodies.

There are very few remaining offences – only those arising out of a refusal to respond to a summons, to give evidence and perjury.

In addition, in order to improve corporate accountability, the Act (Section 216) states that it will be an offence, punishable by a fine or up to ten year's imprisonment (or both) for a director who:

- Commits a breach of confidence
- Makes false statements, or participates in reckless conduct and non-compliance
- Is party to the falsification of any accounting records of a company
- Knowingly, and with a fraudulent purpose provides false or misleading information in any circumstances required by the Act
- Knowingly is party to an act or omission by a company calculated to defraud a creditor or employee of the company, or a holder of the company's securities or with another fraudulent purpose
- Is a party to the preparation, approval, dissemination or publication of a prospectus or a written statement contemplated in Section 101, that contains an untrue statement as defined and described in Section 95.

Any such offences must be referred by the Commission to the National Prosecuting Authority (NPA) for trial in the Magistrate's Court.

It is also an offence to fail to satisfy a compliance notice issued in terms of this Act, however should an administrative fine have been imposed by a court in respect of the non-compliance, then no person can also be prosecuted for such an offence.

In terms of Section 214(4), if a company contravenes Section 99(1) (2), (3), (4), (5), (8) or (9) (which deals with general restrictions on offers to the public), then every director or prescribed officer of the company who knowingly was a party to the contravention is guilty of an offence and liable to any other person for any losses sustained as a consequence of that contravention.

Such offences may also lead to directors also incurring civil liability.

All other offences may lead to a fine or up to twelve months imprisonment (or both).

Civil Liability

A Breach of Fiduciary Duty

A director is generally liable for a breach of fiduciary duty (in accordance with the common law principles relating thereto), for any losses damages or cost sustained by the company from breach of Sections 75, 76(2), 76(3)(a) or (b) (relating to non-disclosure of personal financial interests, misusing the position as director to gain personal advantage, or not acting in good faith and for proper purpose or in the best interests of the company).

Delict

A director is generally liable, in accordance with the principles of common law relating to delict for any loss, damages or costs sustained by the company as a consequence of any breach by the director of a duty contemplated in Section 76(3)(c) (acting with the degree of care, skill and diligence that may be reasonably expected of such a person), or a duty as set out per the MOI, or any provision of the Act not otherwise mentioned in Section 77.

The code of conduct for directors as set out in Section 76 of the Act is extended to members of committees even if the member is not a director on the board, and thus the consequent liability relating to the transgression of any such duties will also apply to members of the committees.

Codified Liability

Section 77 codifies liability for directors and prescribed officers. It sets out civil liability (delict and breach of fiduciary duty), and then in sub-section 3, sets out specific statutory liabilities.

- Section 77 is applicable to an extended definition of director
- The liability that is incurred in terms of Section 77 is joint and several with any other person who may be held liable for the same act
- Any person with a claim can bring it against all the directors or any one particular director. A single director can therefore be held liable for the totality of damages suffered by a third party as a result of a breach of fiduciary duties
- An action to recover loss, damages or costs may not commence more than three years after the act or omission.

Specific Statutory Liability

A director is liable for loss, damages or costs sustained by the company as a direct or indirect consequence of the director having:

- **Section 77(3)(a)** – acted in the name of the company despite knowing he did not have the authority to do so
- **Section 77(3)(b)** – acquiescing to carrying on of company's business despite knowing that it was being conducted recklessly
- **Section 77(3)(c)** – being party to an act or omission by the company despite knowing that it was calculated to defraud a creditor, employee or shareholder, or had another fraudulent purpose
- **Section 77(3)(d)** – for signing or consenting to the publication of any financial statements that were false or misleading in a material respect or a prospectus which contained an untrue statement, despite knowing that the statement was false, misleading or untrue (conditions apply)

- **Section 77(3)(e)** being present at a meeting of the board, or participating in the making of a decision in terms of Section 74, and failing to vote against:
  - the issuing of unauthorised shares, despite knowing that those shares had not been authorised in accordance with Section 36
  - the issuing of authorised securities despite knowing that such issue was inconsistent with Section 41
  - for granting unauthorised options
  - the provision of financial assistance to any person contemplated in Section 44 for the acquisition of securities of the company despite knowing that this financial assistance was inconsistent with Section 44 or the company's MOI
  - the provision of financial assistance to a director despite knowing that this financial assistance was inconsistent with the Act or the company's MOI
  - a resolution approving a distribution despite knowing that the distribution was contrary to Section 46, subject to sub-section (4)
  - the acquisition by the company of any of its shares or the shares of its holding company despite knowing that the acquisition was contrary to Section 46 or Section 48
  - an allotment by the company despite knowing that the allotment was contrary to any provision of Chapter 4 of the Act.
  - For granting unauthorised options
  - For agreeing to the granting of financial assistance to directors or other parties, when not in accordance with requirements (Section 45)
  - For knowingly failing to vote against a share purchase which did not accord with legislative requirements
  - **Section 46:** A director will only be liable for failing to vote against a distribution if, immediately after so voting, the company failed to satisfy the solvency and liquidity test and this was reasonably predictable.

REMEDIES AND ENFORCEMENT

The Act provides for statutory remedies and regulatory bodies, using a system of administrative enforcement in place of criminal sanctions to ensure compliance.

Minority shareholders and other stakeholders, such as employees have protection, powers and remedies under the Act, including the ability to bring class actions.

Any stakeholder, including a shareholder, has free recourse to lay a complaint against a director or company with the Companies Tribunal.

Sections 20 and 218 of the Act enable shareholders to sue directors/officers for civil damages, or any losses suffered by them (civil liability).

Restraining Orders

Section 20(4): One or more shareholders, directors or prescribed officers or trade union representing employees of the company may apply to the High Court for an appropriate order to restrain a company from doing anything inconsistent with the Act.

Section 20(5): One or more shareholders or directors or prescribed officers may apply to the High Court for an appropriate order to restrain the company or its directors from doing anything inconsistent with any of the limits, restrictions or qualifications of the MOI, (without prejudice to any rights to damages of a third party who obtained such rights in good faith and did not have actual knowledge of the limit, restriction or qualification).

Section 20(6) provides a specific remedy for shareholders – each shareholder of a company has a claim for damages against any person, including a director, who intentionally, fraudulently or due to gross negligence causes the company to do anything inconsistent with the Act or the MOI, unless the action has been ratified by shareholders by special resolution.

Section 218(2) provides a general remedy to any person, (including an employee or shareholder) to bring a civil action against a person who contravenes the Act for any loss or damages suffered by that person as a result of that contravention.

Section 81(1)(d) gives significant power to minority shareholders stating that the company, one or more directors or shareholders may apply to court for the winding-up of a solvent company on the grounds that either:

- The directors are deadlocked in the management of the company and the shareholders are unable to break the deadlock which is causing irreparable harm to the company or

- The shareholders are deadlocked in voting power and have failed for a period that includes at least two consecutive AGM dates, to elect successors to directors whose terms have expired, or
- It is otherwise just and equitable for the company to be wound up.

Section 81(1)(e) provides that one or more shareholders can apply to wind up a solvent company if the directors or prescribed officers or other persons in control of the company are acting in a manner that is fraudulent, or illegal or that the company's assets are being misapplied or wasted.

Section 163 – a shareholder or director may apply to court for relief if the powers of a director or prescribed officer or a person related to the company are being exercised in a manner that is oppressive, unfairly prejudicial or unfairly disregards the interests of the applicant.

Section 165 allows for a general derivative notice whereby an aggrieved party, such as a shareholder, director or even a representative of a trade union is able to send a notice to the company to enforce its rights and to demand to protect its or the company's legal interests.

The Act also provides a right for dissenting shareholders in a fundamental transaction to have their shares appraised and to be compensated for the fair value of those shares.

Right to Seek Specific Remedies

Application can be made to Court in matters such as protecting the rights of security holders, declaring a director delinquent or on probation, or relief from oppressive or prejudicial conduct.

Application can be made to Companies Tribunal or Human Rights Commission in disputes concerning reservation or registration of company names.

Voluntary Resolution of Disputes – filing of complaint to Company Tribunal or Alternative Dispute Resolution Agent.

Complaints to Commission or Take-Over Regulation Panel – a person can file a complaint with the Panel (relating to fundamental transactions, takeovers and offers) or Commission (regarding any other matter arising in terms of the Act) who may direct that an investigation is conducted.

Following an investigation into a complaint, the Commission or Panel may:
- End the matter;
- Urge the parties to attempt the voluntary alternative resolution of their dispute;
- Advise the complainants of any right they may have to seek a remedy in court;
- Commence proceedings in a court on behalf of a complainant, if the complainant so requests;
- Refer the matter to another regulator if there is a possibility that the matter falls with their jurisdiction; or

- Issue a compliance notice, but only in respect of a matter for which the complainant does not otherwise have a remedy in a court.

The Commission or Panel may also apply for leave to intervene in any court proceedings arising in terms of the Act in order to represent an interest that would not otherwise be represented.

A compliance order may be issued against a company or against an individual if the individual was implicated in the contravention of the Act.

Administrative Fines

A court, on application by the Commission or Panel, may impose an administrative fine for failure to obey a compliance notice. The fine may not exceed the greater of:

- 10% of the respondent's turnover for the period during which the company failed to comply with the compliance notice, and
- The maximum prescribed in terms of sub-section (5). Regulation 163 prescribes this as R1 million.

Under certain circumstances, the court may refer the matter to the National Prosecuting Authority.

In the case of a company that has failed to comply, been fined, and continues to contravene the Act, the Commission or Panel may apply to a court for an order dissolving the company.

A derivative action is when the shareholders sue a third party (such as a director or officer) on behalf of the company.

A class action is when a group of people take a person (such as a director or officer) to court.

Section 157 of the Act simplifies the application for a class action which can be made to a Court, the Companies Tribunal, the Take-Over Panel, or the Commission.

For example: A class action complaint from outside investors stating that directors failed to disclose material information, which could have indicated that the company would eventually be liquidated.

The Act does provide some form of relief to directors – by way of Indemnification and Insurance for directors.

In terms of the Act, a possible defence known as 'the business judgement rule' is available to a director who asserts that he had no financial conflict, was reasonably informed and made a rational business decision in the circumstances.

ACTIONS REQUIRING SHAREHOLDER APPROVAL

The directors are ultimately responsible to the shareholders. They act as their "agents", and are required at all times to act in the shareholder's best interests.

The doctrine of separation of powers, whereby the directors are ultimately responsible and answerable to shareholders, has always been entrenched in South African law. This doctrine ensures that the correct checks and balances on power and control are upheld in a company.

The Act does provide for shareholder approval for certain transactions carried out by directors, including (but not limited to):

- Disposal of greater part of assets or undertaking
- Amendment of MOI
- The issue of shares in certain cases
- Making additional rule/s permanent

The company's MOI can also list additional scenarios when shareholder approval will be required for director actions. As long as the MOI is consistent with the Act, a company may tailor its MOI in such a way as to limit directors actions substantially by increasing shareholder activism.

General Ratification by Shareholders of Directors' Actions

Section 20 (2) – (3): The shareholders may ratify by special resolution any action by a company or the directors that is inconsistent with any limitations, restrictions or qualifications listed in the MOI of the company. The action of the director cannot be ratified if it is in contravention of the Act.

A director must act within the powers and authority conferred on him by the law, the MOI, the shareholders, and fellow directors.

Where a director acts beyond his legal power or authority, the shareholders may ratify the transaction retrospectively by special resolution. Alternatively, the shareholders may elect to repudiate the action, whereupon the erring director may be held personally liable to the company for any loss suffered by the company as a result thereof.

The Act sets out a comprehensive list of actions requiring authorisation by special resolution of shareholders in Section 65(11).

RING-FENCED AND PERSONAL LIABILITY COMPANIES

The Act provides that the public will not deemed to be acquainted with or have knowledge of any provision of a company's MOI merely because it is filed with the Commission or is available for inspection at the company's office, except for the following two specific scenarios:

Ring-fenced

A company's MOI may restrict the purpose, objectives or powers of the company; and may contain additional requirements or even prohibit the amendment of these restrictions or limitations.

In such a case, the company is required to have the word Ring-Fenced or RF subjoined to its name, and its Notice of Incorporation or subsequent Notice of Amendment is required to draw attention to the relevant provision and its location in the MOI. All persons or the public are then regarded as having notice and knowledge of such a provision in the company's MOI.

Personal Liability Company

All persons are also regarded as having notice and knowledge of the fact that a personal liability company (Incorporated) means that the directors and past directors are jointly and severally liable, together with the company, for any debts and liabilities of the company as are or were contracted during their respective periods of office.

REMUNERATION OF DIRECTORS

Unless the MOI provides otherwise, the company may pay remuneration to its directors for their service as directors, subject to the fact that remuneration contemplated in this section, may be paid in accordance with a special resolution approved by the shareholders within the previous two years.

Section 78 applies to the extended definition of a director.

Section 78(2): Director may not be Relieved of Liability

Subject to sub-sections (4) to (6), any provision of any agreement, the MOI, or rules of the company, or resolution adopted by a company, whether express or implied, is void to the extent that it directly or indirectly purports to relieve a director of a duty contemplated in Section 75 or 76, or liability contemplated in Section 77, or which negates, limits or restricts any legal consequences arising from an act or omission that constitutes willful misconduct or willful breach of trust on the part of the director.

Section 78(3): Fines

Subject to sub-section (3A), a company may not directly or indirectly pay any fine that may be imposed on a director of the company, or on a director of a related company, as a consequence of that director having been convicted of an offence, unless the conviction was based on strict liability.

Section 78(3A): Sub-section (3) does not apply to a private or personal liability company if a single individual is the sole shareholder and sole director of that company, or two or more related individuals are the only shareholders of that company, and there are no directors other than one or more of those individuals.

Section 78(4): Indemnity of Directors/Company may Advance Legal Expenses

Except to the extent that a company's MOI provides otherwise, the company:

- May advance expenses to a director to defend litigation in any proceedings arising out of his service to the company
- May directly or indirectly indemnify the director for such expenses, irrespective of whether it has advanced those expenses, if the proceedings are abandoned or exculpate the director or arise in respect of any liability for which the company may indemnify the director.

Section 78(6): The company may not indemnify a director in respect of any liability resulting from the director's failure to act in good faith and for a proper purpose or in the best interests of the company or with the degree of care, skill and diligence required, willful misconduct or willful breach of trust, or an offence or fine in terms of national legislation.

Section 78(7): Directors' Insurance

Except to the extent that the MOI of a company provides otherwise, a company may purchase insurance to protect:

- A director against any liability or expenses for which the company is permitted to indemnify a director
- The company against any contingency including, but not limited to:
  - any expenses:
    - that the company is permitted to advance in accordance with sub-section (4)(a), or
    - for which the company is permitted to indemnify a director in accordance with sub-section (4)(b), or
  - any liability for which the company is permitted to indemnify a director in accordance with sub-section (5).

In terms of Section 78 of the Act, there are two types of insurance available:

Insurance where the director is the insured: The director himself is covered should he incur liability.

Insurance where the company is the insured: The company is covered in case of loss resulting from a director's breach of duty towards the company, or in case of the company being sued by a third party for the acts of a director.

BUSINESS RESCUE

Directors are duty bound to constantly monitor the company's financial position, to determine whether voluntary business rescue proceedings need to be initiated.

Failure to implement business rescue proceedings could result in the director being charged with reckless trading and be exposed to personal liability.

It is incumbent upon directors to ensure that they place their companies into either business rescue or liquidation, or to cease trading, when the warning signs become evident.

Directors should be aware of the practicalities of business rescue, and the duties and powers of the business rescue practitioner.

Where the director has reasonable grounds to believe that:

- The company is financially distressed, and
- There is a reasonable prospect of rescuing the company

business rescue proceedings must be initiated by the directors by board resolution.

Such resolution must be filed with the Commission before it is of any force or effect, and may not be adopted if liquidation proceedings have already been initiated against the company.

If a company is financially distressed and directors decide not to place it into business rescue, the directors will be under a statutory obligation to deliver a written notice to each affected person, confirming that the company is financially distressed and is not being placed into business rescue and providing reasons for this. **The Amendment Bill proposes to amend Sections 135 and 145 by stating that any amounts due by a company under business rescue to a landlord for rent or services will be regarded as "post commencement financing" and the landlord will have a voting interest in the business rescue proceedings to the extent of its claim. Post commencement finance, whether secured or unsecured, enjoys preference over unsecured creditors**.

The 'Business Rescue' clause in the Companies Act 71 of 2008, also applies to CC's.

DEFENCES AND RELIEF FOR DIRECTORS

Ignorance of the law is no excuse, and will not hold up as a defence for directors.

The Business Judgement Rule

Sections 76(4)(b) and 76(5): The Business Judgement Rule is regarded as the main form of protection for directors. It is based on the idea that a director who has relied on the professional opinions of accountants, attorneys, and other business advisors that influenced their business decisions (and which turned out not to be in the best interests of the Company), may raise this as a defence against liability. In other words, he will not be held liable for bad outcomes as long as such decisions were made in good faith, with due diligence and on an informed basis, and which the director thought were in the best interests of the company.

In theory, directors should be held liable for decisions which have an adverse effect on a company. However, certain situations may arise where a director would be unfairly prejudiced by the provisions of 'Standards of Directors' Conduct'.

The business judgement rule can only be used if all of the requirements of the Act are met. Where a director ignores relevant information or advice given to him and conducts business in bad faith, the business judgment rule will not apply. This defence is not available to members of CC's.

THE ROLE OF THE PUBLIC OFFICER IN THE COMPANY

- The Income Tax Act requires that all companies have to appoint a public officer with the South African Revenue Service (SARS).
- To qualify as a public officer, a person has to be a natural person who is resident in South Africa, is approved by SARS, and has a tax number. It is usually one of the directors of the company or members of a CC who is appointed, or it could be a senior official in the company.
- The appointment must be made within one month of the company commencing business activities, or acquiring an office in South Africa. The appointment is not registered with the Commission, but with SARS.
- Where there is a change of public officer, the company must notify SARS within 14 days of the change taking effect. Failure to do so may result in hefty penalties, and SARS will, by default, designate a director, member, or company secretary as the public officer. In addition, the non-appointment of a public officer does not exonerate the company from complying with the provisions of the Income Tax Act.
- The role of the public officer is of extreme importance in a company. He is the "face of the company" for taxation purposes. All actions carried out in his or her capacity as a public officer are deemed to have been done by the company.
- His duties are to attend to the tax affairs of the company, including (but not limited to) attending to the submission of annual and provisional tax returns, registration of the company as taxpayer and employer, submission of employee tax, VAT returns, monthly declarations, and acceptance of notices served against the company. He should be empowered by the company to properly fulfill these duties.
- By signing returns, the public officer declares that all the information provided therein is true. Where the information is found to be false, action may be taken against the public officer in his personal capacity.
- Companies and directors should be aware of the requirement to appoint a public officer, and the duties and risk imposed upon the person taking up such a position.

NON-PROFIT COMPANIES (NPC'S)

Section 1 of the Act defines a NPC as a company incorporated for a public benefit object, or an object relating to one or more cultural or social activities, or communal or group interests, and where the income and property are not distributable to its incorporators, members, directors, officers or related persons, except in regards to:

- Reasonable remuneration
- Reimbursement for expenses incurred to advance the object of the company
- Payment in terms of a bona fide agreement
- Payment in respect of rights of a person, which rights are administered by the company, or
- Legal obligations of the company.

Formation of a NPC

- A NPC is required to be formally registered with Commission, with a MOI which specifically states that it is incorporated for a public benefit or an object relating to one or more cultural or social activities, or communal or group interests.
- It must be incorporated by at least 3 persons acting together, an organ of state or by a legal entity, and must have a minimum of 3 directors.
- It can be formed without members or it can have voting or non-voting members, and membership can be held by juristic persons, including profit companies.
- It is a separate legal entity distinct from its members or directors, and any assets are registered in the name of the NPC.

Section 10 and Schedule 1 of the Act

- A special set of fundamental rules for NPC's is set out in Section 10 and Schedule 1 of the Act, which sets out on-going regulatory, governance and accountability requirements. These rules provide clarity to both those working within the organisation and to those stakeholders outside the organisation.

Section 10:

- Section 10(1) states that every provision of the Act applies to a NPC, subject to those set out in Section 10 and Schedule 1.

- Section 10(2) sets out where provisions of the Act do not apply to NPC's, namely: Captialisation of profit companies, securities registration and transfer, remuneration of directors, election of directors, company secretaries and audit committees [except to the extent that an obligation to appoint a company secretary, auditor or audit committee arises in terms of (i) a requirement in the company's MOI to have its AFS audited every year as set out in Section 34(2) or (ii) regulations contemplated in Section 30(7)-where the Minister may require certain NPC's to have its AFS audited], Public offerings of company securities, Takeovers, offers and fundamental transactions [except to the extent contemplated in item 2 of Schedule 1.] Rights of shareholders to approve a business rescue plan [except to the extent that the NPC is itself a shareholder of a profit company that is engaged in business rescue proceedings], Dissenting shareholders' appraisal rights [except to the extent that the NPC is itself a shareholder of a profit company].
- Section 10(3) states that Sections 58 to 65 (in re shareholders' rights and meetings), read with the changes required by the context, apply to a NPC only if the company has voting members, and when applied to a NPC, are subject to the provisions of item 4 of Schedule 1.
- Section 10(4) states that with respect to a NPC that has voting members, a reference in the Act to "a shareholder", "the holders of a company's securities", "holders of issued securities of that company" or "a holder of voting rights entitled to be voted" is a reference to the voting members of the NPC.

Schedule 1

Objects and policies

- The MOI must contain the NPC's objective/s which should reflect the public benefit intention, or that should relate to either the communal or group interests or the cultural or social activities which it should set out in advance.
- The contents of the MOI must comply with the following:
  - It must apply all of its assets and income, however derived, to advance its stated objects, as set out in its MOI, and subject to this requirement, may acquire and hold securities issued by a profit company, or directly or indirectly, alone or with any other person, carry on any business, trade or undertaking consistent with or ancillary to its stated objects.
  - No part of its income may be paid to, and no assets transferred to - an incorporator, member or director, officer or related persons-regardless of how the income or asset was derived. This is only permissible in circumstances as set out in the blue panel on the previous page.

- Certain provisions have been made upon the winding up or dissolution of the NPC, more specifically:-
  (a) no past or present member or director of that company, or person appointing a director of that company, is entitled to any part of the net value of the company after its obligations and liabilities have been satisfied, and
  (b) the entire net value of the company must be distributed to one or more non-profit companies, registered external non-profit companies carrying on activities within the Republic, voluntary associations or non-profit trusts-
    (i) having objects similar to its main object; and
    (ii) as determined-
      (aa) in terms of the company's MOI,
      (bb) by its members, if any, or its directors, at or immediately before the time of its dissolution, or
      (cc) by the court, if the MOI, or the members or directors fail to make such a determination.
- Incorporation of a company as a NPC does not necessarily qualify that NPC, for any particular status, category, classification or treatment in terms of the Income Tax Act, or any other legislation, except to the extent that any such legislation provides otherwise.
- Each voting member of a NPC has at least one vote.
- The vote of each member of a NPC is of equal value to the vote of each other voting member on any matter to be determined by vote of the members, except to the extent that the company's MOI provides otherwise.
- If a NPC has members, the requirement in Section 24(4) to maintain a securities register must be read as requiring the company to maintain a membership register.

Fundamental transactions

Item 2 of Schedule 1 prohibits a NPC to amalgamate or merge with or convert to a profit company or dispose of any part of its assets, undertaking or business to a profit company, except to the extent that it is in the course of ordinary activities of a NPC, unless, where there are members, they have followed the necessary procedure to do so.

Incorporators of a NPC

- The incorporators of a non-profit company are its first directors, and its first members, if its MOI provides for it to have members.

Members

- A NPC is not required to have members, but its MOI may provide for it to do so.
- A NPC can therefore choose whether it will have membership and a board of directors, or just a board of directors.

- Where a NPC does elect to have membership, its MOI must contain a provision that stipulates this.
- The MOI may allow for membership to be held by juristic persons, including profit companies.
- The MOI may provide for no more than two classes of members, that is voting and non-voting members, respectively and must set out-
  (i) the qualifications for membership (ii) the process for applying for membership (iii) any initial or periodic cost of membership in any class (iv) the rights and obligations, if any, of membership in any class, and (v) the grounds on which membership may, or will, be suspended or lost.

Directors

- A NPC must ensure that the directors are aware of the criteria set out in respect of the eligibility and disqualification of directors (Section 69) as well as standards of directors' conduct (Section 76), liability of directors (Section 77), amongst others and that it is adhered to.
- If a NPC has members, the MOI must-
  (a) set out the basis on which the members choose the directors of the company; and
  (b) if any directors are to be elected by the voting members, provide for the election each year of at least one-third of those elected directors.
- If a NPC has no members, the MOI must set out the basis on which directors are to be appointed by its board, or other persons.
- No loan or financial assistance may be provided by a NPC to a director or related or inter-related company or person related to such a director, unless one of the exceptions contained in the Act is applicable, i.e. it is:
  (a) is in the ordinary course of the company's business and for fair value
  (b) constitutes an accountable advance to meet-
    (i) legal expenses in relation to a matter concerning the company, or
    (ii) anticipated expenses to be incurred by the person on behalf of the company
  (c) is to defray the person's expenses for removal at the company's request, or
  (d) is in terms of an employee benefit scheme generally available to all employees or a specific class of employees.

Financial Statements and Audits of a NPC

- Financial statements must be prepared within six months of the financial year end
- There is no audit required unless the NPC passes a public interest score, or meets any other requirements set out in Regulation 28 of the Act, or elects for a voluntary audit

- An annual return must be filed within 30 business days after the anniversary of the date of incorporation, and if the NPC is required to be audited, the annual return must be accompanied by the company's AFS (in iXBRL format)
- Company secretary not mandatory and neither is an audit committee
- An AGM is only required if it is stated in the NPC's MOI
- It is not required to, but may register as a Non-Profit Organisation (NPO) in terms of the Non-Profit Organisation Act. In doing so, it may become eligible for certain government benefits, and acquire the status of a NPO registered entity.
- Regulation 25(4) states that NPC's must maintain adequate records of all revenue received from donations, grants and members' fees or in terms of funding contracts or arrangements with any party.

WINDING-UP OF SOLVENT COMPANIES AND DEREGISTRATION

Despite the repeal of the 1973 Companies Act, winding-up of insolvent companies will remain governed by Chapter 14 thereof, (until the Bankruptcy Act is a reality) and subject to the provision that if any conflict arises between Chapter 14 and the Act, the provisions of the Act will prevail.

The new Act governs the winding-up of solvent companies and the deregistration of companies.

Winding-up of Solvent Companies

A solvent company may be wound up voluntarily (in terms of Section 80), or by court order (in terms of Section 81). Despite any provision to the contrary in a company's MOI, the company remains a juristic person and retains all powers as such while it is being wound up (voluntarily). However, from the beginning of the process, it must stop carrying on its business except to the extent required for the beneficial winding-up of the company.

All of the director's powers cease, except to the extent specifically authorised in the case of winding-up by the company, by the liquidator or the shareholders in a general meeting, or in the case of a winding-up by creditors, the liquidator or the creditors.

Dissolution of Companies and Removal from the Register

The Commission may deregister a company if:

- The company has transferred its registration to a foreign jurisdiction

- The company omitted to file an annual return for two or more years in succession and has either failed to give satisfactory reasons for the failure or has failed to show satisfactory cause for the company to remain registered
- The Commission has determined that the company appears to have been inactive for at least seven years and no person has demonstrated a reasonable interest in, or reason for, its continued existence
- The Commission has received a request that the company be deregistered because it has ceased to carry on business and has no assets or, because of the inadequacy of the assets, there is no reasonable probability of the company being liquidated.

Once the company is dissolved and deregistered, its name is removed from the companies register.

The removal of its name does not affect the liability of any former director or shareholder (or any other person) in respect of any act or omission that took place before deregistration, which may be enforced as if the company's name was never so removed from the register.

Specific requirements apply for the winding-up of an NPC.

IMPORTANT LAWS AFFECTING BUSINESSES IN SOUTH AFRICA

Knowledge of and compliance with both the common law and legislation is essential for good governance. Not only do directors need to make sure that they are maintaining the highest standard in respect of their duties, but they must also ensure that they are complying with the administrative provisions of other legislation, such as the Income Tax Act. In addition, it is important that directors have a working knowledge of the guidance provided in King IV™.

While the list below is not exhaustive, important legislation (and amendments), including those expanded upon in the Table below, include:

- The Companies Act
- The Close Corporations Act
- The South African Income Tax Act
- The Labour Relations Act
- The Occupational Health and Safety Act
- The Compensation for Occupational Injuries and Diseases Act
- The Employment Equity Act
- The Promotion of Access to Information Act
- The Financial Intelligence Centre Act

- The Trade Marks Act
- The Business Names Act
- The Consumer Protection Act
- The Competition Act
- The Electronic Communications and Transactions Act
- The National Credit Act
- The Basic Conditions of Employment Act
- The Securities Transfer Tax Act
- The VAT Act
- The Skills Development Act
- The Unemployment Insurance Act
- The Insolvency Act
- Industry or sector specific legislation
- Listed companies must adhere to JSE securities exchange regulations.

Directors need to continually be aware of amendments and changes to legislation affecting a company, for example:

POPI	■ The Protection of Personal Information Act (POPI) is aimed at bringing South Africa in line with international standards of protection of personal data ■ A few limited sections of POPI have already been implemented, and the Information Regulator (IR) has requested President Cyril Ramaphosa to declare that the remaining provisions of POPI commence on 1 April 2020. If the President acts on the IR's request, the remaining provisions will become effective on 31 March 2021 ■ If a director is in violation of any of its provisions, the IR may impose a fine of up to R10 million
BBBEE	■ In terms of the Broad-Based Black Economic Empowerment Act, a business with a turnover of less than R10 million does not require a B-BBEE certificate, and may complete an Affidavit, signed by a Commissioner of Oaths. The Affidavit serves as a B-BBEE certificate as no other verification is required for Exempted Micro Enterprises

Some Important Definitions in the Act

Accounting Records means information in written or electronic form concerning the financial affairs of a company as required in terms of this Act, including but not limited to, purchase and sales records, general and subsidiary ledgers and other documents and books used in the preparation of financial statements.

Audit and Auditor has the meaning set out in the Auditing Profession Act, but "audit" does not include an independent review of annual financial statements as contemplated in Section 30(2)(b)(ii)(bb).

Ordinary Resolution: Section 65(7): means a resolution adopted with the support of more than 50% of the voting rights exercised on the resolution, or a higher percentage as contemplated in the MOI, or one or more higher percentages of voting rights to approve ordinary resolutions concerning one or more particular matters, respectively, provided there must at all times be a margin of at least 10 percentage points between the highest established requirement for approval of an ordinary resolution on any matter, and the lowest established requirement for approval of a special resolution on any matter – (a) at a shareholders meeting or (b) by holders of the company's securities acting other than at a meeting, as contemplated in Section 60.

Related and inter-related persons, and control: A related person is: (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. It also includes: (b) an individual who is related to a juristic person if the individual directly or indirectly controls the juristic person ('control is defined in Section 2 (2) of the Act; 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 or (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.

Securities means any shares, debentures or other instruments irrespective of their form or title issued or authorised to be issued by a profit company. **The Amendment Bill proposes amending this definition by deleting the words "or other instruments" and replacing them with the words "or any options in respect thereof."**

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.

Public Interest Score
(For Purposes of Regulations 27–30, 43, 127 and 128)

Every company must calculate its public interest score for each financial year, calculated as the sum of the following:

- Number of points equal to the average number of employees of the company during the financial year
- One point for every R1 million (or portion thereof) in third party liability of the company at the financial year end
- One point for every R1 million (or portion thereof) in turnover during the financial year, and
- One point for every individual who at the end of the financial year, is known by the company:
  - in the case of a profit company, to directly or indirectly have a beneficial interest in any of the company's issued securities, or
  - in the case of a non-profit company, to be a member of the company or a member of an association that is a member of the company

Directors' Checklist

- Appointment of public officer
- Submission of CIPC annual returns
- Updating the register of directors and members
- Updating of the securities register
- Maintaining a registered address
- Keeping proper minutes of meetings
- Keeping financial and accounting records in the prescribed form
- Ensuring that annual financial statements are produced every year within 6 months after the end of their financial year
- Displaying the business name correctly on all documents
- Ensuring that all statutory submissions and payments to SARS are made timeously (VAT, PAYE, UIF etc.)
- Monitor the company's financial position and ensure that the company meets the solvency and liquidity test, where applicable
- Directors knowledge of legislation and compliance requirements

[The checklist is intended as a "quick" checklist for directors, and does not purport to include all of the directors' duties and responsibilities contained in the Act].

Leniency of Governance for Certain Companies

A profit company (other than SOC Ltd)

Where there is Only One Shareholder:

- That shareholder may exercise any or all of the voting rights pertaining to that company on any matter at any time without notice or compliance with any other internal formalities unless the company's MOI provides otherwise
- Reporting requirements are less onerous
- Simplified decision making and no notice requirements
- Sections 59–65 do not apply to the governance of the company

Where there is Only One Director who is also the Sole Shareholder:

- No notice requirements for board meeting
- Requirement for disclosure of director's personal financial interest does not apply if one person holds all the beneficial interests of all of the issued securities of the company and is the only director of that company

Where there is Only One Director in a Profit Company (Not a SOC Ltd):

- That director may exercise any power or perform any function of the board at any time without notice or compliance with any other internal formalities except to the extent that the company's MOI provides otherwise
- Sections 71(3) – (7), S73, S74 are not applicable to the governance of that company – company may enter into a contract in which a related person has a personal financial interest after obtaining an ordinary resolution of shareholders

Where Every Director is Also a Shareholder of a Particular Company (Other than a SOC Ltd):

- No notice or other internal formalities unless the MOI provides otherwise and subject to the requirements of this section
- When acting in capacity as shareholders, no need to comply with Sections 73–78 relating to meetings, duties, obligations, standards of conduct, liabilities and indemnification of directors
- Section 30(2A) – exempted from audit or independent review of FS or AFS (unless voluntarily required)
- Diminished need to seek shareholder approval for certain board actions
- A disqualified director may nevertheless act as a director where he is the sole shareholder in a private company [Section 69(12)]

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