



# THE COMPANIES ACT, NO. 71 OF 2008

## AN EXPLANATORY GUIDE

*Replacing the Companies Act, No. 61 of 1973*



**the dti**

Department:  
Trade and Industry  
REPUBLIC OF SOUTH AFRICA



---

© Department of Trade and Industry, 2010.

**the dti** Campus  
77 Meintjies Street  
Sunnyside  
Pretoria  
0002

**the dti**  
Private Bag X84  
Pretoria  
0001

**the dti** Customer Contact Centre: 0861 843 384

**the dti** Website: [www.thedti.gov.za](http://www.thedti.gov.za)

#### **DISCLAIMER**

This information booklet serves as an explanatory guide to, and general reference tool about the stipulations of the Companies Act, No. 71 of 2008. It may not be used as an exhaustive legal reference or substitute for the Act.

---

## CONTENTS

BACKGROUND .....	6
MAIN FEATURES OF THE COMPANIES ACT .....	8
COMPANY LEGISLATION PLAN .....	12
INSTITUTIONAL REFORMS.....	14
<i>The Companies and Intellectual Property Commission</i> .....	14
<i>The Take-over Regulation Panel</i> .....	15
<i>The Financial Reporting Standards Council</i> .....	15
<i>The Companies Tribunal</i> .....	15
CATEGORIES OF COMPANIES .....	18
<i>Non-Profit Companies</i> .....	18
<i>Profit Companies</i> .....	18
Personal Liability Companies .....	19
State-Owned Companies .....	19
Public Companies.....	19
<i>Private Companies</i> .....	19
THE FUTURE OF CLOSE CORPORATIONS.....	22
COMPANY FORMATION .....	24
COMPANY NAMES .....	26
MEETINGS AND NOTICES .....	30
DUTIES OF DIRECTORS .....	32
ACCOUNTABILITY AND TRANSPARENCY .....	34
<i>Flexible Regime</i> .....	34
<i>Rotation of Auditors</i> .....	34
<i>Audit Committees</i> .....	35
<i>Appointment of a Company Secretary</i> .....	35
COMPANY FINANCE.....	38
COMPANY GOVERNANCE .....	40
BUSINESS RESCUE REGIME .....	42
REMEDIES.....	46
ENFORCEMENT.....	48
CONTACT DETAILS.....	50





**BACKGROUND**



---

## BACKGROUND

The process of developing the Companies Act, No. 71 of 2008 began in earnest over five years ago. For guidance, the developers looked to *South African Company Law for the 21st Century: Guidelines for Corporate Law Reform* (May 2004), a policy document developed by the Department of Trade and Industry (**the dti**). The ultimate goal in repealing the Companies Act, No. 61 of 1973, was to ensure that the regulatory framework for enterprises of all types and sizes promoted growth, employment, innovation, stability, good governance, confidence and international competitiveness.

The Companies Act was introduced in Parliament during 2008 and published for general comment on 27 June 2008 as Bill No. 61 of 2008. The Portfolio Committee on Trade and Industry received a large volume of written comments, as well as oral representations during the public hearings on the Companies Bill, in the latter half of 2008. These comments and representations had a significant influence on the content of the Bill, as finally approved by the Committee and Parliament in November 2008. The Act was translated into Afrikaans as the other official language and signed-off by the President in April 2009. Due to a sunset clause in the Act, the Act could not be put into operation within a period of one year after promulgation. It is envisaged that the Act will become effective in April 2011, when all sub-delegated legislation matters, including regulations, have been resolved.



## **MAIN FEATURES OF THE COMPANIES ACT**



---

## MAIN FEATURES OF THE COMPANIES ACT

The main features of the Companies Act, 2008 are as follows:

- It has been modernised and brought into line with international best practices. This applies in particular to public companies, communications and corporate governance. At the same time, it has been harmonised with other South African legislation, such as the Promotion of Access to Information Act (PAIA) and the Electronic Communications and Transactions (ECT) Act.
- It has been simplified and made less prescriptive to make it easier to understand and apply, in the following ways:
  - It was drafted in plain language and the number of sections has been reduced from 450 to 225.
  - The rules relating to pre-incorporation contracts have been simplified, making it possible for any person to enter into a pre-incorporation contract.
  - Fewer statutory forms are required to incorporate a company. Rather than a memorandum and articles of association, a company's constitutional documents will now consist of one document only, the Memorandum of Incorporation (Mol). The Mol sets out the rights, duties and responsibilities of shareholders, directors and others in relation to the company. A company may alter certain provisions of the Act in its Mol, but there are specific provisions that may not be altered that apply notwithstanding the provisions of the Memorandum of Incorporation. In this way, certain protections are built into the Act. All current articles and memoranda of association will automatically be converted to an Mol.
  - Companies are allowed to change certain requirements according to their own circumstances – in addition to the Mol, companies can now make certain governance rules themselves.
  - Different types of companies must comply with different rules. This means smaller companies have less arduous responsibilities than large public companies when it comes to corporate governance and financial reporting. For instance, smaller companies will be subject to less taxing financial reporting standards than larger companies.



- The regulatory burden on companies has been reduced, but there are stricter accountability and transparency requirements for state-owned and public companies. Shareholders have extensive rights to obtain information from the company, including access to the securities register and minutes of directors meetings. Greater director accountability and the appropriate participation of all stakeholders ensure improved transparency.
- High standards of corporate governance are encouraged, with minimum accounting standards having been set for annual reports. So too, there are stricter provisions governing directors' conduct and liability, and their common law duties and liabilities have now been codified. A new feature is that an act of a company is not void solely because the company did not have the capacity to do the act or the directors did not have the authority to perform the act on behalf of the company. No person may rely on this lack of capacity, power or authority in legal proceedings, except in certain specified circumstances. A company is specifically prohibited from reckless, negligent or fraudulent trading, and persons who were knowingly party to such conduct are guilty of an offence.
- The Act contains new structural arrangements, with the introduction of new regulatory institutions and the transformation of others. Companies are now classified as either profit or non-profit companies.
- Take-overs and fundamental transactions receive greater attention, with radical changes to the take-over provisions contained in the Companies Act, 1973. This applies particularly with regard to minority shareholding and appraisal rights for dissenting minority shareholders. New rules relate mergers and amalgamations, allowing two companies to merge into one entity, provided that the solvency and liquidity test is satisfied and certain approvals are obtained.
- Capital maintenance will now be based on solvency and liquidity rather than a minimum amount of share capital consisting of par value shares and nominal value shares.
- The concept of business rescue is broadened and formalised, and provision is made for a modern business rescue regime. Schemes of arrangement are dealt with separately under the Act.
- There is a move towards the decriminalisation of company law and the establishment of bodies for the effective enforcement of the legislation. However, minority shareholders and other stakeholders, such as employees, will have better protection, powers and remedies under the Act, including the ability to bring class actions.





## **COMPANY LEGISLATION PLAN**

---

## COMPANY LEGISLATION PLAN

All existing close corporations will retain their current status until such time as their members decide that it is in their interest to convert to a company. Therefore, the Act provides for the indefinite continued existence of the Close Corporations Act. However, it also provides for the closing of that Act as an avenue for the incorporation of new entities or for the conversion of any existing companies into close corporations as of the effective date of the Companies Act.

The Department of Justice and Constitutional Development has informed **the dti** of proposals to develop uniform insolvency legislation. If brought to use, this legislation would overlap and may conflict with the regime set out in the current Companies Act, 1973 for dealing with and winding up insolvent companies. The Act therefore provides for transitional arrangements that will retain part of the current regime for the interim until any new uniform insolvency law is introduced.



## **INSTITUTIONAL REFORMS**



---

## INSTITUTIONAL REFORMS

The Companies Act proposes the establishment of a new institution, the Companies and Intellectual Property Commission. It furthermore proposes the transformation of three existing company law entities, namely the Take-over Regulation Panel, the Financial Reporting Standards Council and the Companies Tribunal. Together, these four institutions, as discussed in more detail below, will provide for a more predictable regulatory and enforcement system.

### *The Companies and Intellectual Property Commission*

Chapter 8 of the Act provides for the migration of the Companies and Intellectual Property Registration Office (CIPRO) into a newly established organ of state with significantly expanded functions and powers, to be known as the Companies and Intellectual Property Commission (“the Commission”). The Commission will be a merging of CIPRO and the enforcement division of **the dti**, known as the Office of Company and Intellectual Property Enforcement (OCIPE). In particular, most of the administrative functions currently assigned to the Minister under the Companies Act, 1973, apart from the appointment of members of the institutions and the making of regulations, are de-politicised and placed within the jurisdiction of the Commission. However, the Minister retains the authority to issue policy directives to the Commission.

The main functions of the Commission are as follows:

- Register companies, co-operatives and intellectual property rights and maintain such register;
- Disclose information on its register;
- Promote education about, and awareness of, company and intellectual property law;
- Promote compliance with the relevant legislation;
- Ensure the efficient and effective enforcement of relevant legislation;
- Monitor compliance with and contraventions of financial reporting standards, and make recommendations in this regard; and
- Report to, conduct research for, and advise the Minister of Trade and Industry, on matters of national policy relating to company and intellectual property law.

---

## *The Take-over Regulation Panel*

The Act proposes the transformation of the existing Securities Regulation Panel (SRP) into an independent organ of state, the Take-over Regulation Panel (“the Panel”). The Panel will have powers similar to those currently vested in the SRP. However, under the Act its authority to prescribe rules will be exercised in consultation with the Minister, who alone will have final authority to make regulations.

## *The Financial Reporting Standards Council*

The Financial Reporting Standards Council (FRSC) is to be re-established as an advisory committee to the Minister. It will be tasked with advising the Minister on regulations establishing financial reporting standards which will govern the form, content and maintenance of companies’ financial records and statements.

## *The Companies Tribunal*

The Act provides for one new body, the Companies Tribunal (“the Tribunal”), which will be an independent organ of state. The Tribunal will have a dual mandate, first, to serve as a forum for voluntary alternative dispute resolution in any matter arising under the Act and second, to carry out reviews of administrative decisions made by the Commission.

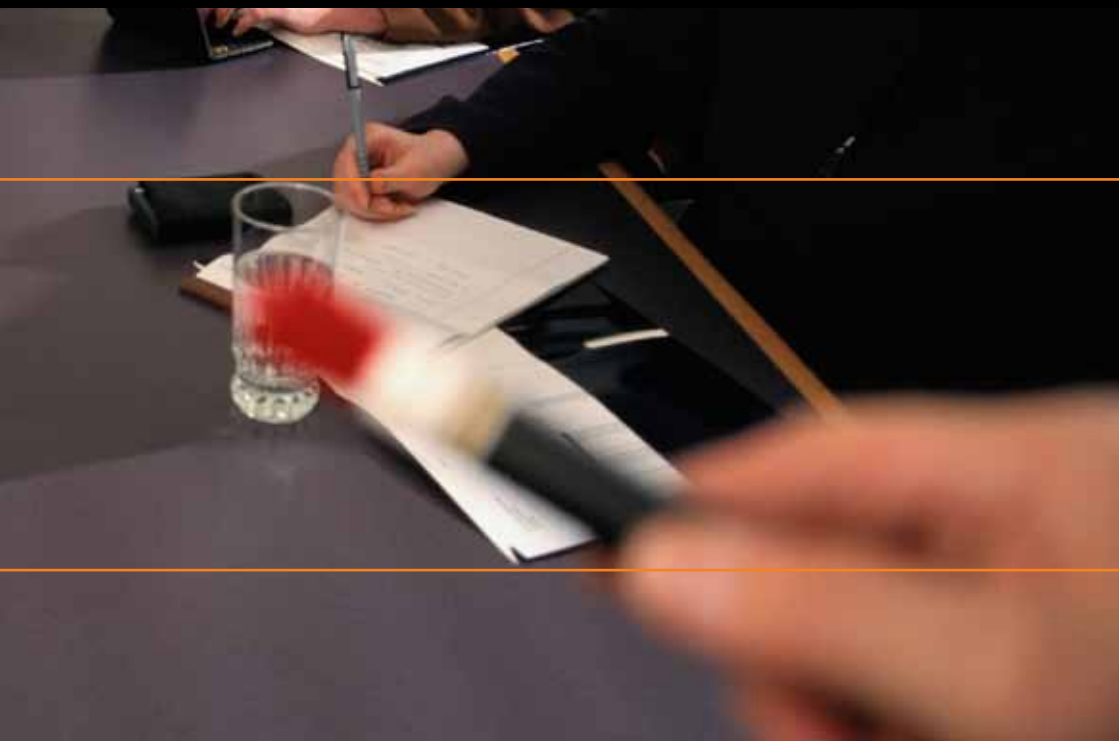
Decisions of the Tribunal will be binding on the Commission, but not on any third party, which has a constitutional right of access to a court for further review. As is the case under the Companies Act, 1973, the High Court remains the primary medium for the resolution of disputes and the interpretation and enforcement of the proposed Companies Act.







## **CATEGORIES OF COMPANIES**



---

## CATEGORIES OF COMPANIES

The Companies Act, 2008 provides for two categories of companies, namely non-profit and profit companies.

### *Non-Profit Companies*

Non-profit companies take the place of companies limited by guarantee and section 21 companies. Non-profit companies are characterised by the following:

- They are incorporated for a “public benefit purpose”.
- Income and property may not be distributed to the incorporators, members, directors or officers of a non-profit company, except for reasonable compensation for services rendered by them.
- The name of a non-profit company will end with “NPC”.
- A minimum of three persons, called incorporators, must complete and sign the Mol.
- A minimum of three directors must be appointed.
- All of a non-profit company’s assets and income must be used to advance its stated objects, as set out in its Mol.
- Non-profit companies are subject to a varied application of the Act, as set out in section 10.
- A special set of fundamental rules for non-profit companies is set out in Schedule 1 of the Companies Act, 2008. According to these rules, the objects of non-profit companies remain subject to the current principles. Furthermore, on their dissolution, non-profit companies are restricted in terms of the distribution of any residual assets. These special rules also include various other matters unique to non-profit companies.

### *Profit Companies*

Profit companies are categorised as companies without restrictions on the transferability of their shares and that do not prohibit offers to the public, i.e. larger public companies, and companies that do contain restrictions on the transferability of their shares and that prohibit offers to the public, i.e. smaller private companies. They may take one of four different forms: a personal liability company, a state-owned company, a public company and a private company.

---

## ***Personal Liability Companies***

A personal liability company is comparable to companies contemplated in section 53(b) of the Companies Act, 1973. Its name must end with the word “Incorporated” or its abbreviation “Inc.”.

## ***State-Owned Companies***

State-owned companies were often incorporated or registered under the Companies Act, 1973, but were not recognised in that Act as requiring separate legislative treatment in respect of certain matters to avoid conflict or overlap with other legislation specifically applicable to them, and not to companies. The name of a state-owned company must end with the expression “SOE Ltd.”.

## ***Public Companies***

Public companies are comparable to companies of the same status under the Companies Act, 1973. They are characterised by the following:

- Their MoI permits them to offer shares to the public but restricts, limits or negates their right of pre-emption.
- The name of a public company must end with the word “Limited” or its abbreviation, “Ltd.”.
- The incorporators of a public company must consist of at least one person. The word “person” includes a juristic person, as provided under section 1 of the Act.
- A public company must have at least three directors.

## ***Private Companies***

Private companies are comparable to companies of the same status under the Companies Act, 1973. They are characterised by the following:

- They are subject to fewer disclosure and transparency requirements.
- A private company will still be prohibited from offering its shares to the public and

---

the transferability of its shares will be restricted, but it may now have more than 50 shareholders.

- The name of a private company must end with the expression “Proprietary Limited” or its abbreviation “(Pty) Ltd.”.
- The board of a private company must comprise at least one director, or any other minimum number as stipulated in its MoI. Each incorporator is a first director of the company.
- In a further effort to create a more flexible regime, the Bill makes exceptions for companies of which –
- All the shares are owned by related persons, so that there is less need to protect minority shareholders; or
- All of the shareholders are directors, so that there is less need to seek shareholder approval for certain board actions.



## **THE FUTURE OF CLOSE CORPORATIONS**



---

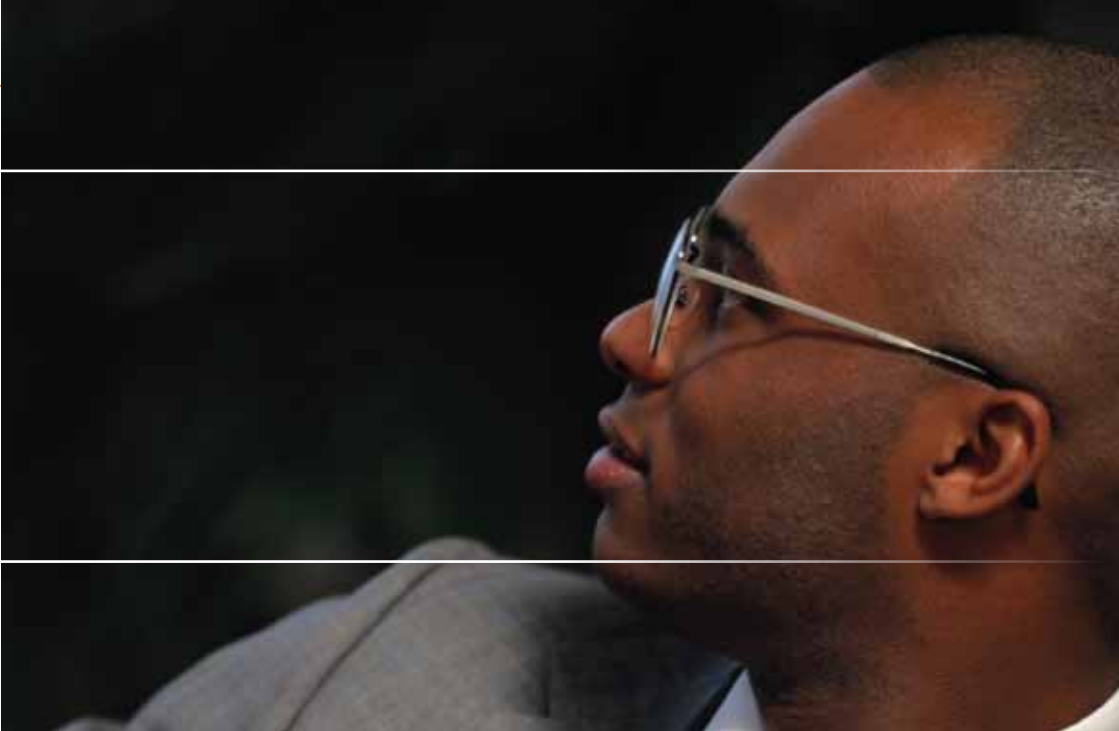
## THE FUTURE OF CLOSE CORPORATIONS

Under the Act, smaller businesses will no longer automatically be subject to strict financial reporting and auditing requirements. This allows companies with characteristics very similar to those of close corporations to be formed. In effect, it means there will be no further need for close corporations.

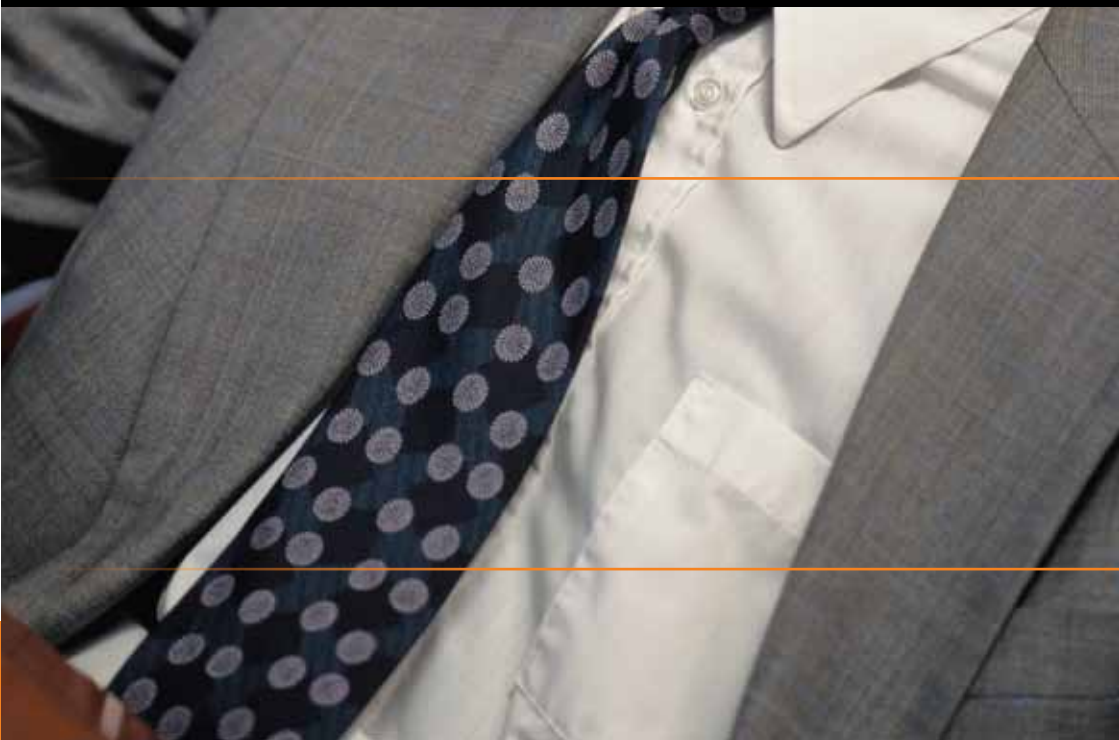
Once the Companies Act, 2008 comes into operation, it will not be possible to register any new close corporations, nor may companies be converted into close corporations.

Existing close corporations will be treated as follows:

- They will exist indefinitely.
- They will be treated as private companies, and the Close Corporations Act will be brought into line with legislation on private companies.



## **COMPANY FORMATION**



---

## COMPANY FORMATION

The Act gives effect to the essential core principle that the formation of a company is an action by persons in the exercise of their constitutional right to freedom of association combined with their common law right to freedom of contract.

As such, the Act reflects, in both its language and its substance, the principle that the incorporation of a company is a right, rather than a privilege bestowed by the State. The Act accordingly places minimal requirements on the act of incorporation.

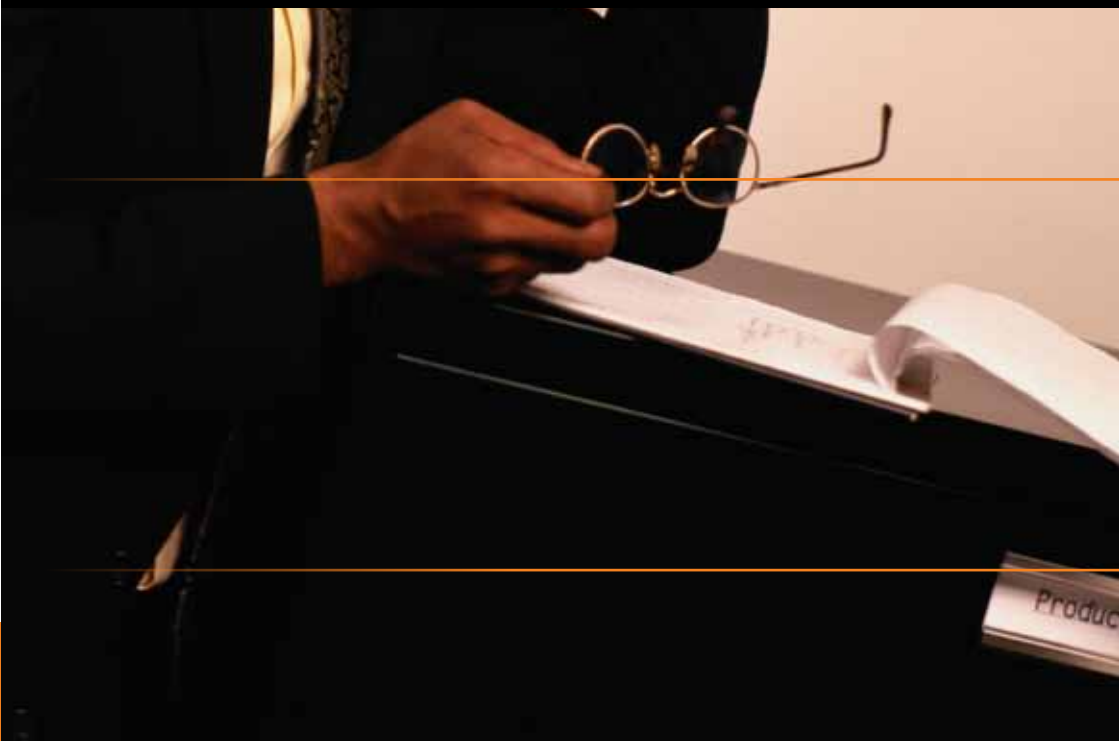
A company is incorporated by the adoption of an MoI, which is the sole governing document of the company. The Act imposes certain specific requirements on the content of an MoI which are necessary to protect the interests of shareholders in the company. It further provides a number of default rules which companies may accept or alter as they wish to meet their needs and serve their interests.

In addition, the Act allows for companies to add to the required or default provisions to address matters not addressed in the Act itself, but every provision of every MoI must be consistent with the Act, except to the extent that it expressly contemplates otherwise. In other words, a company cannot fundamentally 'contract out' of the Companies Act, 2008. For companies wishing to, the Act provides for the simplest possible form of incorporation by use of a standard form of MoI which permits the incorporators to accept the required provisions, as well as the default provisions with or without alteration.





## **COMPANY NAMES**



---

## COMPANY NAMES

The Companies Act, 2008 retains the broad outlines of the existing regime for company names. In particular, it continues the practice of name reservation, but this will no longer be mandatory. The name reservation process will no longer be a separate, formal pre-registration process. If a proposed name is rejected, then the registration number becomes the name of the company.

Transitional provisions allow for names registered or reserved under the current regime to continue to be so registered or reserved under the Act.

With regard to the criteria for acceptable names, the Act proposes that maximum effect be given to the constitutional right of freedom of expression. To this effect, the Act restricts a company name only as far as necessary to:

- Protect the public from misleading names which falsely imply an association that does not in fact exist;
- Protect the interests of the owners of names and other forms of intellectual property from other persons misappropriating the first person's reputation and standing; and
- Protect the society as a whole from names that are hateful or otherwise of a negative nature.

Further to the above, the Act, 2008 also contains provisions to prevent 'name squatting'.

Names can be forwarded to the Human Rights Commission for their approval if any uncertainty exists as to whether a name is offensive or not.

Except for the restrictions mentioned above, there will be no further administrative discretion to reject names as is found in the Companies Act, 1973. In particular:

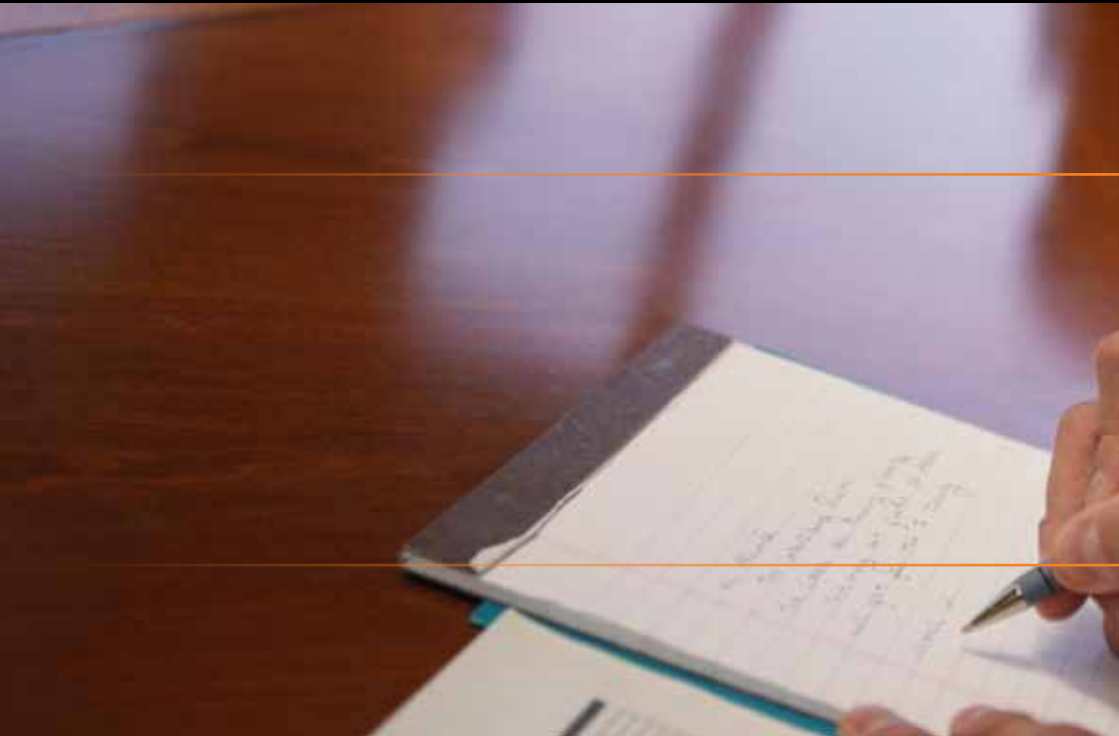
- Symbols will be allowed in company names.
- All languages will be accepted, as well as translations of names.

As regards associated names, the Commission will require proof from the associated company that a similar name is to be allowed.

---

It is a criminal offence to contravene the following protective measures:

- A company has to disclose its full name and registration to any person on demand.
- A company may not misstate its name or registration number in such a way that it would be misleading or likely to deceive anyone.
- No un-authorised person may use the name of a company to create the impression that that person is acting on behalf of the company.
- No person may use any form of name to create a false impression that that name is the name of a company.





## **MEETINGS AND NOTICES**



---

## MEETINGS AND NOTICES

Meetings are regulated in terms of section 62 of the Companies Act, 2008.

As regards attendance of meetings, the Act provides that shareholders can be represented by way of a written proxy, which is valid for one year. Physical attendance is not mandatory, and meetings may be conducted entirely by electronic communication. Alternatively, some members may participate in this manner. The requirement is that they must be able to communicate simultaneously.

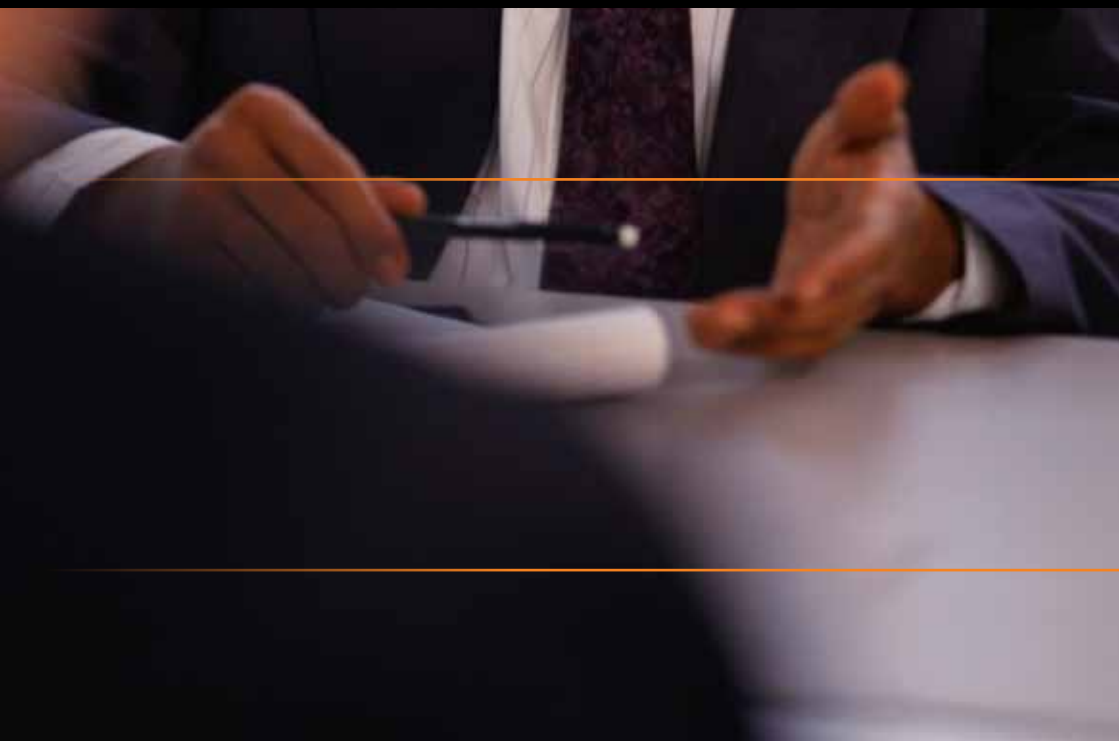
Notice periods for meetings are as follows:

- 15 business days for public companies, and
- 10 business days for private companies.

The rights of debenture holders can be altered only by resolution of the debenture holders. The Act provides that the majority for a special resolution, such as to amend the MoI, is 75% of shares. The majority for an ordinary resolution is 51%. The MoI can alter these percentages, but not lower than 65% for a special resolution or higher than 60% for an ordinary resolution. The quorum for all resolutions is 25% of voting shares.



## **DUTIES OF DIRECTORS**



---

## DUTIES OF DIRECTORS

Directors need to know their rights and must be aware of what is expected of them. They are subject to the common law as found in court rulings and judgments.

The Companies Act, 2008 introduces a partial codification of directors' duties. These duties include both a fiduciary duty and a duty of reasonable care, which operate in addition to the existing common law duties. Section 76, in particular, requires a director to act in good faith and for a proper purpose in the best interests of the company. A director should furthermore act with the degree of care, skill and diligence that may reasonably be expected of a person carrying out such functions and having the same skill and experience of that director – the reasonable man/woman test.

Directors are required to disclose any "personal financial interests". They may not use their position as director or information gained as a director to make a secret profit or gain advantage for themselves or someone else or to cause harm or detriment to the company.

The Act deals comprehensively with the election, disqualification, vacancies, removal, meetings, resolutions and liabilities of directors.





## **ACCOUNTABILITY AND TRANSPARENCY**



---

## ACCOUNTABILITY AND TRANSPARENCY

### *Flexible regime*

The Companies Act, 2008 aims to provide a flexible regime that balances accountability and transparency, with less of a regulatory burden. To that end, it sets certain common requirements for all companies. Differentiated requirements depend on the company's wider responsibility to the public and the social and economic impact that the company's operations have. This flexibility is illustrated by the following provisions:

- All companies must prepare annual financial statements (AFSs), unless the company can satisfy the Commission that it meets certain criteria.
- Public companies are subjected to a more demanding regime, with the added requirement that their AFSs have to undergo an annual audit.
- All companies have to file annual returns with the Commission.
- Public companies have to file a copy of their audited AFSs with their annual return.
- Public companies must appoint a company secretary, auditors and an audit committee.
- Certain private companies with a greater responsibility to the wider public as a consequence of their significant social or economic impact may be required to have their AFSs audited. All other companies must be either voluntarily audited or independently reviewed.
- All financial statements, or a summary thereof, must satisfy the prescribed financial reporting standards. These standards may vary for different categories of companies but must be consistent with International Financial Reporting Standards as set by the International Accounting Standards Board.
- All public and certain private companies must appoint an auditor.

### *Rotation of Auditors*

The same individual may not serve as the auditor or designated auditor of a company for more than five consecutive financial years. So too, if an individual stops being the auditor or designated auditor of a company after two or more consecutive years, he or she may not be appointed as such again for at least five more financial years.

---

## ***Audit Committees***

Public companies and state-owned enterprises must appoint audit committees at each annual general meeting. The Act prescribes the duties of an audit committee, which include determining the fees to be paid to the auditor and the auditor's terms of engagement.

## ***Appointment of a Company Secretary***

A private company will generally not need to appoint a company secretary. However, public companies and state-owned companies are obliged to appoint company secretaries, and the Act prescribes their duties. These include the following:

- Providing the directors of the company with guidance;
- Making them aware of relevant laws and any failure to comply;
- Recording minutes in accordance with s242;
- Certifying in the annual financial statements of the company that the company has lodged With the Registrar all returns required of a public company in terms of the Act and that all such returns are true, correct and up to date;
- Ensuring that a copy of the company's annual financial statements is sent, in accordance with section 302, to every person who is entitled thereto; and
- Filing information returns in terms of the annual transparency and accountability report.

If a person is not eligible to be a company secretary in terms of the Act, that person will be regarded as having resigned when the Act becomes effective. So too, if a company does not have a secretary as required by the Act, the position must be filled once it becomes effective.

If the company secretary is removed from office, the secretary may require the company to include a statement by the secretary in that year's annual financial statements about the circumstances surrounding the removal.





## **COMPANY FINANCE**



---

## COMPANY FINANCE

The Act provides for a shift from a capital maintenance regime based on par value to one based on solvency and liquidity. Shares will no longer have a nominal or par value, and the board may issue authorised shares only for consideration or other benefit to the company. Existing par value shares remain valid for so long as they are in existence, and regulations govern the transition of such shares to the new regime.

The solvency and liquidity test consists of two parts:

1. The assets of the company, fairly valued, must equal or exceed its liabilities, fairly valued
2. The company must be able to pay its debts as they become due in the ordinary course of business for 12 months after the date of the test, or 12 months after a distribution to shareholders.

The interests of minority shareholders are still protected in that shareholders also have to approve share and option issues to directors and other specified persons, or financial assistance for share purchase, or any financial assistance to a director or related person.

The solvency and liquidity test must be satisfied if:

- The company purchases its own shares back from a shareholder.
- A company's subsidiary purchases shares in its holding company.
- The company provides financial assistance to any person to purchase or subscribe for any of the company's shares.
- The company makes a distribution (including the payment of dividends).
- The company provides a director with financial assistance.
- The company becomes party to a statutory merger.

Offers of shares to the public by public companies are subject to some modifications to ensure closer correlation with stock exchange requirements.



## **COMPANY GOVERNANCE**



---

## COMPANY GOVERNANCE

The Act, 2008 introduces changes to company governance to enhance flexibility, while retaining much of the existing regime designed to promote transparency and accountability.

In particular, the Act:

- Introduces flexibility in the manner and form of shareholder meetings, the exercise of proxy rights, and the standards for adoption of ordinary and special resolutions; and
- Retains existing qualifications and disqualifications for directors, with some enhanced flexibility, particularly for very small companies where the sole shareholder may be the only director even if otherwise disqualified.





## **BUSINESS RESCUE REGIME**



---

## BUSINESS RESCUE REGIME

The Act, 2008 replaces the existing regime of judicial administration of failing companies with a modern business rescue (BR) regime. This regime is largely self-administered by the company, under independent supervision within constraints set out in the Act, and subject to court intervention at any time on application by any of the stakeholders.

To ensure the integrity and effectiveness of supervisors contemplated by the Act, provision has been made for the Minister to designate a suitable association to regulate the functions of persons seeking to be appointed, or acting as supervisors. The Act recognises the interests of stakeholders in general, such as shareholders, creditors and employees, and provides for their respective participation in the development and approval of a BR plan.

Notably, the Act protects the interests of employees and workers by:

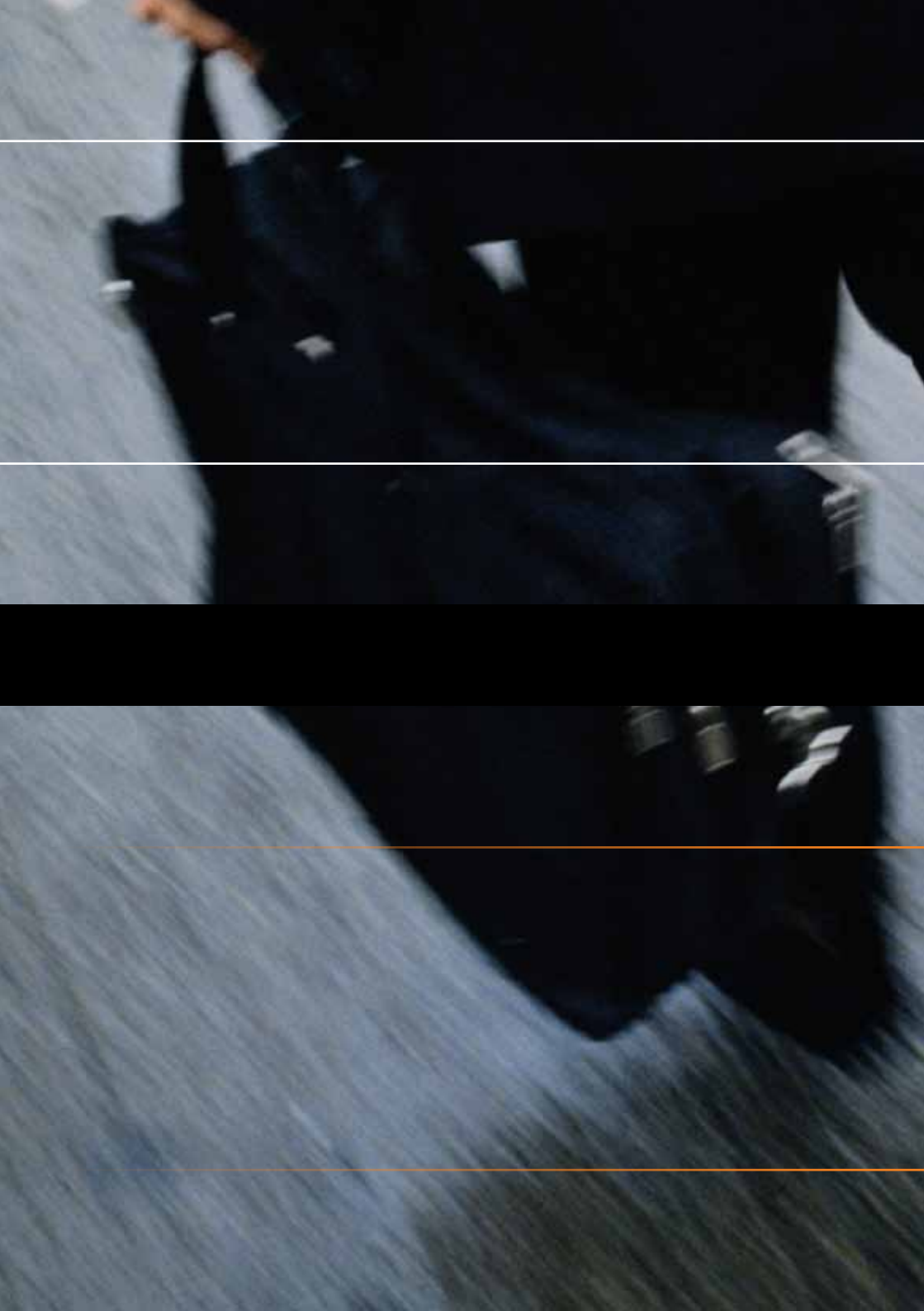
- Recognising them as creditors of the company with a voting interest to the extent of any unpaid remuneration before the commencement of the rescue process;
- Requiring consultation with them in the development of the BR plan;
- Permitting them an opportunity to address creditors before a vote on the plan; and
- Giving them, as a group, the right to buy out any unco-operative creditor or shareholder who has voted against approving a rescue plan.

BR proceedings begin when the board passes a resolution that the company voluntarily begins BR proceedings, or when an affected person, such as a shareholder, creditor, employee or organised labour, applies to court for BR proceedings.

For a company to qualify for the BR process, no liquidation proceedings must have commenced against the company. The process includes the following steps:

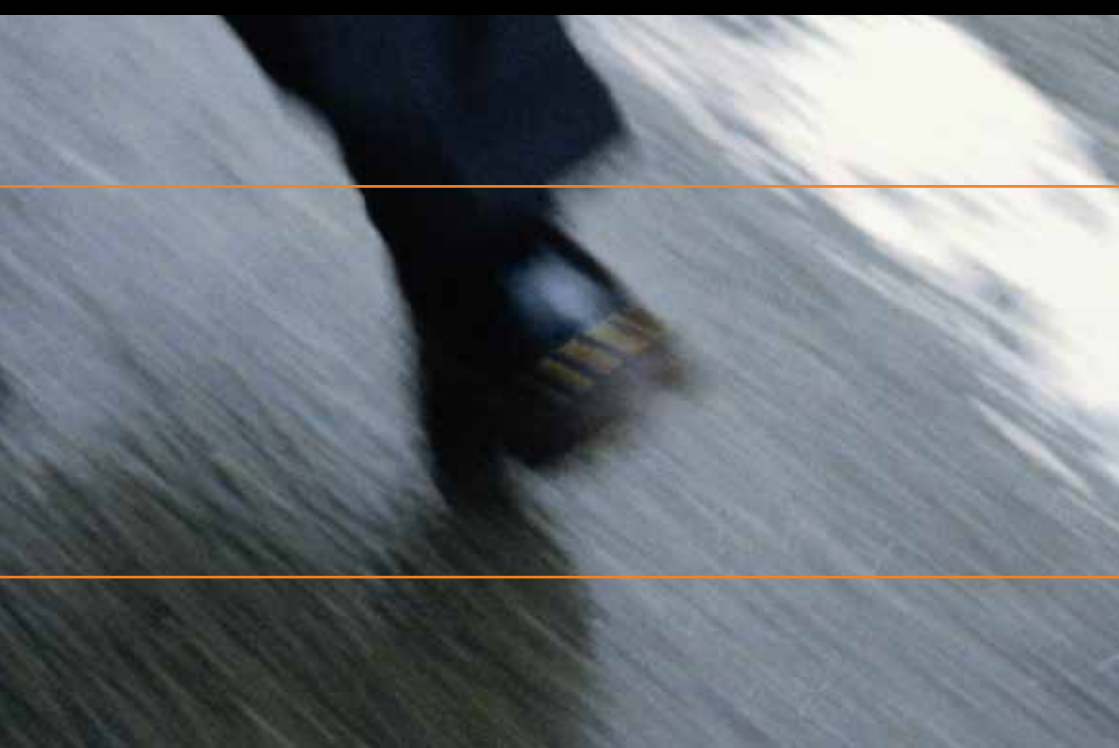
- Within five days after passing the necessary resolution, the company must appoint a BR practitioner and publish the notice as prescribed.
- The company must then file the appointment of the BR practitioner with the Commission and inform all affected parties of the appointment.
- During BR proceedings, no legal proceedings may commence or proceed against the company in any forum.

- 
- BR proceedings end when a court sets aside a resolution or order that began BR proceedings or converts BR proceedings to liquidation proceedings; the BR practitioner files a termination notice of BR proceedings; the BR plan has been rejected; or the BR practitioner has filed a substantial implementation of the plan.
  - During BR proceedings, all directors of the company can only act by authority of the BR practitioner.





## **REMEDIES**



---

## REMEDIES

The High Court remains the principal forum for remedies in terms of the Act.

The Act establishes new general principles, including an extended right to commence an action on behalf of an aggrieved person and a regime to protect 'whistle blowers' who disclose irregularities or contraventions of the Act. These new principles have been formulated to harmonise with the protections already afforded to employees under the Protected Disclosures Act, No. 26 of 2000.

As well as retaining existing remedies, the Act introduces:

- A right to apply to have a director declared delinquent or under probation;
- A right for dissenting shareholders in a fundamental transaction to have their shares appraised and to be compensated for the fair value of those shares; and
- A codification and streamlining of the right to commence or pursue legal action in the name of the company, which replaces any common law derivative action.



## **ENFORCEMENT**



---

## ENFORCEMENT

The Act decriminalises company law. The few remaining offences include those arising out of the falsification of records or documents; the publishing of untrue or misleading information; the refusal to respond to a summons or give evidence; perjury; and similar matters relating to the administration of justice in terms of the Act.

Any such offences must be referred by the Commission to the National Prosecuting Authority (NPA) for trial in the Magistrate's Court. Generally, the Act uses a system of administrative enforcement in place of criminal sanctions to ensure compliance with the Act. The Commission or Panel may receive complaints from any stakeholder or may initiate a complaint itself or act on a matter as directed by the Minister.

Following an investigation into a complaint, the Commission or Panel may:

- End the matter;
- Urge the parties to attempt the voluntary alternative resolution of their dispute;
- Advise the complainants of any right they may have to seek a remedy in court;
- Commence proceedings in a court on behalf of a complainant, if the complainant so requests;
- Refer the matter to another regulator if there is a possibility that the matter falls with their jurisdiction; or
- Issue a compliance notice, but only in respect of a matter for which the complainant does not otherwise have a remedy in a court.

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

A person who has been issued a compliance notice may of course challenge it before the Companies Tribunal, and in court, but failing that, is obliged to satisfy the conditions of the notice. If he or she fails to do so, the Commission may either apply to a court for an administrative fine, or refer the failure to the National Prosecuting Authority as an offence.



---

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

Finally, to improve corporate accountability, the Act proposes that it will be an offence, punishable by a fine or up to 10 years' imprisonment, for a person to sign or agree to a false or misleading set of financial statements or prospectus, or to be reckless in the conduct of a company's business.

---

## CONTACT DETAILS

For further information or enquiries related to the Companies Act, Contact:

### **M Mnyatheli**

Chief Director: Office of Company and Intellectual Property Enforcement (OCIPE), **the dti**

Tel.: (012) 394 1505

Fax: (012) 394 2505

E-mail: [MMnyatheli@thedti.gov.za](mailto:MMnyatheli@thedti.gov.za)

### **M Vimba**

Director: Education and Capacity Building, OCIPE, **the dti**

Tel.: (012) 394 1523

Fax: (012) 394 2523

E-mail: [MVimba@thedti.gov.za](mailto:MVimba@thedti.gov.za)



**the dti Customer Contact Centre**

0861 843 384

**the dti Website**

[www.thedti.gov.za](http://www.thedti.gov.za)

**the dti Postal Address**

Private Bag X84

Pretoria

0001



**the dti**

Department:  
Trade and Industry  
REPUBLIC OF SOUTH AFRICA

