

**What is the effective date for the implementation of the new Companies Act?**

The effective date for the Act is 1st of May 2011

**What is the difference between the current Companies Act and the new Act?**

The new Companies Act (Act 71 of 2008) repeals the current Act and the following are notable changes:

The policy enunciated in the new Act is one of:

- Simplification of the legislation; simple and accessible language for all business and stakeholders
- Reduction of the regulatory burden; simplicity and speed of formation of business entities
- Decriminalisation: Recognising that this is a business legislative instrument constant reference to “if a person fails to file ...shall be guilty of an offence and upon conviction sentenced to a fine or imprisonment or both” etc. has been avoided in the new Act as far as possible except for issues of perjury, fraud etc.
- It has been harmonised with other legislation such as Access to Information Act, Protected Disclosures Act, Electronic Communications and Transactions Act, etc.

Furthermore, there are major changes to the new Act and are as follows:

- Structural Arrangements and new regulatory institutions
- Overhaul of Fundamental Transactions and Takeovers
- Partial Codification of Corporate Governance aspects
- New Concept of Business Rescue for failing companies

**What structural changes are proposed by the new Companies Act?**

The Act proposes the establishment of one new institution, and the reformation/transformation of three existing company law entities, which together will provide for a more predictable regulatory and enforcement system.

The four institutions are:

- The Companies and Intellectual Property Commission (CIPC), a new entity being formed via a merger between The Office of Company and Intellectual Property Enforcement (OCIPE) and the Companies and Intellectual Property Registration Office (CIPRO)
- The Takeover Regulation Panel, reforming the current Securities Regulation Panel
- The Financial Reporting Standards Council: an entity mandated to review the financial reporting standards within the South African context and to propose to the Minister any amendments thereto
- The Companies Tribunal: a new entity focusing on expeditious alternate dispute resolution mechanisms within companies as well as providing for reviews of decisions made by the Commission to affected parties

**What are the functions of the Companies and Intellectual Property Commission?**

The main functions of the Companies and Intellectual Property Commission are:

- Registration of companies, co-operatives and Intellectual Property Rights (trade marks, patents, design, copyright) and maintenance of these registers, inclusive of the Close Corporation Register
- Disclosure of information on its register
- Promotion of education and awareness of Company and Intellectual Property Law
- Promotion of compliance with relevant legislation
- Efficient and effective enforcement of relevant legislation
- Monitoring compliance with and contraventions of financial reporting standards, and making recommendations on amendments to the Financial Reporting Standards Council Report, research and advise Minister on matters of National policy relating to Company and Intellectual Property Law

**What is the future of close corporations?**

The Act provides for the indefinite continued existence of the Close Corporations Act, but provides for the closing of that Act as an avenue for further incorporation of new close corporations. Close corporations on the Register as of the effective date of the new Companies Act will continue to exist accordingly.

**Does the Act force close corporations to convert into companies?**

No, close corporations will not be forced to convert.

**How many categories of companies do we have under the new Act?**

The Act provides for 2 categories of companies:

- Non profit companies, which are the successor to companies limited by guarantee and section 21 companies; and
- For profit companies:

- private companies;
- public companies
- personal liability companies;
- state-owned enterprises/companies

### **What are the requirements for incorporation of a company? Do we still need to hire experts to draft the Memorandum and Articles of Association?**

A company is incorporated by the lodging of a Notice of Incorporation and adoption of a Memorandum of Incorporation (MOI), a document which replaces the Memorandum and Articles of Association, which is the sole governing document of the company. The Act imposes certain specific requirements on the content of a Memorandum of Incorporation, as necessary to protect the interests of shareholders in the company, and provides a number of default rules, which companies may accept or alter as they wish to meet their needs and serve their interests. The new Companies act has model Memorandum of Incorporations as attachments to be adopted by incorporators, depending on whether the company is a Non – Profit or a Profit Company requiring registration.

### **Is the name reservation process still a pre-requisite for registration under the new Act?**

No, those requiring the incorporation of a company will have a choice. An incorporator may choose four names and place those on the Notice of Incorporation together with the other required incorporation information for example, the directors, address of company etc. Those names are then tested by the Commission. If unsuitable for use, the registration number as provided by the Commission becomes the registered name of the company.

The other choice is for the incorporator to simply leave the section on the Notice of Incorporation dealing with names blank, which then indicates to the Commission that the incorporator chooses the Incorporation number as the name of the company.

In both cases, the full registration of the company continues as per normal.

Furthermore, the Act restricts a company name only as far as necessary to:

- a. Protect the public from misleading names which falsely imply an association that does not in fact exist;
- b. Protect the interests of the owners of names and other forms of intellectual property from other persons passing themselves off, or coat-tailing on the first person's reputation and standing; and
- c. Protect the society as a whole from names that would fall within the ambit of expression that does not enjoy constitutional protection because of its hateful or other negative nature

### **Is there a difference between SARS and the Companies and Intellectual Property Commission's (CIPC's) Annual Returns?**

Yes, there is a difference.

#### **The CIPC's Annual Returns:**

All companies must file its Annual Return within twenty (20) business days, after its incorporation anniversary date, and together with the supplementary documents as follows:

1. Companies required to have their financial statements audited, must file a copy of those audited financial statements
2. Companies voluntarily choosing to have their financial statements audited can elect to file a copy of those audited financial statements, or to file a document called a Financial Accountability Supplement, a new document which contains only the prescribed pertinent financial information of a company
3. All other Companies must file a Financial Accountability Supplement

### **Are there any changes regarding meetings and notices?**

Yes, there are major changes.

For example,

- Shareholders can be represented by way of a written proxy which is valid for 1 year
- Meetings may be conducted entirely by electronic communication or some members may participate in this manner
- The requirement is that they must be able to communicate simultaneously
- The notice periods for calling of meetings are:
  - 15 business days for public companies
  - 10 business days for private companies

Since the rights of debenture holders can only be altered by resolution of the debenture holders, the Act therefore provides for meeting of debenture holders. **Shareholders meetings**

- Board or person specified in MOI may call a shareholders' meeting at any time – upon written notice
- Must call meeting, if one or more written demands specifying purpose are made, by at least holders of 10% of the voting rights (or lower % if specified in MOI)
- Notice must specify : Date, time, place, purpose of meeting, copy of proposed resolutions, % of voting rights required for the resolution

- Only a Public Company must have an Annual General meeting – 18 months after incorporation, and then every calendar year.

## Resolution

- The majority for :
  1. a special resolution is 75% of shares voted
  2. an ordinary resolution is 51%.
- The Memorandum of Incorporation 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

## Why papers continue to write that very few people will be interested in being company directors under the new Act?

The answer to this question is two-fold.

Firstly, the duties of directors have been codified in the new Act but we still keep the common law duties of directors- based on the law of contract and delict.

Partial Codification: Act introduces a partial codification of directors' duties, which includes both a fiduciary duty, and a duty of reasonable care, which operate in addition to existing common law duties.

Secondly, Liability of directors

Director - includes alternate director, prescribed officer (CEO, MD CFO etc.), and Audit committee or board committee members. Directors will be held liable for breach of fiduciary duty, or delictual act, acting without authority, party to supplying false or misleading info about the company or untrue statement in a prospectus. This is good because it will hold directors responsible for the decisions that they take which affect the functioning and viability of the company.

## What happens in a case where the company has taken insurance for its directors to cover itself against liability?

### Indemnification and Insurance

A company may not indemnify a director for willful misconduct or breach of trust, or for a director acting without proper authority from the company, or undertaking a prohibited act (reckless or insolvent trading), or for perpetuating a fraudulent act.

A company may take indemnity insurance on behalf of its directors in order to aid in any lawsuit against the director as related to the company. A company is entitled to claim restitution from a director of a company or of a related company for any money paid directly or indirectly by the company to, or on behalf of that director.

## Does the concept of accountability and transparency apply to all companies regardless of size?

Yes, but the threshold is different. In order to provide a flexible regime that balances accountability and transparency, with a lessened regulatory burden, the Act provides for certain common requirements of all companies and differentiated requirements depending on their wider responsibility to the public and their social and economic impact. The following would illustrate the flexibility:

- All companies must prepare annual financial statements (AFS), but not all require an audit
- Public companies would be subjected to a more demanding regime and would also be required to have these AFS audited annually
- All companies would have to file Annual Returns with the Companies and Intellectual Property Commission
- Public companies would have to file a copy of their audited AFS with their Annual Return
- Public companies to appoint Company Secretary [inclusive of a juristic person/partnership], Auditors and Audit committees
- Certain private companies, which may have a greater responsibility to a wider public as a consequence of their significant social or economic impact may be required to have their AFS audited.
- All other companies must either be audited voluntarily or independently reviewed.

## What is the difference between judicial management of failing companies and Business Rescue?

Business Rescue is similar to judicial management of companies, but has additional remedies included to aid in the affective turnaround of a failimng company. Business Rescue is largely self-administered by the company, under independent supervision within the prescribed provisions as set out in the Act, and subject to court intervention at any time on application by any of the stakeholders. The most distinct feature of Business Rescue is that shareholders, employees, manufacturers, and suppliers are regarded as stakeholders and have a right to make an application for any company to be placed under business rescue and to participate in the turnaround strategy of the company. A Business Rescue Practitioner, which is a person appointed to turnaround the company has the power to suspend any agreement of a company, except contracts of employment and S35A and B Insolvency agreements. It is a democratic process as rebellious creditors/ stakeholders who are opposed to Business rescue R can be bought out after due diligence has been conducted.

## What offences are left after decriminalisation of the Act?

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

## What happens if a company does not comply with compliance notices as sent to the Company by the Commission, to effectively warn the company that it is failing in its regulatory duties?

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 imprisonment of up to 10 years, for a person to sign or agree to a false or misleading financial statements or prospectus, or to be reckless in the conduct of a company's business.