DIRECTORS GUIDE

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1 Introduction

This guide is intended as an easy reference, pocket-sized guide for directors, shareholders, company officers and any other stakeholder who has an interest in corporate governance.

The information contained herein is a summary of some of the key issues affecting directors and officers of companies, and provides an overview of relevant legislation. Due to limitations in length of the guide, many aspects affecting the director and officer have not been covered.

Directors and officers are required to be cognisant of corporate legislation pertaining to their office, namely, the Companies Act, no. 71 of 2008 (as amended by the Companies Amendment Act, no.3 of 2011 and the Financial Markets Act, no. 19 of 2012), read together with the Companies Regulations, 2011.

Directors also have a duty to ensure that the company complies with all other applicable laws, industry or sector specific legislation which may be applicable to the company.

In addition, adherence to non-binding rules, codes and standards of good corporate governance is considered key to the effective management and control of a company.

While legislation is required to be complied with, the King III Report and Code of Governance is a guideline for best practice (and required for certain categories of company). Where appropriate, the guide indicates where King III could provide amplification for directors and officers on the governance of the company.

One of the main purposes of the Act is to promote compliance with the Bill of Rights as provided for in the Constitution in the application of company law. Other purposes are, inter alia, to encourage transparency and high standards of corporate governance, and to provide for the balancing of rights and obligations of shareholders and directors.

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 and with integrity, and a high level of competence and knowledge.

Disclaimer:

The reader is advised to consult a professional adviser for further assistance and information, and for guidance on new and existing legislation which may affect directors and officers of companies.

All references to the masculine gender shall include the feminine (and vice versa).

While every care has been taken in the compilation of this guide, no responsibility of any nature whatsoever shall be accepted for any inaccuracies, errors or omissions.

2 Categories of companies

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

PROFIT COMPANIES	Section 8(2) a) state owned company (SOC Ltd)
	b) a private company [(Pty) Ltd] if: (i) its not a state owned company (ii) its Memorandum of Incorporation (MOI) (aa) prohibits it offering any of its securities to the public and (bb) restricts the transferability of its securities.
	c) a personal liability company (Incorporated or Inc) if: (i) it meets the criteria for a private company (ii) its MOI states that it is a personal liability company {i.e that 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}.
	d) a public company, (Ltd) in any other case **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" {previously Section 21 Companies} 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.
An organ of state, a juristic person, or 3 or more persons acting in concert may incorporate a non-profit company.	

External Company means a foreign company (profit or non-profit) that is conducting business or non-profit activities within the RSA, as set out in section 23(2) for example, if such a company is party to one or more employment contracts within the RSA. The company does business in the RSA while remaining primarily regulated by its country of origin or registration.

Regulation 20 – sets out requirements for registration at the Commission.

Domesticated Company means a foreign company whose registration has been transferred to the RSA in terms of section 13(5) to (11). It is regulated as if it had been incorporated in the RSA.

3 Nature and definition of director

Nature of 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) 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".
  b) 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 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.
- For purposes of those sections which deal with qualification and eligibility (section 69), standards of directors conduct (section 76), liability of directors and prescribed officers (section 77), and indemnification and directors' insurance (section 78), the definition 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 the audit committee of a company (irrespective of whether or not the person is also a member of the company's board).
- Section 78 relating to indemnification and directors' insurance also applies to a former director.
- For purposes of section 75 (director's personal financial interests), the definition is extended to include an alternate director, prescribed officer, person who is a member of a committee of the board of a company (irrespective of whether the person is also a member of the company's board), and also a "related person" when used in reference to a director, has the meaning set out in section 1, but also includes a second company of which the director or a related person is also a director, or a CC of which the director or a related person is a member. There are some instances when this section will not apply to a director.
- Those designated officers, as described above will be subject to the same duties of care, skill and diligence and to the fiduciary duties applicable to directors, will be subject to the same standards of conduct 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.

Definition of Prescribed Officer:

- Section 1 of the Act: A prescribed officer can be defined as a person who within a company, performs any function that has been designated by the Minister in terms of section 66(10).
- Regulation 38 states that, despite not being a director of a particular company, a person is a "prescribed officer" of the company for all purposes of the Act, if that person:
  a) exercises general executive control over the management of the whole, or a significant portion, of the business and activities of the company, or
  b) 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.
- The Regulation applies to such a person irrespective of any particular title given by the company to –
  a) an office held by that person in the company, or
  b) a function performed by the person for the company.

4 Appointment and election of directors

- **Section 66(2):** The board must comprise:
  a) in the case of a private or personal liability company: at least one director, or
  b) 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:
  (i) 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
  (ii) 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)
  (iii) the appointment or election of alternate director(s) to the company.

- **Section 66(4)(b):** A profit company however (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–
  i) powers and functions of any other director of the company, except to the extent that the company's MOI restricts the powers, functions or duties of an ex officio director, and
  ii) duties, and is subject to all of the liabilities, of any other director of the company.

Election of directors of profit companies

- **Section 68 (1):** Subject to sub-section (3) below, each director of a profit company [other than the first directors or a director contemplated in section 66(4)(a)(i) or (ii)] 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, in any election of directors: (a) 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 and (b) in each vote to fill a vacancy, (i) each voting right entitled to be exercised may be exercised once, and (ii) the vacancy is filled only if a majority of voting rights exercised support the candidate.
- **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 until the vacancy has been filled by election in terms of subsection (2), and during that period any person so appointed has all of the powers, functions and duties, and is subject to all of the liabilities, of any other director of the company.
- King III recommends that the majority of directors be non-executive directors so as to ensure that the board operates independently and is not an extension of the day to day management of the company.
- 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. [King III recommends that where a director lacks experience, a detailed induction and formal mentoring and support programme should be implemented].

- **Section 66(7):** A person becomes entitled to serve as a director when he has been appointed or elected in accordance with these provisions, 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.

5 Non-eligible and disqualified directors

- Section 69 of the Act sets out qualifications and disqualifications of directors.
- A person who is ineligible or disqualified, as set out in this section, must not be appointed or elected as a director of a company, or consent to being appointed or elected as a director, or act as a director of a company. 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 on its directors, 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.
- 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 in terms of section 162, or in terms of section 47 of the Close Corporations Act, or
- **Section 69(8)(b):**

(i) an unrehabilitated insolvent

(ii) is prohibited in terms of any public regulation to be a director

(iii) any person removed from an office of trust because of misconduct involving dishonesty

(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 an offence - (aa) involving fraud, misrepresentation or dishonesty (bb) in

connection with the promotion, formation or management of a company, or in connection with any act contemplated in subsection (2) or (5), or (cc) under this Act, the Insolvency Act, 1936, the CC's Act, the Competition Act, the Financial Intelligence Centre Act, 2001, the Financial Markets Act, 2012 or Chapter 2 of the Prevention and Combating of Corruption Activities Act, 2004. [Regulation 39(4) – the prescribed minimum value of a fine upon conviction for certain offences which would result in automatic disqualification in terms of section 69(8)(b)(iv), is R1 000].

- The disqualifications listed in section 69(8)(b)(iii) and (iv) listed in the block above will end at the later of five years after the date of removal from office or the completion of any sentence imposed for the relevant offence, or at the end of one or more extensions as determined by a court from time to time, on application by the Commission [as per section 69(10)].
- **Note:** on application, a court may exempt a person from the application of any of the provisions listed in section 69(8)(b).
- **Section 69(11A):** The Registrar of the Court must upon (a) the issue of a sequestration order (b) the issue of an order for the removal of a person from any office of trust on the grounds of misconduct involving dishonesty, or (c) a conviction for an offence referred in section 69(8)(b)(iv) send a copy of the relevant order or particulars of the conviction to the Commission. **Section 69(11B):** The Commission must notify each company which has as a director to whom the order or conviction relates, of the order or conviction. **Section 69 (13):** The Commission must also establish and maintain a public register of persons who are disqualified from serving as a director, or who are subject to an order of probation as a director, in terms of an order of a court pursuant to the Act, or any other law.

6 Probation and delinquency

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). Refer to Tables at the back of this guide for specific provisions relating to these applications.

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

7 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 resolution of the shareholders or the board or a court order

Resignation

- Directors may resign by tendering a letter of resignation.

Removal by shareholders

- **Section 71 (1):** Despite anything to the contrary in a company's MOI or rules, or any agreement between a company and a director, or between any shareholders and a director, 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, subject to subsection (2). **Section 71(2)** states that 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(3):** Under certain specific circumstances, the board (as long as the company has more than two directors) may remove a director without shareholder approval. Section 71(3) provides that where a company has two or more directors, and a director or shareholder alleges that a director has become disqualified or ineligible [other than on the grounds per section 69(8)(a)], or 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, or has neglected or been derelict in performance of the functions of a director, the board other than the director concerned, must determine the matter by resolution, and may remove a director whom it has determined to be ineligible or disqualified, incapacitated, or negligent or derelict, as the case may be.
- The board must then call a meeting of directors to determine the matter. **Section 71(4):** The director must be given notice of the meeting and the proposed removal, including a copy of the proposed resolution and a statement setting out reasons for the resolution, with sufficient specificity to reasonably permit the director to prepare and present a response. He must be afforded a reasonable opportunity to make presentation

personally (or by a representative) at the meeting before the resolution is put to a vote.

- Section 71(3) does not apply to a company with less than 3 directors. **Section 71(5):** The director concerned, or the person who appointed the director [section 66(4)(a)(i)] may apply within 20 business days to a court to review the determination of the board. On the other hand, if the board has determined that a director is not ineligible or disqualified, incapacitated or has not been negligent or derelict, any director who voted otherwise on the resolution, or any holder of voting rights entitled to be exercised in the election of that director, may apply to a court to review the determination of the board [section 71(6)], which court may either then confirm the board determination or remove the director from office. Any applicant in terms of section 71(6) must compensate the company and any other party for costs in relation to the application, unless the court reverses the board decision.
- Section 71 is an unalterable provision and therefore cannot be amended in a company's MOI.

Removal by 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. The same sub-sections (4), (5) and (6) each read with the changes required by the context, apply to the determination of the matter by the Tribunal.

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 71 is in addition to the right of a person in terms of section 162, to apply to a court for an order declaring a director delinquent, or placing a director under probation.

Section 137(5): 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 that the director has (a) failed to comply with the requirements of Chapter 6, or (b) by act or omission, has impeded or is impeding (i) the practitioner in the performance of his powers and functions (ii) the management of the company by the practitioner, or (iii) the development or implementation of a business rescue plan. This is in addition to any right of a person to apply to a court for an order contemplated in section 162.

8 Rights, powers, duties and responsibilities of directors

Some key rights and powers of directors can be listed as follows:

Rights

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

Powers

Some of the sections in the Act which empower directors to act are as outlined below. The Act provides directors with increased powers to act, compared to the previous Act.

- **Section 66(1):** unfettered powers:
  - The business and affairs of the company must be managed by or under the direction of its board, which 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:** To make additional rules:
  - Except to the extent that a company's MOI provides otherwise, the board may make, amend or repeal any necessary or incidental rules relating to the governance of the company in respect of matters not addressed in the Act or the MOI – by publishing a copy of those rules to the shareholders and filing a copy thereof with the Commission [Regulation 16 – this must be done within 10 business days of being published]. These additional rules require shareholder approval before they may become permanent.
- **Section 21:** To ratify Pre-Incorporation contracts:
  - A person may enter into a written agreement in the name of, or on behalf of, an entity that is contemplated to be incorporated but does not exist at the time. Within three months of the date on which the company was incorporated, the board may completely, partially or conditionally ratify or reject that pre-incorporation contract or other action purported to have been made or done in its name or on its behalf. Regulation 35 – the company must within five business days file a notice of the decision with the Commission and deliver a copy to each party to the contract or materially affected by the transaction.

- **Section 38:** To issue shares:
  - The board has the power 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). See also shareholder approval required for issuing shares in certain cases – section 41.
- **Section 129:** To resolve to institute business rescue proceedings:
  - The board has the authority to resolve that the company voluntarily begin business rescue proceedings and place the company under supervision.
- **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:
  - The Act defines "distribution" in section 1.
  - No distribution may be made by the company unless it is pursuant to an existing legal obligation of the company or a court order or has been authorised by the board by resolution and immediately after completing the distribuiton it reasonably appears that the company would satisfy the solvency and liquidity test, and the board resolution acknowledges that the board has applied the solvency and liquidity test and reasonably concluded that the company will satisfy that test immediately after completing the proposed distribution. In addition, the requirements of section 46(2) to (5) must be complied with.
  - A director of a company is liable to the extent set out in section 77(3)(e)(vi) – if the director:
    - was present at the meeting when the board approved a distribution as contemplated herein or participated in the making of such a decision in terms of section 74, and failed to vote against the distribution despite knowing that the distribution was contrary to section 46.
- **Section 48:** Company or subsidiary acquiring company's shares
  - If the decision satisfies the requirements of section 46, the board of a company may determine that the company will acquire a number of its own shares, and the board of a subsidiary company may determine that it will acquire shares of its holding company, subject to the following:
    i) not more than 10%, in aggregate, of the number of issued shares of any class of shares of a company may be held by, or for the benefit of, all of the subsidiaries of that company, taken together, and
    ii) no voting rights attached to those shares may be exercised while the shares are held by the subsidiary, and it remains a subsidiary of the company whose shares it holds.

Where the board has resolved that the company is to acquire a number of its own shares, the decision must be approved by a 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.

Note: The company may not acquire its own shares, and a subsidiary of a company may not acquire shares of that company, if as a result of that acquisition, there would no longer be any shares of the company in issue other than (a) shares held by one or more subsidiaries of the company or (b) convertible or redeemable shares.

- A director of a company is liable to the extent set out in section 77(3)(e)(vii) if that director was present at a meeting when the board approved the acquisition and failed to vote against it despite knowing that the acquisition was contrary to section 46 or 48.

Common law duties

Some of the common law duties of directors are:

A. The fiduciary duties to:

- 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.

B. The duty to exercise care and skill

C. The duty to prevent any conflict of interest

A breach of any of the above results in the director being liable to the company for any damages it sustains as a result.

Partially codified duties

- The Act incorporates many of the duties which were previously considered to be common law duties, into a partially codified regime of director's duties, in section 76: standards of directors conduct.
- These codified duties prevail over any conflicting common law duties. If there is no such conflict, the common law remains applicable.
- Section 76 applies to an extended definition of director.
- These partially codified common law duties have always been present in our common law. They are now just incorporated into statute. This, in effect, means that when an action is taken against a director, specific reference to the section in the Act can be made, and the person bringing the action does not necessarily need to refer to the common law as a basis for his action.

Other statutory duties

The Act lists specific statutory duties, as follows:

A. Duty to comply with the Act in relation to different types of companies

- **Section 8:** Depending on the type of company formed and incorporated, the board will have to ensure that the applicable administrative requirements are met in relation to minimum number of directors on the board, audit and independent review requirements, Chapter 3 requirements regarding transparency and accountability (if applicable), appointing a company secretary, auditor and establishing an audit committee (where necessary), and compliance with shareholder meetings and AGM's (where applicable).

B. Duty to manage the business affairs of the company

- While section 66(1) provides directors with power and unfettered discretion to manage the business affairs of the company, the corresponding duty is that a director is responsible for the control of the company.

C. Accountability and Transparency

Retention of records and making them available to shareholders

- 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 –
  - **Section 24(3)(a):** a copy of its MOI, any amendments or alterations to it, and any rules of the company made in terms of sections 15(3)–(5).
  - **Section 24(3)(b):** a record of its directors including all the information required by section 24(5) – see Regulation 23 – in respect of each current director at any particular time and with respect to each past director, the information must be retained for seven years after the past director retired from the company.
  - **Section 24(3)(c):** copies of all reports presented at an AGM of the company,annual financial statements and accounting records required by this Act, for a period of seven years.
  - **Section 24(3)(d):** notice and minutes of shareholders meetings including resolutions adopted and any document made available by the company to the holders of securities in relation to each resolution for seven years after the date each such resolution was adopted.

- **Section 24(3)(e):** copies of any written communications sent generally by the company to all holders of any class of the company's securities for seven years after the date of the issue of the communication.
- **Section 24(3)(f):** minutes of all meetings and resolutions of directors or directors committees or the audit committee for seven years after the date of the meeting or after such resolution was adopted.

- **Section 24(4):** In addition every company must maintain a securities register or its equivalent as required by section 50 in the case of a profit company, or a members register in the case of a non-profit company, that has members and also the records required in terms of section 85 (where applicable).
- Regulation 22 states that 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.
- See Table at back of guide for requirements if securities register and/or accounting records are kept in electronic format.

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 are specifically listed in section 26(1) of the Act.
- 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.
- Any such right of access may be exercised only in accordance with The Promotion of Access to Information Act 2000.

Regulation 23 sets out in detail the information to be kept concerning directors [in addition to the information required by section 24(5)]. The regulation states that 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, to the extent necessary to enable the company to comply with section 94(5) and Regulation 42.

This information is over and above that information required by **section 24(5)**, which states that a company's record of directors must include 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.

King III expands on this requirement.

Where 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 any reasonable request or otherwise interfere with, impede, frustrate such a person's right (also in regard to access to financial statements – section 31).

Registered office

- Every company and external company must have a registered office and maintain their documents at that office and indicate such in its Notice of Incorporation, and
- File a Notice of Change of Registered Office with the Commission if the address changes from time to time, subject to the requirements of the MOI (refer Regulation 21).

Annual returns

- Annual returns are required to 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).
  - Regulation 30: Companies required to have their financial statements audited in terms of the Act or Regulation 28, must file a copy of the latest approved audited financial statements on the date it files its annual return.
  - A company that is not required in terms of the Act or Regulation 28 to have its annual financial statements audited, may file a copy of its audited or reviewed statements together with its annual return.
  - A company that is not required to file annual financial statements in terms of (2) above or a company that does not elect to file a copy of its audited or reviewed annual financial statements in terms of sub-regulation (3), must file a financial accountability supplement to its annual return in Form CoR 30.2.
  - 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.

Registered use of name and number

- A company or external company must ensure that its registered name and number (and not just its trading name) are clearly stated in legible characters in all notices and other official publications of the company including those in electronic format, and in 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.

D. Maintaining and Keeping of Accounting Records

It is the duty of directors to ensure that all necessary records are kept by the company at its registered office.

Regulation 25(3) sets out what is required to be included in the accounting records of a company, and can be summarised as follows:

a) A record of the company's assets and liabilities including but not limited to:
   (i) a register of company's non-current assets
   (ii) a record of any loan by the company to a shareholder, director, prescribed officer or employee of the company or to a person related to any of them
   (iii) a record of any liabilities and obligations of the company.

b) 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.

c) Record of company's revenue and expenditure including daily records of all money received and paid out.

d) If the company trades in goods – a record of inventory and stock in trade.

If such records are kept in electronic format there are certain provisions that must be complied with. (see tables at back of this guide)

Regulation 25(4) states that 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.

E Provide for the proper conduct of audit or independent review

Directors are obliged to comply with sections 28–30 of the Act and Regulations 26–29, and have a duty to ensure that the company has an effective and independent audit committee (where applicable).

F Annual financial statements and financial statements

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.

G Directors Report

Section 30(3).

H Business Rescue duties

- King III and Chapter 6 of the Act. It is incumbent upon directors to ensure they place their company's into either business rescue or liquidation, or to cease trading, when the warning signs become evident.

I Disclosure of personal financial interests: section 75

- The Act defines "personal financial interest" in section 1. See Table at back of guide.
- This section applies to an extended definition of "director". Such a person is required to disclose his personal financial interest in respect of a matter to be considered at a meeting of the board, and in the instance where the person related to him has a financial interest in the matter.
- He must disclose his interest in advance, i.e before it is considered by a meeting of the board [as set out in section 75(4)] and recuse himself by leaving the meeting, without taking part in the discussion. He 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.

Exceptions: where section 75 will not apply:

- Where there is only one director who is also the sole holder of beneficial interest in the company, this duty to disclose the financial interest falls away.
- Where there is only one director, but he does not hold all of the beneficial interests of all of the issued securities, then that director may request that the shareholders pass a resolution (ordinary) authorising him to enter into a contract in which he (or a related person to him) has a personal financial interest, after he has disclosed the nature and extent of the interest to the shareholders.
- The section does not apply (a) to a director of a company:(i) in respect of a decision that may generally affect:(aa) all of the directors of the company in their capacity as directors, or (bb) a class of persons, despite the fact that the director is one member of that class of persons, unless the only members of the class are the director or persons related or inter-related to the director, or (ii)in respect of a proposal to remove that director from office as contemplated in section 71.
- **Section 75(7):** A decision by the board, or transaction or agreement approved by the board, or by a company with only one director but a number of holders of beneficial interest of issued securities, is valid despite any personal financial interest of the director or person related to him only if it was approved following disclosure of that interest or despite there being lack of disclosure, the decision was subsequently ratified by ordinary resolution of the shareholders following disclosure of that interest or has been declared valid by a court (on application by any interested person).

J. Duty to facilitate shareholders meetings

- **Section 61(3):** The board is required to convene a shareholder's meeting on receipt of one or more written and signed demands are delivered to the company, in accordance with the provisions of section 61(3)(a) and (b), or otherwise in accordance with the provisions of section 61(2).
- 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: (a) any other person authorised by the company's MOI may convene the meeting, or (b) if no person has been authorised, the Companies Tribunal, on a request by any shareholder, may issue an administrative order for a shareholders meeting to be convened on a date, and subject to any terms, that the Tribunal considers appropriate (c) the company must compensate the shareholder who applies to the Tribunal, for the cost of those proceedings.
- If a company fails to convene a meeting for any reason other than the above, at a time required in accordance with its MOI, or when required by shareholders to convene a meeting, or when a public or State owned company is required to call an AGM as per the Act [section 61(7)], then: (a) a shareholder may apply to a court for an order requiring the company to convene a meeting on a date, and subject to any terms, that the court considers appropriate in the circumstances (b) the company must compensate the shareholder who applied to court for the cost of those proceedings.

K. Duty to comply with Solvency and liquidity test

- Refer to section on Solvency and Liquidity test for more detail.

Other duties and responsibilities

A. Duties in terms of the Memorandum of Incorporation

- The Regulations provide a standard set of MOI that companies may use as a basis but may amend to meet their specific needs, where applicable, and as provided for in the Act. The directors should familiarise themselves with the contents thereof since it will invariably impose duties, limitations and/or powers on directors.

B. Good Corporate Governance, ethical leadership and corporate citizenship

- King III suggests certain duties for the board of directors, which are outlined in detail on page 48.

C. Delegation and decision-making

- Shareholders delegate the day to day running of the company to directors, who in turn, appoint and supervise management.
- While many duties can be delegated to management, the directors retain overall responsibility over management, and have a duty to monitor management's performance, and the smooth running of the company.

D Compliance with legislation

Directors and managers of companies are being increasingly exposed to actions, with a variety of legislative sources as the basis. Knowledge of and compliance with legislation is essential for the good governance of a company.

Some of the pieces of legislation that directors should have a working understanding of, are:

- Industry or sector specific legislation
- Listed companies must adhere to JSE securities exchange regulations
- The South African Income Tax Act
- The Labour Relations Act
- The Occupational Health and Safety Act
- The Employment Equity Act
- Promotion of Access to Information Act
- Financial Intelligence Centre Act
- Trade Marks Act
- Business Names Act
- Consumer Protection Act
- The Competition Act (as amended)
- Electronic Communications and Transactions Act
- National Credit Act
- Basic Conditions of Employment Act
- The Protection of Personal Information Act
  (the list is not exhaustive).

Some specific responsibilities under other legislation

Consumer Protection Act:

- Depending on the nature of the business of the company, provisions relating to marketing, the cooling off period following direct marketing, disclosure and information, fair and honest dealing with consumers, over-booking and over-selling, cancellation of advance reservations, franchise agreements, business names, may all be applicable to a company, which falls within the definition of "supplier" under the Consumer Protection Act. Directors need to be aware of the legislation, and to ensure that the managers and employees of the company adhere to the requirements and obligations set out for suppliers in terms of the Consumer Protection Act.

Competition Amendment Act:

- This Act aims to regulate fair competition practices in South Africa.

Electronic Communications and Transactions Act:

- Legal recognition of electronic messages and records for evidential purposes.
- Statutory criminal offences relating to information systems.

The Protection of Personal Information Act:

- Has substantial implications for human resources functions. Information on employees is required to be obtained and retained in a lawful manner.

9 Balance of power: 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):

Section 112: Disposal of greater part of assets or undertaking

Subject to section 112(1), directors shall not have the power save by virtue of a special resolution (passed in accordance with section 115) by the shareholders to dispose of the whole or greater part of the undertaking of the company, or the whole or greater part of the assets of the company.

Such special resolution is effective only to the extent it authorises a specific transaction. Any part of the undertaking or assets of a company to be disposed of must by fairly valued, as calculated in the prescribed manner, as at the date of the proposal, which date must be determined in the prescribed manner.

Amendment of MOI

- A company's MOI can be amended by resolution if the amendment is:
  - Proposed by the board, or by shareholders entitled to exercise at least 10% of the voting rights that may be exercised on such a resolution, and a special resolution to amend the MOI is adopted at a shareholders meeting, or in accordance with section 60 (this second requirement is not applicable to NPC's – that has no voting members).
  - A company's MOI may provide for different requirements with respect to proposals for amendments.

{Note: the MOI may also be amended in compliance with a court order (proposed by a board resolution) or in a manner contemplated in section 36(3) and (4)}.

Section 41: Shareholder approval required for issuing shares in certain cases:

- **Section 41(1):** An issue of shares* must be approved by a special resolution of the shareholders of a company if they are issued to: (a) a current or future director or current or future prescribed officer of the company, (b) person related or inter-related to the company or to a director or prescribed officer or (c) a nominee of any of the above, subject to certain exceptions set out in section 41(2), for example section 41(2)(c): where the issue of shares* is in proportion to existing holdings, and on the same terms and conditions as have been offered to all the shareholders of the company or to all the shareholders of the class or classes of shares being issued.

- **Section 41(3):** An issue of shares, securities convertible into shares, or rights exercisable for shares in a transaction, or a series of integrated transactions, requires approval of the shareholders by special resolution if the voting power of the class of shares that are issued or issuable as a result of the transaction or series of integrated transactions will be equal to or exceed 30% of the voting power of all the shares of that class held by the shareholders immediately before the transaction or series of transactions.

{**or securities convertible into shares, or a grant of options contemplated in section 42, or a grant of any other rights exercisable for securities*}

Section 15: Shareholder approval required to make additional rule permanent

- A rule is binding on an interim from the time it takes effect until it is put to a vote at the next general shareholders meeting and permanently only if it has been ratified by an ordinary resolution at such meeting.
- The MOI (and any rules of the company) are binding between the company and the shareholder(s) and between the shareholders themselves (if more than one) and between the company and each director or prescribed officer or any other person serving the company as a member of a committee of the board, in the exercise of their respective functions within the company. If a rule is not ratified, the board may not make a substantially similar rule within the ensuing 12 months, unless approved in advance by ordinary resolution of the shareholders.
- **Section 15(5A):** Any failure to ratify the rules of a company does not affect the validity of anything done in terms of those rules during the period that they had an interim effect.

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, or where the MOI limits, restricts or qualifies the purposes, powers or activities of the company. The action of the director cannot be ratified if it is in contravention of the Act.

- Thus the director must ensure that he act on behalf of the company only to the extent permitted by the powers and authority conferred upon him by 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 (as per above) or 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). See Table at back of guide.

10 Ring-fenced and personal liability companies

- Under the previous Act the public was deemed to be fully acquainted with the Memorandum and Articles of the company, and consequently any limitation of powers of the directors – in other words they are deemed to have "constructive notice" of the company's public documents.
- A party contracting with a director who acted on behalf of the company, beyond the scope of his powers, could not therefore state that he did not have knowledge of the director's lack of authority to act or limitation.
- The company would not be bound by the contract, unless it chose to ratify it (or unless the director fraudulently did not disclose his limitation).
- The new Act provides that the public will not deemed to be acquainted with or having 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 include a provision whereby the purpose or objectives or powers of the company are restricted or limited in the MOI, or contains any requirements in addition to those set out in section 16 relating to the amendment of any of these restrictions or limitations contained in the MOI, or if the MOI contains a prohibition on the amendment of any particular provision contained therein.
- In such a case, the company is required to have the word Ring-Fenced or RF subjoined to it's 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.

11 Remuneration

Section 66(8) and (9)

- Except to the extent that the MOI of a company 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.

12 The board, committees and meetings

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 legal entity to trade through
  - the capital structure
  - 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.

Structure and delegation of duties

- The "board" refers to the collective word used to designate directors when they act together as a group.
- King III refers to different types of directors, all of whom carry equal responsibility to ensure that the company complies with the law and is properly governed. They may act in an executive or non-executive capacity.
- **Executive directors** are salaried, and are involved with the day to day running of the company. Many executive directors enter into a fixed term service agreement with the company, which further regulates their relationship with the company. King III recommends that the term of these contracts should not exceed 3 years.

- **Non-executive directors** are board members who do not have any day-to-day management role in the business. Non-executive directors usually only attend board meetings and are paid directors fees for their service as director on the board, not a monthly salary. This means that he can take a detached look at the way in which the company is managed. A non-executive director may be a shareholder in the company.
- **A non-executive independent director** has limited or no financial interest in the organisation, or any interests that might want to influence the company.
- King III – suggests that having a balanced board of non–executive, independent non-executive and executive directors ensures good corporate governance, as this will more likely bring about the desired result of achieving the "best interest" objectives, and will ensure a clear separation of ownership from control and reward structures.
- The Act, however, only requires that at least three non-executive directors are appointed to the audit committee of a public company or State owned company.
- The Act refers to alternate and ex officio directors. Alternate directors are appointed to act on behalf of a director when he cannot personally fulfil his duties.

Board meetings

- **Section 73(1):** 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 **2** of the directors, or
  - in the case of a board with 12 or more directors, **25%** of the directors require it.
  - The MOI may specify a higher or lower 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 (for example, where all the directors waive notice of the meeting).
- Board meetings may be held with certain or all the directors using electronic communication (EC), as long as the EC facility employed 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, and 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.

Board Committees

- **Section 72(1)(a):** Except to the extent that the MOI provides otherwise, the board may appoint any number of committees of directors, [also recommended in King III], or may consult with or receive advice from any person. The company's MOI may set out the types of committees that the board could appoint.

- 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. Such a person may nevertheless incur the same liabilities as directors in terms of the Act. King III recommends that only directors be appointed to committees.

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.

Statutory Committees

- The Minister has by Regulation 43 prescribed that a listed public company or SOC Ltd or any other company that has in any two of the previous five years scored above 500 points in terms of Regulation 26(2) are obliged to have a social and ethics committee (confirmed by King III), unless exempted in terms of Regulation 43 (2).

Management

- 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.

13 Electronic signatures, communications and substantial compliance

Section 6(12) provides that a signature or initial on a document may be made:

a) by or on behalf of a person by the use of an electronic signature or an advanced electronic signature, as defined in the Electronic Communications and Transactions Act, 2002

b) by two or more persons, it is sufficient if:

   (i) all those persons sign a single document in person or as per (a) above

   (ii) each person signs a separate duplicate original of the document, in person or as contemplated in (a) above, and in such a case, the several signed duplicate originals, when combined, constitute the entire document.

- **Section 6(7):** An unaltered electronically or mechanically generated reproduction of any document other than a share certificate may be substituted for the original for any purpose for which the original could be used in terms of the Act if that reproduction satisfies any applicable prescribed requirements as to the form or manner of reproduction.

- Section 51(2) relating to certificated securities states that a signature contemplated in terms of subsection (1)(b) of that section (i.e the certificated security must be signed by two persons authorised by the company's board) may be affixed to or placed on the certificate by autographic, mechanical or electronic means.
- **Section 6(10):** If, in terms of the Act, a notice is required or permitted to be given or published to any person, it is sufficient if the notice is transmitted electronically directly to that person in a manner and form such that the notice can be conveniently printed by the recipient within a reasonable time and at a reasonable cost.
- **Section 6(11):** Documents, records or statements [other than a notice contemplated in section 6(10)], which are required to be retained, may be so retained in an electronic original or reproduction of that document, as provided for in section 15 of the Electronic Communications and Transactions Act and may be published, provided or delivered by electronic communication in a manner and form which enables them to be conveniently printed within a reasonable amount of time and at a reasonable cost or by giving notice (eg via a weblink) of its availability, a summary thereof and instructions for receiving the complete document.
- A notice of meeting to shareholders as contemplated in section 62 may be "in writing or electronic form" (unless the company's MOI provides otherwise).
- Faxes, telephone communications and conference calls – are all electronic communications which are suitable for establishing a "virtual" presence for purposes of meetings as contemplated in the Act, as long as the requirements set out in the Act are met.
- Section 63 relates to shareholders meetings and section 73 refers to board meetings of Directors and provides that a meeting of shareholders and directors respectively may be conducted entirely by electronic communication or if held in person, one or more of the shareholders, directors or proxies may participate by electronic communication – so long as the methods employed enables all persons participating to simultaneously communicate with each other without an intermediary and to participate reasonably effectively in that meeting (and so long as the MOI allows for it). In such a case the notice of that meeting must inform shareholders/directors (whichever is applicable) of the availability of that form of participation, and provide any necessary information to enable shareholders or their proxies/directors – to access the available medium or means of electronic communication. Such access is at the expense of the shareholder or proxy/director, except to the extent that the company determines otherwise.
- The definition "present at a meeting" means to be present in person, or to be able to participate in the meeting by electronic communication, or to be represented by a proxy who is present in person or able to participate in the meeting by electronic communication.
- Record retention will be complied with if an electronic original or reproduction is retained in terms of section 15 of the Electronic Communications and Transactions Act 25 of 2002, see Table at the back of this guide

14 Accounting records, financial statements, financial reporting standards

Some key provisions are as follows:

Section 28: Accounting records

- All companies must keep accurate and complete accounting records in one of the official languages of RSA at its registered office (a) as necessary to enable the company to satisfy its obligations in terms of this Act or any other law with respect to the preparation of financial statements and (b) including any prescribed accounting records, which must be kept in the prescribed manner and form.
- Regulation 25(2) states that the accounting records must provide an adequate information base to (a) enable the company to satisfy all reporting requirements applicable to it, as set out in section 28(1) read with section 29(1), and (b) to provide for the compilation of financial statements, and the proper conduct of an audit, or independent review, of its annual financial statements, as applicable for that particular company.
- Regulation 25(3) sets out information / documentation that should be included in the accounting records of a company.
- Accounting records may be kept in electronic format, subject to certain conditions – see Table at back of guide.

Section 29: Financial statements

- If a company provides any financial statements (including annual financial statements) to any person for any reason, these must satisfy the requirements as set out in section 29(1) of the Act.

Any such statements must not be false or misleading in any material respect or incomplete in any material particular. If they are in the form of a summary, these summaries must comply with prescribed requirements for summaries. Non compliance is an offence.

Section 29(6): Subject to section 214(2), 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 as contemplated in section 30, knowing that those statements fail in a material way to comply with the requirements as listed in section 29(1), or are materially false or misleading. The Act places increased onus and liability on preparers of financial statements [section 214(1)(d)].

Financial Reporting Standards

Section 29(4): The Minister after consulting with the Financial Reporting Standards Council (FRSC) may make regulations prescribing the financial reporting standards or the form and content requirements for summaries. Regulation 27 has been published in this regard.

Section 30: Annual financial statements (AFS)

- All companies are required to produce annual financial statements (AFS) each year within **6 months** after the end of their financial year which must:

  Section 30(2)(a): be audited in the case of a public company, or

  Section 30(2)(b): in the case of any other profit or non-profit company, –

  (i) be audited if so required by the regulations made in terms of subsection 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 –

  (aa) its annual turnover

  (bb) the size of its workforce

  (cc) the nature and extent of its activities, or

  (ii) be either –

  (aa) audited voluntarily if the company's MOI or a shareholders resolution so requires or if the company's board has so determined, or

  (bb) independently reviewed in a manner that satisfies the regulations made in terms of subsection 7, subject to section 30(2A).

Note: Section 30(7): The Minister may make regulations including different requirements for different categories of companies, prescribing (a) the categories of profit or non-profit companies that are required to have their annual financial statements audited as contemplated in subsection (2)(b)(i) and (b) the manner form and procedures for the conduct of an independent review under subsection (2)(b)(ii)(bb) as well as the professional qualifications, if any, and duties of persons who may conduct such reviews and the accreditation of professions whose members may conduct such reviews.

Section 30(8): Despite section 1 of the Auditing Profession Act, an independent review of a company's AFS required by this section does not constitute an audit within the meaning of that Act.

Section 30(2A): Exemption of Owner-Managed Companies

If, with respect to a particular company, every person who is a holder of, or has a beneficial interest in, any securities issued by that company is also a director of the company, that company is exempt from the requirements in this section to have its annual financial statements audited or independently reviewed, but this exemption –

a) 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 subsection 7(a), and

b) 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.

Section 30(3): 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.

Regulation 26 sets out the criteria for determining the public interest score for purposes of Regulations 27 to 30, 43, 127 and 128. Every company must calculate its public interest score at the end of each financial year – which determines the scoring thresholds for determining which category of company requires an audit and the type of person allowed to perform an independent review, and which category of company requires a social and ethics committee. See Table at back of guide.

Regulation 28 sets out the categories of company required to be audited and **Regulation 29** applies to the independent review of annual financial statements for certain categories of company.

Annual General Meeting Requirement

- Section 61(7) requires a public company to call an AGM of its shareholders within eighteen months of its date of incorporation and thereafter once in every calendar year, but no more than fifteen months of the date of the previous AGM to present the audited annual financial statements to the shareholders.
- 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.

Independent Review by an Independent Accounting Professional

- Regulation 26(1)(d) relating to "Independent Review", states the minimum requirement for a professional person to conduct an independent review.
  - An "independent accounting professional" when used with respect to any particular company, means a person who:
    - (i) is –
      - (aa) a registered auditor in terms of the Auditing Profession Act, or
      - (bb) a member in good standing of a professional body that has been accredited in terms of Section 33 of the Auditing Profession Act, or
      - (cc) qualified to be appointed as an accounting officer of a CC in terms of section 60(1),(2) and (4) of the CC's Act, and
    - (ii) Does not have a personal financial interest in the company or a related or inter-related company, and
    - (iii) Is not a person as described in Table L on page 64
    - (iv) Is not related to any person who falls within any of the criteria set out in clause (ii) or (iii).

- **Public companies and SOC's Ltd** must also comply with additional requirements set out in Chapter 3 of the Act, subject to certain exemptions, as set out in section 84(1)(a) and (b).
- Private companies, personal liability companies and NPC's are not required to, however such companies may have to comply with these additional requirements as follows:
  - Section 84(1)(c)(i) – if the company is required to comply by the Act or regulations to have its annual financial statements audited every year, provided that the provisions of Parts B (Company Secretary requirements) and D (Audit Committees) of Chapter 3 will not apply to such a company, or
  - Section 84(1)(c)(ii) – otherwise only to the extent that the company's MOI so requires, as contemplated in section 34(2).

Every company contemplated in section 84(1)(a) or (b) must appoint:

- A person to serve as a company secretary
- A person to serve as an auditor
- An audit committee.
- Regulation 43 requires 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 in terms of Regulation 26(2), to also appoint a Social and Ethics Committee unless exempted.

Company Secretary

- Must be permanently resident in South Africa and have the requisite knowledge and experience to act as such, is accountable to the board, duties are set out in the Act.

Appointment and rotation of auditor (Section 90)

- Upon its incorporation, and each year at its AGM, a public company or state-owned company must appoint an auditor. Upon its incorporation and each year at its annual meeting, a company referred to in section 84(1)(c)(i), or a company that is required only in terms of its MOI to have its annual financial statements audited as contemplated in sections 34(2) and 84(1)(c)(ii), must appoint an auditor (a)in accordance with subsection (1), if the requirement to have its annual financial statements audited applies to that company when it is incorporated, or (b)at the AGM at which the requirement first applies to the company, and each AGM thereafter.
- The auditor must be a registered auditor, and in addition to the prohibition contemplated in section 84(5) [a person who is disqualified in terms of section 69(8) to serve as a director of any particular company], must not be a director, prescribed officer, or employee or consultant of the company 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 or a director, officer or employee of a person performing the secretarial work for the company. Neither must the auditor be a person who, alone or with a partner or employees, habitually or regularly performs the duties of secretary or bookkeeper of the company, or is related to any such person, or a person who at any time during the five financial years immediately preceding the date of appointment was a person contemplated above. And must be acceptable to the company's audit committee as being independent of the company, having regard to the matters enumerated in section 94(8), in the case of a company that has appointed an audit committee, whether as required by section 94, or voluntarily as contemplated in section 34(2).

- Any firm appointed as auditor must, in order to be a valid appointment, specify the name of the individual member of the firm who will undertake the audit and that individual must also meet the requirements of the paragraph above, and
- 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.
- Section 93 sets out the rights and restricted functions of auditors and cannot 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.

Audit committee (Section 94)

- At each AGM, a SOC Ltd, public company or one that is required only by its MOI to have an audit committee as contemplated in sections 34(2) and 84(1)(c)(ii) must elect an audit committee (i.e the shareholders and not the board of directors) must elect an audit committee for the following financial year (subject to certain exemptions). It must have at least three members who must also be independent non-executive directors of the company. [King III recommendation re composition of committee]. In terms of the Act, members of the audit committee must also meet the qualifications as set out in Table L on page 64.
- **Regulation 42** states that 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.
- 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).

- **Note:** 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.

Directors and audit committees per King III

- King III – if differences of opinion should arise between the board and the audit committee, where the audit committee's statutory functions are concerned, the audit committee's decision will prevail.

Additional sections in Act relating to enhanced accountability and transparency requirements:

- **Section 159:** Confidential disclosures
- 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.

Social and Ethics Committee

- This is compulsory for those companies prescribed by the Regulation 43 to have a Social and Ethics Committee unless:
  a) 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
  b) 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].
- 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.
- Regulation 43(5) sets out the functions of the committee in detail.

16 Lending and financial assistance to directors

- "Financial assistance" in section 44 and 45 does not include lending money in the ordinary course of business by a company whose primary business is the lending of money. For the purposes of section 45, the definition of 'financial assistance' also includes the lending money, guaranteeing a loan or other obligation and securing any debt or obligation, but does not include an accountable advance to meet legal expenses in relation to a matter concerning the company or anticipated expenses to be incurred by the person on behalf of the company or an amount to defray the persons expenses from removal at the company's request.

Section 44: Financial Assistance for subscription of securities

- Except to the extent that 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 the requirements set out in Table K on page 63 relating to conditions and consequences of lending financial assistance.

Section 45: Loans or other financial assistance to directors

- Except to the extent that 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 corporation, or to a member of a related or inter-related corporation, or to a person related to any such company, corporation, director, prescribed officer or member, subject to the requirements set out in Table K on page 63.
- **Section 45(5):** If the board adopts a resolution to provide financial assistance as contemplated in the section, the company must provide written notice of that resolution to all shareholders, unless every shareholder is also a director of the company, and to any trade union representing its employees:
  a) within 10 business days after the board adopts the resolution, if the total value of all loans, debts, obligations or assistance contemplated in that resolution, 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
  b) within 30 business days after the end of the financial year, in any other case.

17 Solvency and liquidity test

- The board must constantly 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 defined in the Act.
- The test will be an accounting exercise, as 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).
  - 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).
  - an amalgamation or merger with another company (section 113).
- Directors are required to constantly monitor whether a transaction that the company proposes to enter into will require that the statutory liquidity and solvency test be satisfied together with the additional provisions of each particular section of the Act (for example section 46), in order to remain compliant with the Act.
- If the answer is affirmative, the directors are required to 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 [see section 44(6)(b), section 46(6)(b), section 48(7)(b)].

- Such personal liability extends not only to board members but, amongst others, also to prescribed officers, who could be members of management and others who significantly influence the management of the business of the company (as per the definition of prescribed officer).
- Liability is joint and several with any other person who may be liable for the same act or ommission. 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.

18 Reckless trading

Section 22: A company must not carry on its business recklessly, with gross negligence with intent to defraud any person or for any fraudulent purpose.

- **Section 22(2) and (3):** If the Commission has reasonable grounds to believe that a company is engaging in reckless conduct prohibited by subsection (1), 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 conduct prohibited by subsection (1), 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, as the case may be.
- **Regulation 19:** the Commission could also accept the information and confirm the company's right to continue carrying on business.
- **Section 171(7):** 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:
  a) apply to a court for the imposition of an administrative fine, or
  b) 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.

19 Liability of directors

- Generally, the directors are not personally liable for the debts of the company.
- In the case of 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 [section 19(3)].
- 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 years imprisonment (or both) for a director to:

  Section 213: commit a breach of confidence, or

  Section 214: False statements, reckless conduct and non-compliance

  (1)(a) who is party to the falsification of any accounting records of a company, or

(1)(b) with a fraudulent purpose knowingly provided false or misleading information in any circumstances in which the Act requires the person to provide information or give notice to another person, or

(1)(c) was knowingly a 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, or

(1)(d) 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.

Section 214(3) it is 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.

Section 214(4): states that a person who contravenes section 99(1) (2), (3), (4), (5), (8) or (9) (which deals with general restrictions on offers to the public), and if that person is a company, every director or prescribed officer of the company who knowingly was a party to the contravention is (a) guilty of an offence and (b) 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 – fine or imprisonment up to twelve months (or both).

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 thus bring it against all the directors or any one particular director.
- An action to recover loss, damages or costs may not commence more than three years after the act or omission.

Section 77(2): 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.

Specific Statutory Liability:

Section 77(3) sets out specific statutory liability, as follows:

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 contra to section 22 (reckless trading).
- **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, [subject to section 104 (3) – liability will not attach if there were reasonable grounds for the director to believe the statement was true].
- **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:
  - (i) the issuing of unauthorised shares, despite knowing that those shares had not been authorised in accordance with section 36
  - (ii) the issuing of authorised securities despite knowing that such issue was inconsistent with section 41
  - (iii) for granting unauthorised options [as set out more clearly in section 77(3)(e)(iii)]
  - (iv) the provision of financial assistance to any person contemplated in section 44 for the acquisition of securities of the company despite knowing that the provision of financial assistance was inconsistent with section 44 or the company's MOI
  - (v) the provision of financial assistance to a director for a purpose contemplated in section 45 despite knowing that the provision of financial assistance was inconsistent with that section or the company's MOI

(vi) a resolution approving a distribution despite knowing that the distribution was contrary to section 46, subject to sub-section (4)

(vii) 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

(viii) an allotment by the company despite knowing that the allotment was contrary to any provision of Chapter 4 of the Act.

Civil liability – other actions available to shareholders and stakeholders:

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

Sections 20(4) and (5): 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):

- Each shareholder may have a claim for damages (a personal claim) 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 any limitation, restriction or qualification in terms the MOI (unless the action has been ratified by shareholders). (Note: an action may not be ratified if it is in contravention of the Act).

Section 218:

- A shareholder (and any other stakeholder, including an employee) can also have a claim against the directors or any person who contravenes the Act for damages for any loss or damaged suffered as a result of that contravention – i.e the action does not need to be fraudulent or carried out with gross negligence for a valid claim in terms of this section.

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

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

20 Remedies and protection of whistle-blowers

The Act introduces a new regime to protect whistle-blowers and introduces new statutory remedies and Regulatory bodies in Chapter 7. The remedies available can be summarised as follows:

1. **Right to seek specific remedies**
   a) Company names – application to Companies Tribunal or Human Rights Commission
   b) Rights of securities holders – application to Court to protect rights
   c) Directors – application to Court to declare a director delinquent or on probation (see Tables at back of this guide which also list which stakeholders may bring such an application)
   d) Relief from oppressive or prejudicial conduct – application to court by a director or shareholder for relief.
2. **Voluntary resolution of disputes** – filing of complaint to Company Tribunal or Alternative Dispute Resolution Agent (accredited entity).
   - King III – directors should endeavour to resolve disputes by way of ADR.
3. **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 investigator conducts an investigation.

Administrative Fines

A court, on application by the Commission or Panel may impose an administrative fine (a) only for the failure to comply with a compliance notice, as contemplated in section 171(7), and (b) not exceeding the greater of:

i) 10% of the respondent's turnover for the period during which the company failed to comply with the compliance notice, and

ii) the maximum prescribed in terms of subsection (5). Regulation 163 prescribes this as R1 million.

The court could also refer the matter to the National Prosecuting Authority for prosecution of an offence in terms of section 214(3) but may not do both in respect of any particular compliance notice.

Protection of whistle-blowers Section 159

- Any shareholder, director, company secretary, prescribed officer, employee, a registered trade union or other representative of the employees, supplier of goods or services to the company, or employee of such a supplier – who has reasonable grounds to suspect that the company or any of its directors or employees have contravened the Act, or a law mentioned in Schedule 4 or any statutory obligation or is engaged in conduct that

has or is likely to endanger the health and safety of any individual or had harmed or was likely to harm the environment or has unfairly discriminated or condoned unfair discrimination in contravention of the Constitution or Unfair Discrimination Act 2000 or has contravened any other legislation that could expose the company to an actual or contingent risk of liability or is inherently prejudicial to the interests of the company and in good faith discloses this information to the Commission, Companies Tribunal, Panel, a regulatory authority, an exchange, legal adviser, a director, prescribed officer, company secretary, auditor, a person performing the function of an internal audit, board or committee of the company concerned, then that person (the whistle-blower), has qualified privilege in respect of that disclosure and will be immune from any civil, criminal or administrative liability for that disclosure, if the conditions set out in section 159 are met.

- If a person who has made such a disclosure is subjected to express or implied threats or conduct that causes detriment to him by any other person, then (s)he will be entitled to compensation for damages suffered.
- Any provision of a company's MOI or an agreement is void to the extent it purports to limit or negate this section 159.
- A public company and SOC Ltd must establish a system for confidential disclosures.

21 Easier access to remedies

- Section 157 extends standing to apply for remedies to those :
  - directly contemplated in a particular provision of the Act
  - acting on behalf of another person who cannot act in their own name
  - a person acting as a member of, or in the interest of a group or class of affected persons, or an association acting in the interest of its members, or a person acting in the public interest, with the leave of the court– a class action.
- The Commission or Panel acting on its own motion and in its absolute discretion may also –
  - Commence proceedings in a court in the name of a person who filed a complaint and made a written request that the Commission or Panel do so, or 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.
- Therefore minority shareholders and other stakeholders, such as employees have better 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 Tribunal.
- **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 to send a notice to the company to enforce its rights and to demand to protect its or the company's legal interests.
- **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 a limitation, restriction or qualification in the MOI, unless the action has been ratified by shareholders by special resolution.
- **Section 218(2)** provides a **general remedy to any person**, stakeholder – including a 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** – the section states that the company, one or more directors or one or more shareholder(s) 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 injury to the company or the company's business cannot be conducted to the advantage of shareholders generally as a result of the deadlock, or
  - on the basis that 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, inter alia:
- **Section 163(1)(c)** – the powers of a director or prescribed officer or a person related to the company are being exercised in a manner that is oppressive or unfairly prejudicial to or that unfairly disregards the interests of the applicant.

22 Defences and relief for directors

- Ignorance of the law is no excuse, and will not hold up as a defence for directors.
- The Act codifies the "business judgement rule" in sections 76(4) and (5).
- Where a director has applied reasonable care, skill and diligence, has no material financial interest and has a basis for believing that the decision made was in the best interest of the company, the director will not necessarily be held liable for a breach of duty.
- This is only if a director did not act in bad faith or for improper purpose. Any fraudulent act or unlawful act would not allow the director to seek this defence.

23 Indemnificaton and directors insurance

- Section 78 applies to an extended definition of 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:
  a) relieve a director of:
     i) a duty contemplated in section 75 or 76, or
     ii) liability contemplated in section 77, or
  b) negate, limit or restrict 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 subsection (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):** subsection (3) does not apply to a private or personal liability company if –
  a) a single individual is the sole shareholder and sole director of that company, or
  b) two or more related individuals are the only shareholders of that company, and there are no directors of the company 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:

a) may advance expenses to a director to defend litigation in any proceedings arising out of his service to the company
b) may directly or indirectly indemnify the director for expenses as per (a) above irrespective of whether it has advanced those expenses, if the proceedings are (i) abandoned or exculpate the director or (ii) arise in respect of any liability for which the company may indemnify the director in terms of subsection (5) and (6).

Section 78(6): The company may not so indemnify the director in respect of:

a) any liability arising (i) in terms of sections 77(3)(a) to (c) [see para above i.e for circumstances where liability arose as a result of the directors 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] or for (ii) willful misconduct or breach of trust (unless (s)he has been exculpated)
b) any fine contemplated in subsection (3).

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) a director against any liability or expenses for which the company is permitted to indemnify a director in accordance with subsection (5), or
b) the company against any contingency including, but not limited to:
   (i) any expenses:
      (aa) that the company is permitted to advance in accordance with subsection (4)(a), or
      (bb) for which the company is permitted to indemnify a director in accordance with subsection (4)(b), or
   (ii) any liability for which the company is permitted to indemnify a director in accordance with subsection (5).

Conversion of CC to Company

- Existing CC's may convert to a company by filing a Notice of Conversion to the Commission, together with the following documentation:
  a) a written statement of consent approving the conversion of the CC signed by members of the CC holding in aggregate at least 75% of the members' interest in the CC
  b) a MOI consistent with the requirements of the Act
  c) the prescribed filing fee.
- 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 founding statement of the CC.

Financial Statements and accounting records of CC's

- The same requirements as per section 27 to 29 of the Act apply to CC's.
- The CC may also voluntarily make the enhanced accountability and transparency provisions of Chapter 3 applicable.
- AFS of CC must be prepared within 6 months of year end.

Business Rescue

- Chapter 6 will also apply to CC's (Business Rescue).

Transparency and accountability of CC's

- Section 10 of the CC's Act is amended by the insertion of the following:
  - Any Regulations made by the Minister in terms of section 29(4) and (5) and 30(7) of the Act will apply equally to a CC.
  - Section 62 of the CC's Act is amended to include – section 34(2) of the Act applies to a CC, and Chapter 3 also applies to CC's where it has voluntarily determined to take action contemplated in section 34(3) of the Act.
  - Section 30(2)(b) and (3) to (6) of the Act now applicable to CC's that has to audit AFS in terms of the Regulations if applicable.
  - Parts A and C of Chapter 3 of the Act now applicable to a CC that has to audit AFS in terms of the regulations.
  - Section 32 of Act (use of name and registration number) applicable to CC's.
  - Grounds of disqualification of member aligned with Act.

Sections 3(1), 11, 16, 22(2) and (4), 41, 47(7), 49(5), 55 and 58(4) of the CC's Act are repealed – Schedule 3.

25 King III and corporate governance

- The King III Report and Code of Governance came into effect on 1 March 2010.
- It is not a legislated document but rather a statement of principles of "best practice".
- However, as certain aspects of governance are legislated (Companies Act 2008, and the Public Finance Management Act) the use of instructive language is relevant i.e where the Code uses the word "must" – this indicates a legal requirement, and "should" indicates that an application of the principle will result in good governance (voluntary) and "may" indicates areas where the King Committee has recommended certain practices for consideration.
- As far as the JSE Securities Exchange South Africa (JSE) is concerned, listed companies must adhere to the King Report recommendations or indicate the extent to which they have deviated from them.
- The Code recommends that all entities should by way of explanation make a positive statement about how the principles have been applied or not – which disclosure will allow stakeholders (including shareholders) to comment on and challenge the board on the quality of its governance – an "apply or explain" theory.
- Directors (and other office bearers) should view the Code as a valuable guide to good corporate governance so as to ensure compliance with their statutory duties as set out in the Act.
- King III applies to all entities regardless of the manner and form of incorporation or establishment and whether in the public, private sectors or non-profit sectors (unlike King I and II).

Board responsibility of ethical leadership and corporate citizenship

- King III recommends that the board provide effective leadership based on an ethical foundation.
- Good governance is effectively about effective leadership characterised by the ethical values of responsibility, accountability, fairness and transparency and based on the moral duties that find expression in the concept of Ubuntu.
- The board should ensure that the company is and is seen to be a responsible corporate citizen (Principle 2.4). The company is a person and should operate in a sustainable manner – the company should be seen as a responsible "citizen", involving 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.

Sustainability

- Responsible leaders build sustainable businesses by having regard to the company's economic, social and environmental impact on the community in which it operates.
- The primary moral and economic imperative of the 21st century.
- A company should develop a strategy to include accounting for sustainability issues and reporting these to stakeholders.

Emerging governance trends incorporated in King III are Alternative Dispute Resolution (Principle 8.6), Risk based internal audit (Principle 7), Shareholders and remuneration (Principle 2.25), Evaluation of board and director performance (Principle 2.22).

New issues in the Report are IT Governance (Principle 5), and Business Rescue (Principle 2.15).

The board of directors (according to King III)

Operation of the board

Responsibilities

- Responsible for corporate governance and has two main functions: to determine the companies strategic direction and responsibility for control of the company. Strategic planning and operations should include accounting for sustainability issues and reporting these to stakeholders.
- Ensure management actively cultivates a culture of ethical conduct and sets the values to which the company will adhere – values to be incorporated into a code of conduct.
- To consider the legitimate interests and expectations of the company's stakeholders in its deliberations, decisions and actions, and to communicate relevant matters to all stakeholders via press releases, to appreciate that stakeholders' perceptions affect a company's reputation.
- Ensure that disputes are resolved as effectively, efficiently and expeditiously as possible, and adopt a formal ADR process for internal and external disputes.
- To ensure that the company is seen to be a responsible corporate citizen.
- To ensure that the company has an effective and independent audit committee (where applicable).
- To be responsible for information technology (IT governance) – to be vested in the board in much the same way as risk governance is. The board has the duty and responsibility (as part of their duty of care) to ensure that the company's IT systems and information integrity are protected, maintained and continually assessed (and subject to risk management).
- Ensure that the company complies with applicable laws and regulations and considers adherence to non-binding rules, codes and standards – and ensure that each individual director has a working understanding of the relevant laws, rules, codes and standards of the company and its business, delegate to management the implementation of effective compliance framework and processes.

- Ensure that there is an effective risk-based internal audit-monitor effectiveness of company's system of internal control and risk management.
- Integrated reporting and disclosure – ensure the integrity of the company's integrated report – a holistic and integrated representation of the company's performance in terms of both its finances and its sustainability.
- A formal process of assurance with regard to sustainability reporting should be established – i.e reporting not only from a financial perspective but also from an ethical, social and environmental perspective – the well known "triple bottom line" method of reporting. King III takes this concept further and introduces the concept of the integrated report – whereby companies publish an integrated report focusing equally on financial, governance, strategy and sustainability issues – providing an overall picture of the company and a "true" value of it economically.
- Act in the best interests of the company.
- Consider business rescue proceedings as soon as the company is financially distressed.
- Review of management goals and plans.
- Responsible for the governance of risk through formal processes and that risk assessments are performed on a continual basis, and that continual risk monitoring is being done by management.

Appointments

- Board appointments – formal and transparent, shareholders ultimately responsible for the composition of the board.
- Appointment of the CEO – being an Executive Director – not a member of any audit, remuneration or nomination committee.
- The positions of CEO and Chairman should be separated.

Rights

- Receive all reports timeously
- Access to independent consultants
- Unrestricted access to company information.

Functions

- The majority of directors to be non-executive, who are also independent – minimum of two Executive Directors – [being the CEO and director responsible for finance].
- The non-executive directors should have sufficient experience and skill (which must be determined before their appointment).
- Director development through induction and on-going training programmes.
- Assisted by a company secretary (compulsory for SOC (Ltd)'s and public companies).
- Performance assessments – evaluation of board, its committees and individual directors (including Chairman) annually.
- Delegation of certain functions to well structured committees without abdicating its own responsibilities.

Remuneration

- Director's remuneration to be transparent and fair.
- Companies should disclose the remuneration of each individual director and certain senior executives (the three most highly paid senior employees who are not directors) giving details of base pay, bonuses, share-based payments, granting of options or rights, restraint payments and all other benefits (including present values of existing future awards).
- Shareholders to approve the company's remuneration policy.

26 Business Rescue

- The introduction of the business rescue provisions means that directors are duty bound to constantly monitor the company's financial position, to determine whether voluntary business rescue proceedings need to be initiated, in terms of section 129. Failure to do so 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.
- Where the circumstances set out in section 129 are present, it is the duty of directors to institute business rescue proceedings.
- Chapter 2, Principle 2.15 of King III states that directors should be aware of the practicalities of business rescue, and the duties and powers of the business rescue practitioner.
- **Section 129** states that where the director has reasonable grounds to believe that

  a) the company is financially distressed, and

  b) there is a reasonable prospect of rescuing the company

  then 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.
- "Financially distressed" in reference to a particular company at any particular time, means that:

  (i) it appears to be reasonably unlikely that the company will be able to pay all of its debts as they become due and payable within the immediately ensuing six months, or

  (ii) it appears to be reasonably likely that the company will become insolvent within the immediately ensuing six months.
- If a company is financially distressed and directors decide not to place it into business rescue, the directors will be under a statutory obligation, in terms of section 129(7), 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.

27 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:

- **Section 79:** A solvent company may be dissolved by: (a) voluntary winding-up – initiated by the company and conducted either by the company or by its creditors as determined by special resolution of the shareholders of the company (section 80) or (b) by court order (section 81).
- The procedure for applying for its dissolution as per the above 2 methods is set out in Part G of Chapter 2 and Item 9 of Schedule 5 of the Act.

Voluntary winding-up of solvent company:

- **Section 80:** A solvent company may be wound up voluntarily if the company has adopted a special resolution to do so, which may provide for the winding-up to be by the company, or by its creditors, and such resolution must be filed with the Commission with the prescribed fee.
- 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, and all of the directors 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.

Winding-up of solvent companies by court order:

Section 81: Applicants can be:

- **The company** – if the company has resolved by special resolution that it be wound up by the court, or has applied to the court to have its voluntary winding-up continued by the court.
- **The Business Rescue Practitioner** – when it becomes apparent that there is no reasonable prospect of the business being rescued.
- **Creditors** – one or more of the company's creditors apply to the court for an order to wind up the company on the grounds that the company's business rescue proceedings have ended either because the business rescue practitioner has filed with the Commission a notice of termination of the business rescue proceedings or a business rescue plan has been proposed or rejected [sections 132(2)(b) and (c)(i)].

- **the company, one or more directors, one or more shareholders apply to court on the grounds that:**
  - (i) **Director(s)** – on basis of deadlock in the management of the company, and the shareholders are unable to break the deadlock, and irreparable injury to the company is resulting or the company's business cannot be conducted to the advantage of shareholders generally as a result.
  - (ii) 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
  - (iii) it is otherwise just and equitable for the company to be wound up.
- **a shareholder applies, with leave of the court, for an order to wind up the company on the grounds that:**
  - (i) the directors, prescribed officers or other persons in control of the company are acting in a manner that is fraudulent or otherwise illegal, or
  - (ii) the company's assets are being misapplied or wasted, or

The Commission or the Take-over Regulation Panel – where the directors, prescribed officers or other persons in control of the company are acting in a manner that is fraudulent or otherwise illegal and a compliance issue has been issued and the company has failed to comply and within the previous five years enforcement proceedings in terms of the Act or the CC's Act were taken against the company its directors, prescribed officers or other persons in control of the company for substantially the same conduct resulting in an administrative fine, or conviction for an offence.

If at any time after the company has adopted a special resolution contemplated herein (relating to the voluntary winding up) or after application to court, it is determined that the company is or may be insolvent, a court on application by an interested person may order that the company be wound up as an insolvent company.

The Master must file a Certificate of winding-up of a company in the prescribed form when the affairs of the company have been completely wound up to the Commission, which then records the dissolution and removes the company name from the Register.

Dissolution of companies and removal from the register:

The Commission may deregister (i.e remove the company's name from the companies register) if:

a) (i) the company has transferred its registration to a foreign jurisdiction in terms of subsection 5.

(ii) The company did not file an annual return for two or more years in succession and on demand by the Commission has either failed to give satisfactory reasons for the failure or has failed to show satisfactory cause for the company to remain registered or.

b) Where the Commission has –

(i) determined in the prescribed manner 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, or

(ii) has received a request in the prescribed manner and form as determined by the company that 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, it will deregister the company.

- **Section 82(5):** A company may apply to be deregistered upon the transfer of its registration to a foreign jurisdiction.
- 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.

Note: specific requirements apply for the winding up of an NPC.

Table A

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.
all or greater part of the assets or undertaking when used in respect of a company, means – (a) in the case of the company's assets, more than 50% of its gross assets fairly valued, irrespective of its liabilities, or (b) in the case of the company's undertaking, more than 50% of the value of its entire undertaking, fairly valued.
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).
knowing, knowingly or knows when used with respect to a person, and in relation to a particular matter, means that the person either (a) had actual knowledge of the matter, or (b) was in a position in which the person reasonably ought to have (i) had actual knowledge (ii) investigated the matter to an extent that would have provided the person with actual knowledge, or (iii) taken other measures which, if taken, would reasonably be expected to have provided the person with actual knowledge of the matter.
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.
personal financial interest means when used with respect to any person: (a) means a direct material interest of that person, of a financial, monetary or economic nature, or to which a monetary value may be attributed, but (b) does not include any interest held by a person in a unit trust or collective investment scheme in terms of the Collective Investment Schemes Act, no. 45 of 2002, unless that person has direct control over the investment decisions of that fund or investment.
securities means any shares, debentures or other instruments irrespective of their form or title issued or authorised to be issued by a profit company.
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.

Table B

Standards of directors conduct
Section 76(2): Conflict of interest **Section 76(2)(a):** A director must not use the position of director or any other info obtained while acting in such capacity (i) to gain advantage for himself or any other person other than the company or a wholly owned subsidiary of the company or (ii) knowingly cause harm to the company or its subsidiary, and (b) must communicate to the board at the earliest any information that comes to his attention unless the director (i) reasonably believes the information is immaterial to the company or generally available to the public or known to other directors or (ii) is bound not to disclose the information by legal or ethical obligation of confidentiality. **Section 76(3): Degree of care and skill and good faith** **Section 76(3)(a):** A director is required to act in good faith and for proper purpose and **Section 76(3)(b):** in the best interests of the company and **Section 76(3)(c):** each director is subject to a duty to exercise a degree of care, skill and diligence that would reasonably be expected of a person (i) carrying out the same functions in relation to the company as those carried out by that director, and (ii)having the general knowledge skill and experience of that director. **Business judgement rule:** **Section 76(4)(a):** A director's judgement as to whether an action or decision is in the best interests of the company is reasonable, and whether he acted in accordance with **Section 76(3)(c)**, will depend on: (i) whether the director has taken diligent steps to become informed about the subject matter of the decision (ii) either does not have a material personal financial interest in the subject matter of the decision (and had no reasonable basis to know that any related person had a personal financial interest in the matter)(and it is a decision that a reasonable person in a similar position could hold in comparable circumstances) and the director has complied with section 75 (disclosure of financial interests with respect to any interest referred to herein), and (iii) the director made a decision or supported the decision of a committee or the board, with regard to that matter, and had a rational basis for believing, and did believe, that the decision was in the best interests of the company and, **Section 76(4)(b):** In discharging any duty contemplated in this section the director is entitled to rely on (i) the performance by any of the persons referred to in subsection (5) [see below], or to whom the board may have delegated formally or informally duties to perform one or more of the board's functions that are delegable under applicable law, and (ii) any information, opinions, recommendations, reports or statements, including financial statements and other financial data, prepared or presented by any of the persons specified in subsection (5). **Section 76(5):** A director is entitled to rely on (a) one or more employees of the company whom the director reasonably believes to be reliable and competent in the functions performed or the information, opinions, reports or statements provided (b) legal counsel, accountants or other professional persons retained by the company, the board or a committee as to matters involving skills or expertise that the director reasonably believes are matters within the particular person's professional or expert competence, or as to which the particular person merits confidence, or (c) a committee of the board of which the director is not a member, unless the director has reason to believe that the actions of the committee do not merit confidence.

Table C

Probationary directors
Section 162(7): A court may make an order placing a person under probation if: a) while serving as a director he (i) 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, contrary to the Act (ii) acted in a manner materially inconsistent with the duties of a director (iii) acted in a manner or supported the company in an action contemplated in section 163 (oppressive or prejudicial conduct or abuse of separate juristic personality of company), or b) within a period of **10 years** after the effective date: (i) the person had been a director of more than one company or managing member of more than one CC, irrespective of whether concurrently, sequentially or at unrelated times, and during the time that the person was a director of each such company or managing member of each such close corporation, two or more of such companies or CC's each failed to fully pay all of its creditors or meet all of its obligations (except under a business rescue plan resulting from a resolution of the board, or a compromise with creditors in terms of section 155).
An order made re sub-section 7(a)(iii) and (b) above shall be made subject to the court's being satisfied that certain circumstances existed to justify the declaration [see section 162(8)].
Section 162(9): A declaration placing a person under probation may be subject to any conditions the court considers appropriate including conditions limiting the application of the declaration to one or more category of company and subsists for a period not exceeding five years as determined by the court at the time it makes the declaration [subject to Sections 162(11) and (12)].
Section 162(11)(b)(ii): A person subject to an order of probation, may apply to court to set aside the order at any time more than two years after it was made.
Section 162(10)(d): A court may order as a condition applicable to the declaration that the person be supervised by a mentor in any future participation as a director/member of CC while the order remains in force or be limited to serving as a director of a private company or a company of which that person is sole shareholder.

For both Probationary and Delinquent directors:

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).

Note: All references to director apply equally to members of CC's who are participating in the management thereof in this section dealing with probation and delinquency, and all references to a company applies equally to CC's.

Table D

Delinquent directors
Section 162(5): A court must make an order declaring a person a delinquent director if:
a) the person consented to serve as a director or acted as director or prescribed officer while ineligible or disqualified as contemplated in section 69 unless (s)he was acting as per a court order per section 69(11)
b) while under a court order of probation in terms of section 162 or section 47 of the CC's Act, acted as a director in a manner contravening that order
An order made re (a) and (b) above is unconditional and subsists for the lifetime of the person declared delinquent
c) while a director, (i) grossly abused that position, (ii) took personal advantage of information or an opportunity, contrary to section 76(2)(a), (iii) intentionally or by gross negligence inflicted harm on the company or a subsidiary of the company, contrary to section 76(2)(a), (iv) acted in a manner amounting to gross negligence, willful misconduct, breach of trust in relation to the performance of the directors functions within and duties to the company, or acted in a manner as set out in section 77(3)(a), (b) or (c)
d) has repeatedly been personally subject to a compliance notice or similar enforcement mechanism for similar conduct i.t.o any legislation
e) has at least twice been personally convicted of an offence or subjected to an administrative fine or similar penalty in terms of any legislation
f) within a period of five years was a director or managing member of one or more companies or CC's, or controlled or participated in the control of a juristic person irrespective of whether concurrently, sequentially or at unrelated times, that were convicted of an offence, or subjected to an administrative fine or similar penalty, in terms of any legislation, and (i) the person was a director of each such company, or a managing member of each such CC, or was responsible for the management of each such juristic person, at the time of the contravention that resulted in the conviction, administrative fine or other penalty, and (ii)the court is satisfied that the declaration of delinquency is justified, having regard to the nature of the contraventions, and the person's conduct in relation to the management, business or property of any company, CC or juristic person at the time.
An order made re (c) – (f) above may be subject to any conditions the court considers appropriate and subsists for seven years, or a longer period, as the court deems appropriate, from the date of the order, subject to sub-sections (11) and (12).
A person declared delinquent i.t.o (c) to (f) may apply to court to suspend the order and substitute an order of probation at any time more than three years after the order, or to set aside an order of delinquency, at any time more than two years after it was so suspended.

Table E

Solvency and liquidity test
Section 4(1): 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 – a) the assets of the company as fairly valued, and equal or exceed the liabilities of the company, as fairly valued, and b) 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 – (i) twelve months after the date on which the test is considered, or (ii) in the case of a distribution contemplated in para (a) of the definition of "distribution" in section 1, twelve months following that distribution. Section 4(2): For the purposes contemplated in (1): a) any financial information to be considered concerning the company must be based on – (i) accounting records which satisfy requirements of section 28 (ii) financial statements which satisfy requirements of section 29 b) subject to para (c) the board or any other person applying the solvency and liquidity test to a company must (i) consider a fair valuation of the company's assets and liabilities including any reasonably foreseeable contingent assets and liabilities irrespective of whether or not arising as a result of the proposed, or otherwise, and (ii) may consider any other valuation of the company's assets and liabilities that is reasonable in the circumstances, and c) unless the MOI provides otherwise, when applying the test in relation to a distribution contemplated in para (a) of the definition of "distribution" in section 1, a person is not to include as a liability any amount that would be required if the company were to be liquidated at the time of the distribution to satisfy the preferential rights upon liquidation of shareholders whose preferential rights on liquidation are superior to the preferential rights on liquidation of those receiving the distribution. **distribution** means a direct or indirect – (a) transfer by a company of money or other property of the company, other than its own shares, to or for the benefit of one or more holders of any of the shares, or to the holder of a beneficial interest in any such shares, of that company, or of another company within the same group of companies, whether – (i) in the form of a dividend(ii) as payment in lieu of a capitalisation share, as contemplated in section 47(iii) as consideration for the acquisition – (aa) by the company of any of its shares, as contemplated in section 48,or (bb) by any company within the same group of companies,of any shares of a company within that group of companies, or (iv) otherwise in respect of any of the shares of that company or of another company within the same group of companies, subject to section 164(19)(b) incurrence of a debt or other obligation by a company for the benefit of one or more holders of any of the shares of that company or of another company within the same group of companies, or (c) forgiveness or waiver by a company of a debt or other obligation owed to the company by one or more holders of any of the shares of that company, or of another company within the same group of companies,but does not include any such action taken upon the final liquidation of the company.

Table F

Requirements for documents to be held in electronic format
Regulation 32(5): If a company keeps its **securities register** in electronic form it must provide adequate precautions against loss of the records as a result of damage or failure of the media on which the records are kept and ensure that these records are capable of being retrieved to a readable and printable form, including by converting the records from legacy to later systems, storage media, or software, to the extent necessary from time to time. Regulation 25(6): If a company keeps any of its **accounting records** in electronic form the company must provide similar precautions as described above. Regulation 25(5): The accounting records must be kept in such a manner as: a) to provide adequate precautions against: (i) theft, loss or intentional or accidental damage or destruction, and (ii) falsification, and b) to facilitate the discovery of falsification, and c) to comply with any other applicable law dealing with accounting records, access to information, or confidentiality. **Offence to fail keep accounting records as prescribed:** Section 28(3): It is an offence for: a) a company: (i) with an intention to deceive or mislead any person: (aa) to fail to keep accurate or complete accounting records (bb) to keep records other than in the prescribed manner and form, if any, or (ii) to falsify any of its accounting records or permit any person to do so, or b) any person to falsify a company's accounting records.

Table G

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: a) number of points equal to the average number of employees of the company during the financial year b) one point for every R1 million (or portion thereof) in third party liability of the company at the financial year end c) one point for every R1 million (or portion thereof) in turnover during the financial year, and d) one point for every individual who at the end of the financial year, is known by the company: (i) in the case of a profit company, to directly or indirectly have a beneficial interest in any of the company's issued securities, or (ii) 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.

Table H

Related and inter-related persons and control
Section 2(1)(a): An individual is related to another individual if (i) they are married or live together in a relationship similar to marriage (ii) are separated by no more than two degrees of natural or adopted consanguinity or affinity.
Section 2(1)(b): An individual is related to a juristic person if the individual directly or indirectly controls the juristic person [as determined in accordance with subsection (2)] – see below.*
Section 2(1)(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 – see below* (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 – see below.*
* ***control****: a person controls a juristic person (JP) or its business if* *a) in the case of a JP that is a company, (i) that JP is a subsidiary of that 1st person (ii) that 1st person together with any related or inter-related* *person is (aa)directly or indirectly able to exercise or control the exercise of a majority of voting rights associated with the securities of that company whether pursuant to a shareholder agreement or otherwise, (bb)or has the right to appoint or elect or control the appointment or election of directors of that company who control the majority of votes at a meeting of the board.* *b) in the case of a JP that is a CC, the 1st person owns the majority of members interest or controls/has right to control majority of members votes in the CC.* *c) in the case of a JP that is a trust, the 1st person has the ability to control the majority of votes of trustees or appoint majority of trustees or appoint or change the majority of beneficiaries of the trust, or* *d) that 1st person has the ability to materially influence the policy of the JP in a manner comparable to a person who in ordinary commercial practice, would be able to exercise an element of control referred to in (a), (b) or (c).*
Definition of "inter-related" when used in respect of three or more persons, means persons who are related to one another in a linked series of relationships, such that two of the persons are related in a manner contemplated in section 2(1) and one of them is related to the third in any such manner, and so forth in an unbroken series.

Table I

Leniency re governance for certain companies
A profit company (other than SOC Ltd) • **has only one shareholder** **Section 57(2)(a):** 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 except to the extent the company's MOI provides otherwise, and ◆ less onerous reporting requirements ◆ no notice requirements (simplified decision making) ◆ section 59–65 do not apply to the governance of the company (re shareholders meetings – notice, conduct, quorum, resolutions) i.e. no need for compliance with internal formalities. • **where there is only one director who is also the sole shareholder** ◆ no notice requirements for board meeting ◆ **Section 75(2)(b):** requirement for disclosure of directors 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. **Section 78(3)** ***Payment of fine for director:*** refer to page 44. • **where there is only one director in a profit company (not a SOC Ltd)** **Section 57(3(a):** 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, and sections 71(3)–(7), S73, S74 are not applicable to the governance of that company i.e. (i) may enter a contract in which (s)he or a related person has a personal financial interest after obtaining an ordinary resolution of shareholders. • **and where every director is also a shareholder of a particular company [other than a SOC Ltd]:** ◆ no notice or other internal formalities re referral by board for shareholders decisions unless the MOI provides otherwise [section 57(4)(a), 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 decides to do so) ◆ diminished need to seek shareholder approval for certain board actions.

Table J

Section 65(11): Actions requiring authorisation by special resolution
A special resolution is required to – a) amend the company's MOI to the extent required by section 16(1)(c) and section 36(2)(a) (authorisation and classification of shares) b) ratify a consolidated revision of a company's MOI as contemplated in section 18(1)(b) c) ratify actions by the company or directors in excess of their authority as contemplated in section 20(2) d) approve an issue of shares or grant of rights in the circumstances contemplated in section 41(1) e) approve an issue of shares or securities as contemplated in section 41(3) f) authorise the board to grant financial assistance in the circumstances contemplated in section 44(3)(a)(ii) or 45(3)(a)(ii) g) approve a decision of the board for re-acquisition of shares in the circumstances contemplated in section 48(8) h) authorise the basis for compensation to directors of a profit company as required by section 66(9) i) approve the voluntary winding up of the company as contemplated in section 80(1) j) approve the winding up of a company in the circumstances contemplated in section 81(1) k) approve an application to transfer the registration of the company to a foreign jurisdiction as contemplated in section 82(5) l) approve any proposed fundamental transaction to the extent required by Part A of Chapter 5, or m) revoke a resolution contemplated in section 164(9)(c). **Special resolution** means, a) in the case of a company, a resolution adopted with the support of at least 75% of the voting rights exercised on the resolution or a different percentage as contemplated in section 65(10) (i) at a shareholders meeting or (ii) by holders of the company's securities acting other than at a meeting, as contemplated in section 60, or b) in the case of any other juristic person a decision by the owner or owners of that person or by another authorised person that requires the highest level of support in order to be adopted in terms of the relevant law under which that juristic person was incorporated. A company's MOI may permit (a) a different percentage of voting rights to approve a special resolution or (b) one or more different percentages of voting rights to approve special 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 requirements for approval of an ordinary resolution and a special resolution on any matter.

Table K

Conditions for lending and financial assistance to directors
Despite any provision in a company's MOI to the contrary, the board may not authorise financial assistance unless: a) The particular provision of financial assistance is: (i) pursuant to an employee share scheme that satisfies the requirements of section 97, or (ii) pursuant to a special resolution of the shareholders adopted in the previous two years which approved such assistance for the specific recipient or generally for a category of potential recipients and the specific recipient falls within that category, and b) The board is satisfied that – (i) immediately after giving the financial assistance, the company would be in compliance with the solvency and liquidity test, and (ii) the terms under which the financial assistance is proposed to be given are fair and reasonable to the company. In addition to these requirements, the board must ensure that any conditions or restrictions respecting the granting of financial assistance set out in the company's MOI have been satisfied.
Consequences of lending and financial assistance to directors contrary to provisions of the Act
Any resolution by the board or agreement to provide financial assistance that is inconsistent with section 44 or section 45 or any prohibition, restriction or requirement in the company's MOI is void, and any director who voted in favour of such a resolution or approved an agreement providing the assistance is liable to the extent set out in section 77(3(e)(iv) in re section 44 and section 77(3)(e)(v) in re section 45 – if the director (a) was present at the meeting when the board approved the resolution or agreement, or participated in the making of such a decision in terms of section 74, and (b) failed to vote against the resolution or agreement despite knowing that the provision of financial assistance was inconsistent with this section or a prohibition, condition or requirement contemplated in the MOI.

Table L

Requirements to qualify as member of audit committee and independent accounting professional
Regulation 26(1)(d)(iii) relating to independent accounting professional requirements, section 94 relating to audit committee member requirements – such persons in order to qualify as such (together with other listed qualifications particular to each section) must not be: (aa) involved in the day to day management of the company's business nor have been so involved at any time during the previous three financial years [Reg 26(1)(d)] and the previous financial year (section 94) (bb) a prescribed officer or full time executive employee of the company or another related or inter-related company or have been such an officer or employee at any time during the previous three financial years, or (cc) a material supplier or customer of the company such that a reasonable and informed third party would conclude in the circumstances that the integrity, impartiality or objectivity of that professional is compromised by that relationship. Note: the requirement per (cc) does not apply to an independent accounting professional [Regulation 26(1)(d)], but does apply to a member of an audit committee. In addition, no person related to any person listed in (aa) to (cc) can act on an audit committee of any company.

Table M

Abbreviations and Regulatory Bodies
Abbreviations: • "previous Act" – Companies Act no. 61, 1973 • "Act" – Companies Act no. 71, 2008 • "Amendment Act" – Companies Amendment Act no. 3, 2011 • "Regulations" – Companies Regulations, 2011 • "MOI" – Memorandum of Incorporation • "CC's" – Close Corporations • "CC's Act" – Close Corporations Act no.69, 1984 • "Members" – Members of Close Corporations or of a non-profit company (as the context indicates) • "JP" – Juristic Person • "AFS" – annual financial statements • "AGM" – annual general meeting • "King III" – King III Report and Code of Governance • "RSA" – Republic of South Africa **Regulatory Bodies** • The Commission – the Companies Intellectual Property Commission (CIPC) • Tribunal – the Companies Tribunal • The Panel – the Take-Over Regulation Panel • FRSC – the Financial Reporting Standards Council

"If management is about running the business, governance is about seeing that it is run properly."

– R Tricker