The Department of Trade and Industry indicated that the Companies Act will be implemented from 1 May 2011. In order to assist with the preparation for the implementation of the provisions of the new Companies Act, please find below a high level comparison between some of the key administrative and financial reporting issues as regulated by the 1973 Companies Act and the 2008 Companies Act respectively.

### Companies Act, 1973

- **Regulatory agencies**
  - Companies and Intellectual Property Registration Office
  - Securities Regulation Panel
  - Financial Reporting Investigations Panel (never established)
  - Financial Reporting Standards Council (never established)

- **Required documents:**
  - Memorandum of association
  - Articles of association
  - Name reservation compulsory
  - Detailed administrative process for incorporation and registration

- **Formation of companies**
  - Section 19
    - Company with share capital
    - Company limited by guarantee

- **Types of companies**
  - Section 19, 1(6)
    - Public company
    - Private company
    - Section 53(b) private company (memorandum states that directors & past directors are jointly and severally liable with company for debts and liabilities)
    - Section 21 companies (associations not for gain)
    - Widely held companies (any company which:
      - allows for the unrestricted transfer of its shares in its articles
      - is permitted by its articles to offer shares to the public or
      - decides by special resolution to be a Widely held company, and
      - any subsidiary of a Widely held company)
    - Limited interest companies (companies other than widely held)

- **Categories of companies**
  - Section 32
    - Incorporation
      - Public company - minimum 7 persons

### Companies Act, 2008

- **Regulatory agencies**
  - Companies and Intellectual Property Commission
  - Companies Tribunal
  - Takeover Regulation Panel
  - Financial Reporting Standards Council

- **Required documents**
  - Memorandum of incorporation (MOI)
  - Rules of a company (optional)
  - Name reservation (optional)
  - Simplified registration process – submission of Notice of Incorporation and copy of Memorandum of Incorporation

- **Formation of companies**
  - Section 8
    - Company with share capital
    - Non-profit company

- **Types of companies**
  - Section 8
    - Profit company
    - Non-profit company

- **Categories of companies**
  - Section 8
    - Profit companies
      - **Private company**
        - a company that is not a state owned company, and its Memorandum of Incorporation of Incorporation prohibits it from offering any of its securities to the public, and restricts the transferability of its securities
      - **Personal liability company**
        - the company and the directors are jointly and severally liable for any debts and liabilities of the company
      - **State-owned company**
        - an enterprise, registered as a company, which falls within the meaning of state owned enterprise’ in terms of the Public Finance Management Act, or is owned by a municipality
      - **Public company**
        - a company that is not a state owned company, private company or personal liability company
        - Non-profit companies

- **Number of members required**
  - Section 13
    - Incorporation
      - 1 person may incorporate a profit company, and 3 or more persons may incorporate a non-profit company
Private company - minimum 1 person
Company limited by guarantee - minimum of 7 persons
- Members
Public company - minimum 7 members
Private company - maximum 50 members
- Members

Public company, private company and personal liability company - minimum 1 member
State-owned company – no requirement for minimum number of members
Non-profit companies - no requirement, unless provided for in Memorandum of Incorporation

Company names
Section 49
Company name to be followed by:
- Public company – Ltd
- Private company – Proprietary Limited - (Pty) Ltd.
- Personal Liability company - Inc.
- Non-profit company - NPC

Section 21 company – “Association incorporated under section 21”

Number of directors
Section 208
- Public company - minimum 2
- Private company - minimum 1
- Personal Liability company - minimum 1
- Non-profit company - minimum 3

Section 11
A company name may be predominantly in any official language and must end with the relevant English expression, being:
- Public company – Ltd
- Private company - Proprietary Limited - (Pty) Ltd.
- Public company – Limited – Ltd.
- State owned company - SOC Ltd.

Section 21 company – “Association incorporated under section 21”

Disclosure of remuneration
Section 297
Disclosure in the annual financial statements in respect of executive directors and non-executive directors.
Disclosure is required in aggregate (not on an individual basis)
- the remuneration as defined by the Act
- pensions
- the amount of any compensation paid in respect of loss of office
- the number and class of any securities issued to a director or person holding any prescribed office in the company
- details of service contracts of current directors and individuals who hold any prescribed office in the company.

Financial assistance for subscription of securities
Section 38
Special resolution
- Financial assistance must be pursuant to an employee share scheme, or
- the provision of financial assistance must have been approved by special resolution within the previous two years, and
- the company's board of directors must be satisfied that:
  o the company would satisfy the solvency and liquidity test immediately after the transaction, and
  o the terms upon which such assistance is given are fair and reasonable to the company

Section 44

Financial assistance to directors and prescribed officers
Section 226
Special resolution or prior consent of all members
- Financial assistance must be pursuant to an employee share scheme, or
- Shareholders must have approved such financial assistance by special resolution (within the past 2 years), and
The company’s board of directors must be satisfied that after the transaction, the company will remain solvent and liquid, and

- The board to inform all shareholders and trade unions representing employees whenever it decides to provide financial assistance

### Shares

Section 74

- Par value (with share premium where applicable)
- No par value (stated capital)
- No shares issued (limited by guarantee)

Schedule 5

- Par value shares abolished – no more share premium account
- Regulations prescribe the transitional process to convert par value shares for existing companies

### Distributions to shareholders

Section 90

- Authorisation by articles
- Solvency and liquidity requirements.

Section 46

- Resolution by the board
- Solvency and liquidity test
- Resolution to approve distribution must specifically acknowledge application and compliance with the solvency and liquidity test
- If distribution is not completed within 120 days of the board resolution, a renewed application of the solvency and liquidity test is required

### Share buybacks

Section 85

- Authorisation by articles
- Approval by special resolution
- Solvency and liquidity requirements

Section 48

- Resolution by the board
- Solvency and liquidity test
- Resolution to approve share buyback must specifically acknowledge application and compliance with the solvency and liquidity test
- Subsidiaries may not own more than 10% in aggregate of the shares of the (holding) company
- Subsidiaries may not exercise any voting rights attached to shares in the holding company

### Financial statements

Section 285 and 286

- Widely held companies must comply with financial reporting standards
- Directors to cause annual financial statements to be prepared, in respect of all companies, and presented to the annual general meeting
- Financial Statements to be prepared within 9 months of financial year end
- Signed by at least 2 authorised directors
- Copy of annual financial statements to be sent to each shareholder

Section 29 and 30

- Financial reporting standards prescribed in Regulations (IFRS or IFRS for SME’s)
- Financial statements must be approved by the board and presented to the first shareholders meeting after such approval (not necessarily the AGM)
- All companies must prepare annual financial statements within six months of its financial year end (Likely to change to 12 months in the Amendment Bill)
- Signed by 1 authorised director
- Shareholders to receive a summary of annual financial statements, full statements to be made available electronically (on a website) or on request
- Summary financial statements may be issued

### Audit of financial statements

Section 300

- All companies to be audited

Section 30

- Companies that MUST be audited:
  - Public companies
  - State owned companies
  - Private companies, personal liability companies and non-profit companies that meet the requirements as per the
## Regulations

Any other company may voluntarily choose to be audited

All companies that are not audited, must have an independent review

### Exception

Private companies where all the shareholders are also directors do not need either audited nor independently reviewed statements

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### Enhanced accountability and transparency

#### Section 269A

<table>
<thead>
<tr>
<th>Widesely held companies must appoint an audit committee</th>
</tr>
</thead>
<tbody>
<tr>
<td>Public companies having share capital must appoint a company secretary</td>
</tr>
</tbody>
</table>

#### Section 296A

<table>
<thead>
<tr>
<th>Appointment of audit committee</th>
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<tbody>
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<td>Public companies</td>
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<td>State owned companies</td>
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<tr>
<td>Other companies only to the extent provided for by the company’s Memorandum of Incorporation</td>
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<tr>
<th>Appointment of auditor</th>
</tr>
</thead>
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<td>All companies that MUST be audited (Public companies, state owned companies, private companies, personal liability companies and non-profit companies that meet the requirements as per the Regulations), as well as other companies that choose to be audited, must appoint a registered auditor as set out in the Act.</td>
</tr>
</tbody>
</table>

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### Audit committee

#### Section 94

<table>
<thead>
<tr>
<th>Appointment</th>
</tr>
</thead>
<tbody>
<tr>
<td>2 independent non-executive directors</td>
</tr>
<tr>
<td>Appointed by board or shareholders</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Functions</th>
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<tbody>
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</tr>
<tr>
<td>Determine audit fee</td>
</tr>
<tr>
<td>Distinguish between audit/non-audit services</td>
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<tr>
<td>Pre-approve non-audit work</td>
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<tr>
<td>3 directors, specific requirements (similar to independent non-executives)</td>
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<td>Appointed by shareholders at the AGM</td>
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<tr>
<td>Other functions assigned by the board</td>
</tr>
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</table>

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### Attendance of auditors at Audit Committee and AGM

#### Section 300

| Auditor of widely held company must meet with the audit committee not more than one month before the board meets to approve the financial statements |
| Auditor must attend every AGM of a widely held company |

| No requirement |

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### Social and ethics committee

#### Section 72

| No requirement |

| All public companies and state owned companies must appoint a social and ethics committee at the annual general meeting. The committee must comprise at least 3 directors (the majority of whom should meet the requirements of membership of the audit committee, in other words be independent non-executive directors). |

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### Quorum for shareholders meeting

#### Section 190

| No requirement |

| All public companies and state owned companies must appoint a social and ethics committee at the annual general meeting. The committee must comprise at least 3 directors (the majority of whom should meet the requirements of membership of the audit committee, in other words be independent non-executive directors). |
Unless the articles of a company provide for a greater number of members entitled to vote to constitute a quorum at meetings of a company, the quorum for such meetings shall be:

- in the case of a public company, three members entitled to vote, personally present, or if a member is a body corporate, represented
- in the case of a private company, not being a private company having one member, two members entitled to vote, present in person or by proxy or, if a member is a body corporate, represented, and
- in the case of a wholly-owned subsidiary company, the representative of the holding company.

Unless the company’s Memorandum of Incorporation provides otherwise, the quorum will be constituted by at least 25% of all of the voting rights that are entitled to be exercised in respect of at least one matter to be decided at the meeting.

**Resolutions**

Section 199

**Ordinary resolution – 50%**

**Special resolution**

- At least 25% of members holding in the aggregate not less than one-fourth of the total votes of all the members entitled to vote thereat, must be present in person or by proxy
- Resolution approved by not less than three-fourths of the number of members of the company entitled to vote at the meeting

Special resolution must be registered with Registrar for it to be valid.

Ordinary resolution – 50% (Memorandum of Incorporation may require higher percentage)

Special resolution – 75% (Memorandum of Incorporation may require a lower percentage provided that there must at all times requirements for approval of an ordinary resolution, and a special Resolution

No requirement to register special resolutions

**Sections 105, 127, 128, 215, 239 and 326**

Requirement to keep:

- Register of members
- Register of directors
- Register of auditors
- Register of interests in contracts of directors and officers
- Register of pledges, cessions and bonds
- Register of debenture-holders

**Sections 24, 50 and 85**

Requirement to keep:

- Register of directors
- Register of auditors
- Register of company secretary
- Certificated and uncertificated securities register

**Disposal of assets**

Section 228

Special resolution to dispose of the greater part of the assets or business (also applicable to subsidiary disposal)

Compromise and arrangement is binding if approved by majority of 75% in value of creditors or members

A disposal of all or the greater part of the assets or undertaking, amalgamation or merger, or a scheme of arrangement must be approved by:

- a special resolution of shareholders at which enough persons are present to exercise at least 25% of all the voting rights
- a special resolution of the company's holding company if the proposed transaction concerns the disposal of all or the greater part of the assets or undertaking of the subsidiary, and the disposal by the subsidiary substantially constitutes a disposal of all or the greater part of the assets or undertaking of the holding company, and
- the court, if the resolution was opposed by at least 15% of the voting rights

**Business rescue and compromise with creditors**

Chapter XV

Judicial manager takes charge of the company for the duration of the process. Stakeholder involvement limited.

Chapter 6

Business rescue is described as the rehabilitation of a company that is financially distressed by temporary supervision of the company and its management, a temporary moratorium on rights of claimants against the company, and the development and implementation of a plan to rescue the company by restructuring its affairs, business, property, debt and other liabilities, and equity in a manner that maximises the likelihood of the company
continuing to exist on a solvent basis.

Business rescue 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.