



**GUIDE FOR DIRECTORS,
MEMBERS AND TRUSTEES**

PARTNERING FOR SUCCESS

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IMPORTANT NOTE

This booklet is intended as an easy reference, pocket-sized guide for directors of companies, members of close corporations, and trustees of trusts (inter vivos and testamentary).

The information contained herein is a summary of some of the key aspects of various law applicable to these entities, and is issued to clients as a general overview of directors', members' and trustees' rights and obligations.

The booklet is set out in two parts. The first part covers current legislation based on the Companies Act, 1973, the Close Corporations Act 1984, the Corporate Laws Amendment Act 2006 and The Trust Property Control Act 1988 (These Acts will be referred to in the booklet as the Companies Act, CC's Act, CLAA and TPCA respectively).

The second part covers proposed changes to corporate law in South Africa. It deals with the Companies Bill, 2008, (referred to herein as the "Bill") and particularly in relation to its sections on directors and members and the proposed changes to their duties and responsibilities.

Please note that the second part refers to the PROPOSED repeal of the existing Companies Act by the Bill, which has not at the date of this publication, been gazetted. The process of corporate law reform is on-going and until the Bill has been promulgated, we anticipate that there may be changes to it.

Consequently, we recommend that professional advice be sought when dealing with any matters relating to the content of this booklet.

All reference to close corporations shall be in the abbreviated form of "CC". All references to the masculine gender shall include the feminine (and vice versa).

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

DIRECTORS OF COMPANIES

GENERAL INFORMATION ON COMPANIES

(Companies Act, 1973, as amended)

Formal structure, stringent controls, annual audit, registered auditor: IRBA standards
Separate legal personality
Types: private (Pty) Ltd, public (Ltd), Section 21, external Section 53(b) Incorporated
Financial Reporting: definition of widely held and limited interest companies introduced by CLAA and concept of differential financial reporting. See table 1 & 2 on page 43 for full definition and requirements for financial reporting (referred to as WHC's or LI company's hereinafter).
Perpetual succession - continues to exist even on death or resignation of shareholders or directors
In a company with share capital, the shareholders are the "owners", decide on matters of general policy, their liability is generally limited to the amount each invests in the company
Private company: up to 50 shareholders, which can be trusts, natural persons & corporate bodies. (see page 36: the Bill introduces concept of unlimited shareholder numbers in private companies)
Shares can be sold and transferred subject to Securities Transfer Tax
Public company: minimum of 7 members with no maximum limit
Separate tax payer, 28% tax rate, 10% STC, will become dividends tax

GENERAL INFORMATION ON DIRECTORS

DIRECTORSHIPS - NATURE

- The directors are the key people entrusted by law with the function of administering the company & are responsible for ensuring good corporate governance in the company;
- Different types of directors: executive & non-executive, & alternate directors. All carry responsibility to ensure that the company complies with the law and is properly governed;
- Executive directors are salaried and involved with the day to day running of the company, & alternate directors are appointed to act on behalf of a director when (s)he cannot personally fulfill his/her duties;
- The CLAA has introduced a definition of an independent non-executive director as "a person who is not involved in the day to day management

of the business and has not in the past 3 financial years been a full time salaried employee of the company or its group, and is not a member of the immediate family of an individual mentioned above”.

- Public company: minimum of 2 directors and a private company: minimum of 1. No maximum number of directors has been set, although this can be regulated by the articles of the company. The King Report on corporate governance suggests that there should be more non-executive directors to ensure that the board operates independently & is not an extension of the day to day management of the company;
- Many executive directors enter into a fixed term service agreement with the company, which further regulates their relationship with the company. The King Report recommends that the term of these contracts should not exceed 3 years;
- The “board” refers to the collective word used to designate directors when they act together as a group;
- The director functions as both a trustee and a consultant i.e (s)he is required to have the experience, skill, time & ability necessary to carry out his/her functions effectively, & should place the interests of the company first, and to focus on adding value to the companies assets, thereby building a successful business for the shareholders’ benefit.
- At common law, directors owe fiduciary duties & obligations of care and skill to the company, which are similar to that of a trustee;
- The directors are generally not personally liable for the debts of the company;
- Under certain circumstances, however, the corporate identity of the company may be disregarded e.g where the business is being conducted recklessly or with intent to defraud. In these circumstances, the persons responsible (usually directors) may become personally liable for the debts of the company (see pages 14 - 15)

APPOINTMENTS, DISQUALIFICATIONS, RESIGNATIONS, REMOVAL & RETIREMENT

APPOINTMENTS

- Only natural persons with legal capacity are eligible to be appointed as directors;
- The company’s shareholders are usually mandated in the articles to appoint directors, although in practice the board of directors appoints most directors. These appointments are then confirmed at the first Annual General Meeting (AGM) after their appointment;
- On appointment, a director is required to lodge a CM27 form (a consent to act as director) with the company within 28 days. It is an offence under the Act not to do so, although the appointment is still effective;
- Where a director is required to hold a qualification shareholding, (s)he must take this up within two months of the appointment;
- Prior to accepting an appointment, a director should carefully consider whether (s)he has the necessary expertise to act as a director, given the size, nature and complexity of the company.

DISQUALIFICATION: (SECTIONS 218 AND 219)

- The Board should ensure that any new director is not disqualified from being a director before the person is approached to act as a director.
- The Act sets out certain disqualifications from accepting an appointment as a director, but specifically states that a company may, in its articles of association, impose additional restrictions
- For a general list of disqualifications that apply see table 3 on page 44.

DIRECTOR'S RESIGNATION

- Directors may resign by tendering a letter of resignation,

REMOVAL FROM OFFICE: SECTION 220

- The shareholders may, by ordinary resolution, remove any director from office before the expiration of his/her period of office.
- Removal takes place even if the director has a service agreement, although depending on the circumstances the company may be liable to pay compensation to a director who has been removed from office. Special notice of the intended removal needs to be given to the company and to the director in question, who shall be entitled to be heard on the proposed removal at the meeting.
- A company may not pay compensation to a director for loss of office or in connection with arrangements and take-over schemes, unless full details have been disclosed to members and have been approved by special resolution (Section 227).

RETIREMENT

- Most articles require one third of the board to retire by rotation at each AGM. These directors are usually re-appointed but need not be, thus giving shareholders the opportunity to accept the retirement of directors they are not satisfied with.

DUTIES, RESPONSIBILITIES AND RIGHTS OF DIRECTORS

A. COMMON LAW DUTIES

▲ Duty of care & skill

The degree of care & skill required is determined objectively by considering how a reasonable person in a similar position & circumstances would have acted, and then comparing this to the director's actions. Each case would be considered individually and a director is not normally responsible for bona fide errors of judgement.

▲ Fiduciary duty

- Every director is bound at common law by a fiduciary duty to the company;
- In this role, the director acts both as an "agent" on behalf of the company, and as a "trustee" who controls company assets. These roles give rise to the following duties:

- to act in good faith toward the company;
- to act only within his/her powers & only for the purposes which benefit the company; a director who acts outside of his/her powers may bind the company to the transaction, but may be held personally liable to the company if a loss results. Alternatively, the shareholders may subsequently ratify his/her action by special resolution. Ratification will not be possible where the action falls outside the objects of the company.
- not to use for personal gain any information acquired in his/her capacity as director
- not misuse his/her position to enrich him/herself. This would normally exclude the general managing of a company that has the result of increasing the value of any shareholding that the director him/herself may hold in the company.
- to act in the best interests of the company,
- to exercise independent judgment in decision-making;

B. STATUTORY DUTIES

Purchase by company of its own shares: Section 38

- The Section 38 restriction to granting financial assistance for the purchase of shares has been lifted by the CLAA. The terms upon which assistance is to be given must be sanctioned by a special resolution of the company's members, and subsequent to the transaction, the consolidated assets of the company fairly valued must be more than its consolidated liabilities and, subsequent to providing the assistance and for the duration of the transaction, the company should be able to pay its debts as they become due in the ordinary course of business (this is retained in the Bill).

Restriction on power to issue shares: Sections 221 and 222

- Directors shall not have the power to issue or allot shares without prior consent of the company in a general meeting [provision is made for the company to grant a general authority to the directors to issue and allot shares but such general authority is only valid until the next annual general meeting (AGM)].

Loans to directors: Section 226

- A loan made on any basis other than a normal arms length basis is prohibited to a director or officer of:
 - the company
 - its holding company or any other company which is a subsidiary to its holding company
- A "loan" includes lending money, shares, debentures or other property, or any credit extended by a company where the debt concerned is not payable or being paid in accordance with normal business practice.
- There are certain exemptions from these provisions, specified in S226, the principal one of which exempts a company from compliance where it has obtained the consent of 75% of its members.

Disposal of the undertaking: Section 228

- The directors shall not have the power, save by virtue of a special resolution of its members, 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.

Interest in contracts: Sections 234 to 241

- Where any director is materially interested (directly or indirectly) in a contract that is of significance in relation to the company's business, (s)he is required to declare his/her interest therein. The company is required to keep a register of such contracts and the auditor must satisfy himself that such a register has been maintained. Should a director not disclose his/her interest (s)he may be required to account to the company for any profits (s)he makes as a result of the transaction. The transaction may also be voidable at the instance of the company.

Minutes of the meetings: Sections 242 and 245

- The minutes of all meetings of directors must be kept in a bound book with numbered pages in one of the official languages. Where a resolution in lieu of a meeting is prepared and signed, it must be inserted in the minute book and must be noted at the next meeting. In terms of Section 245 the directors present at any meeting must sign an attendance register.

Audit Committees: Section 269A

- A. In every financial year in which a company is a WHC, its board of directors shall appoint an audit committee for the following year (subject to certain exemptions);
- B. It must have at least two members who must be non-executive directors of the company who must act independently. (See definition on page 3). Also see table 4 on page 44 for definition of "acting independently" (CLAA).
- C. The audit committee of a WHC has the following duties with respect to the financial year for which it is appointed:
 - (a) nominate & appoint a registered auditor of the company, who is independent of the company;
 - (b) determine fees to be paid to the auditor ;
 - (c) ensure the appointment of the auditor complies with the Companies Act as amended & any other legislation governing auditors;
 - (d) to determine the nature & extent of non-audit services the auditor may provide to the company;
 - (e) to pre-approve any proposed contract with the auditor for the provision of non-audit services to the company;
 - (f) to insert into the financial statements to be issued in respect of that financial year, a report describing how the audit committee carried out its functions & stating whether or not the audit committee is satisfied that the auditor was independent;
 - (g) to receive & deal appropriately with any complaints from within or outside the company relating to the accounting practices or internal audit of the company or any related matter;
 - (h) to perform other functions determined by the board.
- D. A WHC 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;

Appointment & rotation of auditor

1. Where at an AGM no auditor is appointed or reappointed the auditors shall within 30 days from the date of meeting, appoint a person to fill the vacancy.
2. The auditor may not be a director, officer, or employee of the company or act as such for a person performing the secretarial work for the company. Neither may 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; to the extent that these would be subject to its own auditing, internal audit or tax advisory services or any other services determined by its audit committee.
3. 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
4. The same individual may not serve as the auditor or designated auditor of a WHC company for more than 5 consecutive financial years;
5. If an individual has served as auditor or designated auditor of a WHC company for 2 or more consecutive financial years and then ceases to be the auditor, that individual may not be appointed again until after the expiry of at least 2 further financial years;
6. Not more than 1 month before the Board of a WHC will meet to approve the annual financial statements for any financial year, the auditor must attend a meeting of the audit committee to consider matters that appear to the auditor or audit committee to be of importance and relevant to the proposed AFS and to the affairs of the company generally;
7. At every AGM of a WHC, at which the AFS of the company for a financial year are to be considered the auditor must attend & respond to the best of his/her ability to any question relevant to the audit of those AFS;

The Bill retains most of the requirements for the appointment of auditors and audit committees, however with some slight amendments as follows:

1. The following sections in the Bill relate to Public companies and SOE's only.
2. S90: Appointment of auditor:
 - an additional requirement to those set out in point 4 above is that a person who fits the description cannot be appointed as auditor if (s)he filled those prohibited criteria at any time during 5 financial years immediately preceding his/her date of appointment.
3. S92: Rotation of auditor
 - the individual auditor may not be appointed again after the expiry of at least five financial years and not two as per the CLAA.
4. S94: Audit committees:
 - An audit committee will have an additional requirement of commenting on the AFS, accounting practices and internal financial control of the company. Also the requirements for composition

of the committee are slightly different in the Bill. The Bill states that: Each member of an audit committee of a company must (a) be a director who satisfies the requirements of education, skills & experience, and must act independently, (b) there must be at least 3 directors appointed to the committee and all must be non-executive directors as defined.

Accounting records: Section 284

- The directors are empowered to inspect the accounting records of the company at any time and it is a duty of the directors to ensure that all such necessary records are kept by the company at its registered office, or such other place as the directors think fit.
- Any company or any director or officer which fails to do so shall be guilty of an offence.

Annual financial statements: Section 286

- It is the duty of the directors to cause the annual financial statements (AFS) of the company to be made out and laid before the company at the AGM.
- The AGM must be held within nine months of the company's financial year-end, or in the case of the first year, within eighteen months of the date of incorporation of the company (retained by Bill for public companies).

Disclosure of loans: Section 295 and 296

- The AFS of a company must disclose any loans made to a director, whether by way of monetary loans, shares, debentures or other property made available to a director. It should be noted that "loan" includes extended credit granted.
- Where a company has made a loan to a person who is subsequently appointed as a director, the details must be disclosed in the AFS.

Emoluments: Section 297

- The AFS must disclose details of the aggregate amount of the directors' emoluments, current and past directors' pensions and compensation to past directors for loss of office, and details of directors' service contracts. Directors are required to supply the necessary information to the company or its auditors for this purpose (the Bill requires a special resolution to be passed approving directors remuneration).

Approval of AFS: Section 298

- The directors are required to approve and sign the AFS and reports of a company (other than the audit report) before these are circulated or published. These may be signed on their behalf by 2 of the directors or if there is only 1, then that director. The directors are responsible for the content and integrity of the annual financial statements and related financial information included in the report. It is the directors' responsibility to ensure that the annual financial statements fairly present the state of affairs of the company as at the financial year end and is ultimately responsible for the system of internal financial control established by the company. To enable him/her to meet these responsibilities, the director should set standards for internal control aimed at reducing the risk of error

or loss in a cost effective manner. These standards include proper delegation of responsibilities within a clearly defined framework, effective accounting procedures and adequate segregation of duties to ensure an acceptable level of risk.

Directors' report: Section 299 and Schedule 4, part III

- Except in the case of a wholly owned subsidiary of another company incorporated in RSA, every company must include in its AFS a report of the directors dealing with the state of affairs of the company, its business performance and its profit or loss.

Interim reports: Section 303

- Every WHC other than a wholly owned subsidiary, shall not later than 3 months after the expiration of the first period of 6 months of its financial year, send to every member and holder of debentures of the company an interim report on the business and operations of the company, or in the case of a holding company, of the company and its subsidiaries during the said period of 6 months, and the results thereof, subject to certain proviso's as per Section 303(1)(a).

Statement of affairs: Section 363

- Where it is intended to pass a resolution for a creditors' voluntary winding up of the company, the directors are required to prepare a statement of the affairs of the company. This is to be laid before the meeting at which the resolution is to be considered.

Liquidation meetings: Sections 414 and 415

- The directors are required to attend meetings of companies in liquidation and may be called upon to give evidence under oath.

Directors of dissolved companies: Section 421

- The registrar of companies is required to maintain a register of directors of companies that have been dissolved and were unable to pay their debts.

C. OTHER DUTIES

Duties in terms of the Memorandum & Articles of Association

- The Act provides a standard set of articles that many companies use as a basis but may amend to meet their specific needs. The directors should familiarise themselves with the contents thereof since it will invariably impose duties, limitations and/or powers on directors.
- The "memorandum" refers to the external relationships of the company and the "articles" refers to the internal affairs of the company.

Compliance with legislation

Additionally a director must also take note of the following:

- Industry or sector specific legislation
- Corporate governance minimum requirements as per King II report
- 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
- Insolvency Act
- Trust Property Control Act
- VAT Act
- National Credit Act
- BBBEE Act
- Basic Conditions of Employment Act

(note: this list is not intended to be exhaustive and does not purport to include all acts that may be relevant to directors)

Responsibilities - decision making & delegation

- Shareholders do retain ultimate responsibility for the company and have the power to remove or not to re-appoint directors, however, they do delegate the day to day running of the company to directors, who in turn, appoint & supervise management;
- While many of their duties can be delegated to management, the directors retain overall responsibility over management, and have a duty to monitor management's performance, and to ensure smooth running of the company.

Further administrative duties

- A shareholders register must be available (Updated) Section 113
- A minute book of shareholders meetings must be kept available for inspection during normal office hours Section 206(1)
- The registrar may request a list of all current shareholders (including all transfer documents)
- A copy of all special resolutions must be attached to the articles and memorandum of association

D. RIGHTS OF DIRECTORS

- 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 & attend & vote at board meetings;

THE BOARD & MEETINGS

Functioning of the board

Each board will function according to a historically determined way or as determined by the chairman.

Timing

- Directors decide on how often they shall have their regular meetings - fortnightly or monthly - depending on each company's requirements. Usually not less than once per quarter.
- The directors should ensure that the meetings are held regularly so that all directors are adequately informed about what is happening in the company.

Notice

- If regular dates are set for these meetings, then no notice need be given.
- The directors should insist on receiving written reports on matters to be discussed at a directors' meeting and an agenda for that meeting should be received at least 48 hours prior to the meeting so that they can acquaint themselves with the matters to be discussed;
- Meetings may however be called at short notice, whenever a matter arises, and which cannot be left for decision at the next regular meeting. If such a special board meeting is called, then the notice period needs to be reasonable and is usually in the form of a letter or telephone call;
- Proceedings at Board meetings may be usually of an informal character, (unlike shareholders meetings); provided significant decisions are recorded;
- All board documents relevant to the proposed meeting should be attached to the notice.

Quorum at board meetings

- The articles generally prescribe the number of directors required to constitute a quorum. Standard articles state that a quorum may be fixed by directors & unless so fixed, shall, when the number of directors exceeds 3, be 3, and when the number does not exceed 3, shall be 2.

Agenda

Typical items that should be included in the agenda:

- Items from previous meetings
- Discussions regarding the various operational, financial and human resources reports
- Formulation of a medium to long term strategy for the company
- Review yearly budgets
- Formulation of policies and procedures and the monitoring thereof
- The review of internal controls, compliance thereof, and internal and external audit procedures
- Cash flow requirements and planning
- Medium to long term funding requirements

Sub-committees

Certain matters may be referred to various sub-committees, especially where they are specialist in nature. These matters may be delegated for various reasons, but the board will still ultimately remain responsible. Typical examples of such sub-committees are:

- Audit Committee
- Risk Committee
- Remuneration Committee

Chairperson and CEO

It is preferable that the chairperson is an independent non-executive director, as this segregates the duties of chairperson and CEO. The chairperson is mainly responsible for all matters relating to the board, while the CEO must run the company on a day-to-day basis and implement all strategies and policies approved by the board.

The role of the chairperson would be the leadership of the board and the interlinking relationship with management. In addition the chairperson should be:

- Involved in engaging any new directors' appointments
- Ensure that board meetings achieve positive results
- The liaison person who interacts with the shareholders
- Ensure that all matters that should be discussed, are included in the meeting agendas.

The CEO will be responsible for:

- Running the company under his vision, business acumen and the making of strategic decisions
- Ensuring that the correct leadership structures are in place

Voting

- Decisions decided by majority vote i.e the majority of those actually voting;
- Voting usually takes place by a show of hands;
- A director thus has 3 alternatives to any question put to the meeting - ie (s)he may vote for or oppose the motion, or abstain from voting;
- Each Director has one vote at a board meeting (irrespective of his shareholding - if any);
- The articles may provide that the Chairperson may have a second or casting vote in the event of an equality of votes.

Director's contribution at board meetings

- The directors, in order to justify the appropriateness of their appointments, should be able to make a useful contribution during the process of board discussions. They should therefore:
 - Understand the core business of the company
 - Be able to evaluate risk assessment pertaining to the company
 - Devise short, medium and long term strategic plans
 - Assess the medium and long-term financing or capital requirements of the company
 - Act in building up the company culture and ethos

Minutes of meetings

- The company secretary must record all the activities that take place at the meetings. These minutes must be clear and concise and indicate the agreed conclusion.
- The directors should insist that they receive a copy of the official minutes of all directors' meetings within a reasonable period after each meeting - say 3 to 5 days. Attached to each set of minutes should be an action list - detailing who has been allocated to carry out the various tasks.

Directors own notes/ record of meetings

- The directors may be placed in the very awkward position, where perhaps some years later they may be required to defend decisions made at a directors' meeting. This may even be required as part of legal proceedings.
- For this reason, directors should prepare their own notes at each meeting and confirm in writing to the chairman any concerns or subsequent queries that they may have on any aspects of the company's operations.
- The directors should consider maintaining a filing system whereby they maintain all board papers, minutes, file notes, director's own record of meetings and correspondence for at least seven years after a directors' meeting.

PERSONAL LIABILITY OF DELINQUENT DIRECTORS & OFFENCES

False statements and evidence: Sections 249 to 251

- Any person who in any statement, return, report, certificate, financial statement or other document... whether in non-electronic or electronic format, makes a statement which is false in any material particular, shall be guilty of an offence. Further, a director and/or officer who falsifies accounting records or statements in relation to the company's affairs, shall be guilty of an offence.

False or misleading reports: Section 287A

- It is an offence for any auditor or other person (including a director) to be party to false or misleading information in the financial statements of a company. Non-executive directors may thus also become liable in certain circumstances.

Section 423

- If in the course of the winding-up or judicial management of a company, it is found that any promoter, or officer has misapplied, retained, or become accountable for the loss of any money or property of the company, such officer may be required to make restitution to the company, and/or be made criminally liable.
- The Court may order a director who has so retained any property or who has been guilty of a breach of trust, to return such property to the company or to compensate it for the breach of trust.

Section 424: Liability for fraudulent conduct of business:

- When it appears that any business was or is being carried on recklessly, or with intent to defraud creditors of the company, any person who was knowingly a party to the carrying on of such business, shall be personally liable for all or any of the debts of the company so incurred. The court may thus declare a director concerned personally liable for the debts of the company in these circumstances and that person may also be guilty of an offence and subject to criminal proceedings.

Section 425: Trading in insolvent circumstances:

- If a company is trading in insolvent circumstances, a person party thereto could be held personally liable for its debts.
- This is an area about which directors need to be very diligent. They should ensure that the company does not trade recklessly while it is insolvent. Insolvent trading means that the company continues to trade with the public and continues to incur further debts, while the company is unable to meet its existing debts or will be unable to pay the debts currently being incurred. Every company director has a duty to ensure that the company does not incur additional debt where there are reasonable grounds for suspecting that the company is insolvent at the time the debt is incurred, or would become insolvent by incurring the debt. For these purposes, debts include contingencies, guarantees and sureties.
- The test of solvency is - can the company pay all its debts as and when they become due and payable?
- There are numerous signals that indicate that the company is in financial

difficulty. The directors should be aware of these so that they can ensure that appropriate action is taken to prevent the company trading while it is insolvent.

These include:

- Low operating profits or losses being incurred
- Problems in paying creditors in accordance with the negotiated payment terms
- Problems in meeting loan repayments to banks, financial institutions and other lenders
- Problems in paying income tax commitments
- Suppliers refusing to give the company credit
- Legal action being instigated against the company by any supplier for the non-payment of goods or services
- High debtor balances, where there are large amounts owing above the normal credit terms allowed by the company
- High stock or work in progress levels, above the normal value for which the company has budgeted
- Excessive investment in capital expenditure, especially where not budgeted for
- Significant departures from the budget or cash flow forecast prepared for the business

Section 440FF: Offence to issue financial report that fails to comply with financial reporting standard

- This new section applies to WHC and provides that where a WHC issues a financial report that fails to comply with a financial reporting standard, every director of the company that has signed or was party to the financial report, shall be guilty of an offence. This has the effect of ensuring compliance - if a company fails to co-operate, the matter may be handed over for prosecution in terms of this section.

Section 217&218: Disqualified directors who continue to act:

- A person who is disqualified to act as director and continues to do so, is guilty of an offence, and shall be liable, jointly & severally for the debts of the company incurred for the period during which (s)he knew or could reasonably be expected to know of the disqualification. - See *disqualifications applicable on page 44*.

Failure to deduct PAYE:

- Directors or shareholders who control, or are regularly involved in the management of the company are potentially personally liable for the payment of employees tax, including any penalty or interest, if they have not withheld the same from the employees remuneration and paid it over to SARS within 7 days.

INDEMNITY & RELIEF OF OFFENCES BY DIRECTORS

Section 247

- Any provision (whether in a contract or in the articles) which purports to exempt a director, officer or auditor from any liability which would attach to him in respect of negligence, default, breach of trust or duty, shall be void.
- A company may however take out insurance to indemnify its directors or officers for negligence, default, breach of duty or of trust.

Section 248

- If, in any proceedings for negligence, default, breach of duty or of trust against a director, officer or auditor, it appears to the court that the person has acted honestly and reasonably, the court may relieve him, wholly or partially, of his liability. The burden of proof is on the director to show that (s)he acted honestly and reasonably.

A BRIEF OVERVIEW OF KING II

- The 2002 King Report was made public on 26 March 2002;
 - It contains a Code of Corporate Practices and Conduct ('the Code'). These recommendations are voluntary, however, as far as the JSE Securities Exchange South Africa (JSE) is concerned, companies must adhere to the King Report recommendations or indicate the extent to which they have deviated from them;
 - Furthermore, the final clause of the Code places a duty and responsibility on all boards and individual directors to ensure that its principles are observed;
 - The Code is seen as a "living document" which may need periodic updating by the King Committee to ensure that it remains current;
- The code applies only to certain categories of business enterprises (referred to as "affected companies"), notably:
- Companies listed on the JSE
 - Banks, financial and insurance entities
 - Public sector enterprises falling under the Public Finance Management Act and the Local Government Municipal Finance Management Bill (still to be promulgated), including any state departments acting in terms of the Constitution or legislation.
 - Other companies falling outside these categories should nevertheless consider application of the Code so far as applicable. Stakeholders interacting with such companies are encouraged to monitor their application of the Code's principles.

The King Report is divided into 6 sections, as follows:

- Boards and directors
- Risk management
- Internal audit
- Integrated sustainability reporting
- Accounting and auditing
- Compliance and enforcement

Before one can consider how a company is managed and controlled, one needs to understand the company's context and in particular, its strategic direction. It is significant to note that, apart from endorsing the unitary board structure referred to in the first recommendation of the King Report, the board must give strategic direction to the company. Accordingly, Chapter 2 focuses on corporate strategy and its implementation and it is only in Chapter 3 that we turn to the nature and function of the board of directors.

THE BOARD OF DIRECTORS (ACCORDING TO KING II)

OPERATION OF THE BOARD

Responsibilities

- Providing the medium and long term strategy of the company and the strategic direction
- Board appointments
- Appointment of the CEO
- Review of management goals and plans
- Annual risk assessment and risk strategy
- Identify key risk and performance areas
- Monitor compliance with law and other regulations
- Communicate relevant matters to all stakeholders via press releases
- Evaluate whether the company is a going concern
- Ensure that all rules and regulations have been adhered to
- Directors' remuneration to be transparent

Rights

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

Functions

- At least one meeting per quarter
- The majority of directors to be non-executive
- There should be checks and balances to ensure no one block dominates the board of directors
- The non-executive directors should have sufficient experience and skill (which must be determined before their appointment)
- The positions of CEO and chairman should be separated

Remuneration

- The directors should be paid a market related remuneration
- Remuneration should be based on performance
- Bonuses in the form of share options are preferred
- Disclosure is required for all forms of remuneration

Appointment

- The details of proposed directors are to be included in director's minutes
- The appointment process should be transparent
- Training is to be provided for directors to ensure optimum performance

It is expected that after the enactment of the Bill, the King III report will shortly follow, which will allow for a spirit of the law interpretation of the Bill and corporate governance in general.

MEMBERS OF CLOSE CORPORATIONS

GENERAL INFORMATION ON CC'S & MEMBERS

Simpler, less formal structure, no audit required (see Table 2 page 43)
Unique to SA, not readily recognised internationally
Members hold interests in the entity, and are involved with management (similar to a partnership)
No division between “ownership” & “control” as with company’s
Perpetual succession - continues to exist even on death or resignation of members
May provide financial assistance to buy members interest
Separate tax payer, 28% tax rate, 10% STC, will become dividends tax CC’s may be appointed as accounting officers of CC’s (see page 22)
Abbreviation CC or BK required to be subjoined to name used by CC. Now includes all other official languages eg isiXhosa and isiZulu - KB, and Sepedi (KK).
CC’s will be phased out by 2017

MEMBERSHIP - NATURE

1. Minimum of 1 and maximum of 10 members
2. Natural persons can be members. A natural or juristic person in his/her capacity as trustee of an inter vivos trust can be a member of a CC subject to the proviso’s as of Section 29 (see page 19);
3. If an inter vivos trust is a member, the number of beneficiaries on the trust plus the total number of members must not be more than 10;
4. Each member holds an interest, expressed as a percentage, in the CC, the aggregate of which must always be 100%. Two or more persons shall not be joint holders of the same members interest in a CC;
5. The word “close” in “close corporation” depicts the “close” relationship between members;
6. Unlike shareholders of companies, a member of a CC owes a “fiduciary duty” to the CC similar to that of a trustee;
7. Limited liability: the member is not generally personally liable for the debts of the CC. In other words, the members are not liable for the liabilities & obligations of the CC merely by virtue of the fact that they are members;
8. If a member stands surety for the debts of the CC, (s)he then incurs personal liability by reason of the suretyship;

9. Under certain other circumstances (see page 21) members will incur personal liability for the debts of the CC;
10. Member's interests can be sold;
11. Transfer of member's interest are subject to Securities Transfer Tax.

APPOINTMENTS & QUALIFICATIONS

THE FOLLOWING MAY BE MEMBERS OF A CC:

NATURAL PERSONS

- any natural person (includes non-residents);
- a minor person under the age of 18; however he/she must be represented in the CC by his/her guardian;
- an insolvent, deceased or mentally disordered person, and any other person with less than full legal capacity (however he/she must be suitably represented by his/her curator, executor, legal representative or trustee (whichever is applicable). (The representative may be either a natural or a juristic person).

TRUSTS

Testamentary Trust

A trustee of a testamentary trust may become a member of a CC in his/her/its capacity as Trustee acting for the time being on behalf of the Trust (nominee officii). Such Trustee may be either a natural or juristic person, provided that:

- No juristic person shall directly or indirectly be a BENEFICIARY of that trust;
- If the Trustee is a juristic person, it must not be controlled (directly or indirectly) by a beneficiary of that Trust;

Inter Vivos Trust

A Trustee acting for the time being on behalf of the Trust, (nominee officii) may be appointed as a member (whether the Trustee is a natural person or a juristic person), provided that:

Section 29(1A)

- no juristic person shall directly or indirectly be a BENEFICIARY of that trust;
- the member concerned shall, as between himself or herself and the CC, personally have all the obligations and rights of a member;
- the CC shall not be obliged to observe or have any obligation in respect of any provision of or affecting the trust or any agreement between the trust and the member concerned of the CC; and
- if at any time the number of natural persons at that time entitled to receive any benefit from the trust shall, when added to the number of members of the CC at that time, exceed 10 (TEN), the members interest held by the trustee in nominee officii on behalf of the trust shall cease to exist, and shall not again become applicable, even if the number is reduced at a later stage. The membership of such persons/trust as per the above, shall commence on the date of registration of

the founding statement or amended founding statement as the case may be.

A juristic person (eg a company or another CC) may NOT either directly or indirectly hold a member's interest in a CC.

DUTIES, RESPONSIBILITIES AND OBLIGATIONS OF MEMBERS

A. INTERNAL RELATIONS

Fiduciary Position of Members

Each member stands in a fiduciary relationship to the CC. This means that he/she:

- shall act honestly and in good faith, in the best interests of the CC, and shall not exceed the powers that have been granted to him/her by the CC;
- shall avoid any material conflict between his/her own interest and that of the CC, specifically:
- shall not derive any personal economic benefit to which (s)he is not entitled to by reason of his/her membership of the CC;
- shall notify every other member as soon as is practicable of the nature of any direct or indirect material interest which (s)he may have in any contract with the CC;
- shall not compete in any way with the CC in its business activities;
- shall reimburse the CC for any loss suffered to the CC or any benefit that the member has derived where there has been such a material breach of his fiduciary duty;
- that where a member has failed to disclose his material interest, the contract is voidable at the option of the CC.

Liability of Members for Negligence

- A member shall be liable to the CC, where in the carrying on of the business of the CC, (s)he fails to act with a reasonable degree of care and skill as can be expected from a person of his/her knowledge and experience.
- This liability shall not be incurred where the act was either preceded or followed by the approval of all members of the CC, where such approval was taken with knowledge of all the material facts regarding the act.
- A member can bring an action on behalf of the CC against another member in regard to either of the above.

Unfairly prejudicial conduct

- Any member of a CC who alleges that any act or omission by the CC or by another member is unfairly prejudicial, unjust or inequitable to him or her or that the affairs of the CC are being conducted in such a way, may make an application to Court, which Court will accordingly make an order as it sees fit.

Prohibition of Loans to Members

- A CC shall not, directly or indirectly, make a loan to:
 - a member,
 - any CC in which the members hold more than 50%,
 - or any company or juristic person that is controlled by the members, unless the loan is approved in writing by all the members of the CC.

Any member who permits such loan contrary to the above is liable to indemnify the CC and any other person (who had no knowledge of the contravention) against any loss directly resulting from the invalidity of such loan, and is guilty of an offence.

B. EXTERNAL RELATIONS

Powers of Members to bind CC

- any member of a CC, when dealing with a 3rd party, shall be considered to be an agent of the CC;
- Any member shall be able to bind the CC in dealing with a third party, whether or not (s)he is carrying on the business of the CC, unless the 3rd party has knowledge or reason to believe that the member is acting without the necessary authority of the CC. In such a case, the transaction will not be binding on the CC, unless it was expressly or impliedly authorised by the CC in advance or ratified by it after the event.

C. PERSONAL LIABILITY FOR CC'S DEBTS

Liability of Members for Debts and Negligence

Certain circumstances exist where the members of a CC shall be jointly and severally liable together with the CC for the debts of the CC as follows:

- where the name of the corporation is used without the required abbreviation (CC/CK/KB/KK-whichever applicable);
- where a member fails to make his members contribution initially (is usually R100 at incorporation);
- where a juristic person or trustee of an inter vivos trust holds a members interest either directly or indirectly in contravention of Section 29;
- where a CC makes a payment for a members interest where certain statutory requirements are not complied with;
- where the CC gives financial assistance in connection with the purchase of a members interest and immediately thereafter the CC does not remain solvent and liquid;
- where a person takes part in the management of the CC where he is disqualified from doing so;
- where the office of accounting officer is vacant for a period of 6 months.

Reckless or Fraudulent Trading

If at any time the business of the CC is being carried on

- recklessly, with gross negligence or

- with the intent to defraud any person, or for any fraudulent purpose a court may declare any person who is party to the carrying on of the business in such manner, liable for all or any of the debts of the CC. In addition, where the business of the CC is carried out as contemplated herein, every person who is knowingly or a party to same shall be guilty of an offence in terms of the CC Act, without prejudice to any other criminal liability that may be incurred. Note that this includes persons other than members.

Deregistration and Members Liability

- If the Registrar has reasonable cause to believe that the CC is not carrying on business, he shall serve a letter by certified post on the CC, in which the CC is notified and informed that if it does not within 60 days from the date of such letter, inform the Registrar that it is in fact carrying on business, the CC will be deregistered.
- In addition, if all members sign a letter addressed to the Registrar in which they inform him that the CC has ceased trading and that it has no assets or liabilities, the Registrar may deregister the CC.
- If a CC is deregistered while having outstanding liabilities, the members of the CC at the time of such deregistration, shall become jointly and severally liable for the CC's outstanding liabilities.

Financial Assistance for Acquiring Member's Interest

A CC may give financial assistance (whether directly or indirectly and whether by means of a loan, guarantee, the provision of security or otherwise) for the purpose of any acquisition of a member's interest in that CC only:

- with the previously obtained written consent of every member of the CC for the specific assistance
- if, after such assistance is given, the CC's assets, fairly valued, exceed all its liabilities
- if the CC is able to pay its debts as they become due and payable in the ordinary course of business
- if the rendering of such financial assistance does not cause the CC to be unable to meet its obligations as they become due in the ordinary course of business

If any of the above occur, immediately after giving that assistance or acquiring that interest, the members will have a personal liability to the creditors prejudiced as a result.

Appointment of firms as Accounting officers of CC's

- A CC may appoint as its accounting officers (a) a firm trading as a common law partnership (b) a firm of accountants or auditors as defined in the Public Accountants and Auditors Act, 1991.
- A sole proprietor conducting his business under a business name cannot be appointed as a firm, and he will have to be appointed in his personal capacity.

MEETINGS OF MEMBERS

Any member may call a members meeting by giving notice stipulating the purpose of the meeting and unless the association agreement (if applicable) provides otherwise:

- the notice shall contain the date, time and venue, which should all be reasonable taking into account all members entitled to attend
- $\frac{1}{3}$ of the members present at the meeting shall constitute a quorum
- only members present at the meeting may vote
- These minutes should be recorded and be entered into the minute book and held at the CC's registered office.
- A resolution, in writing, and signed by all the members and entered into the minute book, shall be valid as if passed at a meeting at which the members were present.

INTERNAL RELATIONS - ASSOCIATION AGREEMENTS & VARIABLE RULES

Association Agreements

- Where two or more members exist, these members may at any time enter into a written association agreement signed by or on behalf of each member which has the effect of regulating the internal relations between the members and between the members and the CC (provided that it is in a manner that is not inconsistent with the provisions of the Act).
- Such association agreement should be kept at the registered office and should be available for inspection by any member of the CC.
- Any new member of the CC shall be bound by any existing association agreement between the other members, as if (s)he had signed it as a party thereto.

Variable rules relating to internal relations

If the members do not enter into an association agreement, their internal relationship is governed by the Act, and in particular, by the variable rules laid down in Section 46, as follows:

- each member shall be entitled to participate in the carrying on of the business of the CC
- members shall have equal rights with respect to the management of the business of the CC provided that written consent by members holding at least 75% of the members interest shall be required in order to:
 - change its principal business
 - dispose of the whole, or substantially the whole, undertaking of the corporation;
 - dispose of all, or the greater portion of, the assets of the corporation; and

- acquire or dispose of immovable property
- voting at meetings concerning the CC's business shall be decided by a majority vote at the meeting of members
- at any meeting of the members, each member shall have the number of votes that corresponds to his percentage member's interest ;
- the CC shall indemnify each member that incurs expenditure on its behalf in the ordinary course of business or for the preservation of any property owned by it
- payments that are made to members only by virtue of their membership shall be made as agreed and in proportion to their members interest.

REGISTRATION REQUIREMENTS TO FORM A NEW CC

1. Lodge founding statement (CK1) or amended founding statement (CK2) at the Companies & Intellectual Property Registration Office (CIPRO), together with annexures.
2. Registration can be effected electronically on the CIPRO website (www.cipro.gov.za) or manually;
3. The CK1 or CK2 sets out the structure of the entity.
4. Once registered, CIPRO gives notice of the registration in the Government Gazette, issues a Certificate of Incorporation and assigns a registration number to the CC. The CC then officially comes into existence as a juristic person in its own right.
5. The CC continues to exist until it is either dissolved or deregistered. It is deregistered at CIPRO when the founding statement is cancelled and it loses its registration number.

TRUSTEES OF TRUSTS

GENERAL INFORMATION ON TRUSTS

<p>The Trust Property Control Act (TPCA) defines an ownership trust as “when the creator of the trust, “the Founder”, has handed over to another “the Trustee”, the ownership of property, which..is to be administered by the Trustee, for the benefit of some person other than the Trustee (the”beneficiary”), or for an impersonal object”.</p>
<p>The Trustee is owner of the trust property & is required to administer it in terms of the trust deed;</p>
<p>A bewind trust is defined in the same way except ownership is transferred to the beneficiaries & the property is placed under the control & disposal of the trustee in terms of the deed.</p>
<p>(For purposes of this booklet, trusts as defined in the TPCA will be dealt with)</p>
<p>“Property” in a trust may be movable, immovable, including contingent interests in property, which are to be administered or disposed of by a trustee in terms of the deed</p>
<p>The essential elements for creating a valid trust are: (a) a serious intention to create it (b) the intention is expressed in a manner which is legally valid in order to create an obligation eg a deed (c)the trust property must be determined or easily determinable (d) trust object must be clear & lawful</p>
<p>Treated as a separate legal entity in many circumstances eg for income tax,VAT, transfer duty & registration in the deeds office;</p>
<p>Perpetuity- the trust ordinarily continues to exist as an entity, notwithstanding the death of the founder, a trustee or beneficiary.</p>
<p>Audit not required by law.</p>

TYPES OF TRUSTS

1. Inter Vivos Trust: created during one’s lifetime. Established by a trust deed which sets out who the Founder, Trustees & beneficiaries are, defines powers & duties of Trustees & how & when the Trust is to be wound up or amended. Founder may also be co-beneficiary and/or Trustee. Founder usually donates assets (albeit nominal) to the Trust.
2. Testamentary Trust: is created in a Will and comes into effect only on the death of the Testator. Since the Testator is also the Founder, (s)he cannot also be co-beneficiary and/or Trustee. If the Will is invalid for any reason, the Trust will not come into effect.
3. Trusts with an impersonal object (e.g charity): the emphasis in this trust falls on the pursuance of a charitable or other impersonal goal, and thus “beneficiaries” are not necessarily named, and the choice of which institution/persons shall benefit may rest with the Trustee in his/her discretion provided the object of the trust is thereby pursued by the Trustee;

4. Empowerment/Employee Trusts: (inter vivos). Main objective is to empower staff and afford them the opportunity of meaningful participation and “ownership” in the business venture.
5. Business Trusts: (inter vivos). Main objective is to carry on business with a profit incentive.
6. Family (private) Trusts: (can be testamentary or inter vivos). Its main object is the protection & maintenance of trust property, for the benefit of minor children, or family relations of the Founder.
7. “Special Trusts”: two types:inter vivos: a trust created for the maintenance & care of a person with a mental illness or physical disability which precludes him/her from earning income, OR testamentary: created by Testator solely for the maintenance & care of his/her blood relatives who are minors (under 18) at the date of the Testator’s death.
8. Discretionary / non-discretionary: (can be testamentary or inter vivos) indicates whether the trustee has been given discretionary powers to nominate income and/or capital beneficiaries,as well as how & when & the ratio of any such award, as long as a “class” of potential beneficiaries has been named. In terms of non-discretionary trusts, the Trustees are not given any discretion in the deed, and the beneficiaries and their benefit(s) - capital and/or revenue - are fixed and predetermined.

NATURE OF OFFICE OF TRUSTEE

1. The trustee acts in an official capacity, which is fiduciary in nature;
2. The fiduciary office means a position of “trust”. The trustee must honour the trust placed in him/her, and always act in the best interests of the trust beneficiaries and the trust;
3. A trust may be properly established with only one trustee, there is no upper limit to the number of trustees who may be appointed, however the number of trustees in a business trust is limited to 20;
4. A natural person and a corporate person may be a trustee of a trust;
5. The trustee is not personally liable for the debts of the trust & trust assets do not form part of the trustee’s estate in the event of sequestration;
6. Recent case law requires that in the case of discretionary family trusts at least one independent outside Trustee be co-appointed;
7. A trustee can also be a beneficiary of a trust, but a sole trustee may not also be a sole beneficiary of a trust, as a trustee by definition holds & administers property for some person other than him/herself;

REGISTRATION REQUIREMENTS TO REGISTER INTER VIVOS TRUST

1. the requirements for registering a trust are relatively simple;
2. the trust deed, letters of acceptance, appointment of accounting officer or auditor (whichever applicable), undertaking by trustees and statement of case to the Master to dispense with the requirement for security are all lodged at the Master’s office in the provincial division applicable, together with the required

Revenue Stamp affixed to the deed, and provided all the requirements for registration are met, the Master will register the trust, provide it with a trust deed number and issue letters of authority to the trustees, authorising them to act.

APPOINTMENTS, QUALIFICATIONS & REMOVAL

APPOINTMENTS

- Most natural persons and corporate bodies qualify for appointment as Trustees;
- A minor (under 18) may be a trustee, but only with his/her guardian's consent;
- At the Master's discretion, a non-resident person may be a trustee of a trust registered in South Africa;
- A corporate body which is appointed as Trustee is normally represented by a natural person (nominee) who has been nominated by that corporate body to act on its behalf;
- The Trust Deed can make special provision for specific qualifications required by Trustees and limitations on appointments;
- To qualify for exemption from the provision of security, the Master normally requires that a Trustee must have previous experience of trust administration or that (s)he must be assisted by an experienced person;
- No person can be forced to act as Trustee against his/her will.
- A Trustee's appointment will not be effective until (s)he has accepted the appointment (Letter of Acceptance as Trustee).
- Even if a Trustee has accepted his/her appointment, (s)he may not ACT as Trustee until such time as (s)he has received written Letters of Authority from the Master of the High Court.
- A Trustee is liable for any unlawful act committed in the handling of the Trust affairs prior to the issue of Letters of Authority.

Trustees can be appointed in one of the following ways:

1. In terms of the Trust Deed, which may provide for (a) the appointment of the initial Trustees (b) the filling of vacancies and appointment of additional co-trustees by existing Trustees (this is known as "the power of assumption"), or by the beneficiaries or the founder;
2. In terms of a Will (testamentary trusts), whereby the Testator will provide for the appointment of Trustees (as per 1 above);
3. By the Master of the High Court where no Trustee has been nominated or those that have been originally, cannot for any reason, or refuse to act in such capacity. The Master shall make such an appointment after consultation with interested parties;
4. By the Court: this usually applies where a Court order has created a Trust, and the appointment of Trustees would also be provided for by the Court;
5. By legislation: where a trust is created by statute, the act concerned will also make provision for the appointment of Trustees.

REMOVAL & TERMINATION OF OFFICE

REMOVAL:

- A trustee may be removed from office by the Master under the following circumstances:

Persons removed from the office of trustee by Master:

1. If (s)he has been convicted of any offence of which dishonesty is an element or any other offence for which (s)he has been sentenced to imprisonment without the option of a fine; or
 2. If (s)he fails to give security or additional security to the Master within 2 months after being requested to do so
 3. If his/her estate is sequestrated or liquidated or placed under judicial management;
 4. If (s)he has been declared by a competent court to be mentally ill or incapable of managing his/her own affairs or detained as a patient or State patient in terms of The Mental Health Act;
 5. If (s)he fails to perform satisfactorily any duty imposed on him/her by law or by the Master.
- A trustee may, on application by the Master, or an interested party, be removed by the Court if this will be in the interests of the trust & its beneficiaries.
 - A trustee may be removed by his/her fellow trustees before the expiration of his/her period of office on the basis of breach of trust, by passing an ordinary resolution to this effect. Special notice must be lodged with the trustees of any proposed resolution to remove a trustee from office.

TERMINATION:

A trustee can also stop being a trustee in one of the following ways:

1. Death; (the trusteeship does not pass to the executor of the trustee's estate);
2. Resignation by written notice to the Trustees, beneficiaries and the Master. His/her Letter of Authority should be handed back to the Master, so that letters of authority reflecting the new trustees may be issued.
3. Dissolution of the Trust

DUTIES, RESPONSIBILITIES AND OBLIGATIONS OF TRUSTEES

The trustees' duties are determined by the trust deed, the common law, The Trust Property Control Act and case law. Their duties may be divided into 5 categories, as follows:

I. OBLIGATIONS IN RELATION TO THE TRUST DEED

Lodgement of trust deed

The first trustees must lodge the original or notarially certified copy of the trust deed with the Master and pay any required fees;

Acquaintance with trust instructions

The Trustee must obtain the original trust deed as soon as possible and determine the nature & extent of his/her powers and duties.

Amendments to trust deed

The trustees must lodge amendments to the deed with the Master;

2. OBLIGATIONS IN RELATION TO THE TRUST

Authority to act

Trustees can only act in their capacity as trustees once authorised to do so in writing by the Master;

Notice of address

The Trustee must inform the Master of his/her postal and physical address & if there is any change thereto, must inform him by registered mail within 14 days of the change;

Exercising discretion

The trustee may delegate tasks, however must make decisions him/herself & exercise his/her discretionary powers personally and independently. If an agent acts on behalf of a trustee, the trustee is responsible to the beneficiaries for the agent's actions. Where a trustee relies upon a dominant co-trustee and approves of his/her (wrongful) conduct, he/she may be removed from office by a court.

Avoid a conflict of interests

The trustee must act in good faith, and at all times avoid a conflict of interests between his/her personal interests and his official and fiduciary duties to the trust and to the beneficiaries. A trustee is required to ensure that he/she does not personally gain from the trust fund (other than his/her remuneration).

Declare personal "interest"

A trustee who in any way acquires an interest in an agreement or proposed agreement (the "interest") which has been or is to be entered into with the trust, shall immediately declare the nature & extent of his/her interest in writing to the other trustees. This includes having any relationship, either by blood or by marriage with a person who has such an interest.

Duty of care & Negligence

The trustee must not be negligent in the performance of his/her duties. (S)he must act with "the care, diligence and skill which can reasonably be expected of a person who manages the affairs of another". A higher standard of conduct is thus expected of a trustee who acts in his/her official capacity than when (s)he manages his/her personal affairs. A provision in a trust deed which exempts a trustee from liability for negligence is void. A trustee may be held liable for any losses suffered by beneficiaries if he/she is found not to have acted with the required degree of care and skill in the administration of the trust assets.

Accountability

A trustee is accountable at all times to the Master and to the beneficiaries, and if requested in writing to do so, must give either of

them an account of his administration and disposal of trust property. If requested to do so, (s)he is also obliged to provide any book, record, account or document relating thereto. All relevant questions by the Master must be answered honestly & truthfully. The Master may appoint a fit and proper person to investigate the trustee's administration & disposal of trust property. If a trustee is aware of any acts or occurrences that may be prejudicial to the rights of the beneficiaries (s)he is required to take action, which may entail reporting the matter to the Master.

3. OBLIGATIONS IN RELATION TO TRUST PROPERTY

Obtain control of trust property

As soon as possible after the issue of the Master's Letters of Authority, the trustee must obtain effective control over the trust property.

Registration and identification of Trust property

It is a rule of common law that the trustee must identify the trust property and ensure that it is separated from his/her personal property and where applicable, registered in the name of the Trust. A trustee must ensure that the Registrar of Deeds' records reflect that immovable property is trust property and must make any account or investment at a financial institution.

Treatment of trust property

Especially in regard to immovable property, a trustee must give notice to all the trustees in order that a decision may be made in regard to a proposed sale of immovable property held by the trust. A trustee who deliberately refrains from informing one of his/her co-trustees of the intended decision effectively is treating the asset as his/her own, which conduct may very well amount to "acting in bad faith".

Collect debts due to the trust

Trustees have a duty to collect diligently debts owed to them in respect of trust property.

Distribute trust income & capital

A trustee is duty bound to distribute trust income & capital to the appropriate beneficiaries at the time(s) stipulated in the trust deed.

Custody of documents

A trustee is obliged to keep in his/her safe custody all documentation relating to the administration of the trust, including any document which serves as proof of the investment, safe custody, control, administration, alienation, or distribution of trust property for five years after the termination of the trust. (S)he may not destroy such a document before the expiry of this period, without the written consent of the Master.

4. OBLIGATIONS IN RELATION TO THE FINANCES OF THE TRUST

Trust bank account

A trustee must deposit trust monies in a separate account with a financial institution without delay.

Administration and investment

The trustee must administer the trust in terms of the law and the provisions of the trust deed. His/her capacity to invest trust funds are also determined by the deed and the facts of each case, including changed circumstances. A trustee must act with the highest degree of diligence and caution in this regard. It is improper for a trustee to borrow trust money.

Reasonable return on trust capital

Unless otherwise contained in the trust deed, it is the duty of the trustee to ensure that a reasonable return is obtained on the trust capital;

Bookkeeping, accounting and financial statements

A trustee should indicate clearly in the bookkeeping which property is held in his/her capacity as trustee;

The trustee shall keep accounting records that are necessary to fairly present the trust's state of affairs & business & to explain its transactions & financial position. These records shall be kept at the office of the trust, and be available for inspection by any trustee or beneficiary. The Trustees are responsible for producing annual financial statements.

Taxation and trusts

- Separate taxpayer, 40% tax rate for inter vivos trusts, and individual tax rates for special trusts (rebates included);
- 8% transfer duty payable on the transfer of property into a trust;
- Capital gains tax (CGT) on any gains made on assets disposed of by a trust: 50% of any capital gain is subject to tax. Exemptions that apply to individuals do not apply to inter vivos trusts. If a primary residence is held in an inter vivos trust, 50% of any capital gain will be included in the entity's taxable income. The income tax rate is thus effectively 20% of the capital gain. This is not the case for special trusts, which are taxed at the same rates as individuals and thus also will qualify for all the CGT exemptions.

5. COMPLIANCE WITH LEGISLATION

The trustee is responsible for compliance by the trust with all applicable legislation, including, but not limited to, the following:

- The Income Tax Act, as amended;
- The Banks Act;
- The Trust Property Control Act;
- The Financial Institutions Act;
- The Prevention & Combating of Corruption Act;
- The Financial Intelligence Centre Act.

RIGHTS & POWERS OF TRUSTEES

RIGHTS OF TRUSTEES

- A trustee is entitled to remuneration as provided for in the trust deed. If no remuneration is provided for in the trust deed, the trustee will still be entitled to reasonable remuneration for the services to be rendered. In the event of a dispute the Master may fix the trustee's remuneration.
- A trustee who is affected by a proposed removal from office by the other trustees, has the right to make representations with regard to his or her removal from office. The trustee is entitled to have his or her representations heard at the meeting which is convened for the purposes of proposing a resolution for the trustee's removal.

POWERS OF TRUSTEES

- A trustee's powers are determined mainly by the trust deed, and for many discretionary trusts, the trustees are given the widest powers (similar in many respects to the powers of companies), to enable them to achieve the objects of the trust. These powers may include the power to sell, let, mortgage and encumber trust property, both movable and immovable, to invest trust funds, to borrow money, to open and operate banking accounts, and to employ staff.
- subject to the inherent limitations associated with his/her office, namely:
 - the control of the Master and the court over the Trustee;
 - his/her fiduciary position in regard to the trust and the beneficiaries. (S)he therefore must always exercise his/her powers to the advantage of the beneficiaries or in pursuance of an impersonal object and not to his/her personal advantage. In this regard, trustees should act particularly prudently in committing the trust to any surety;
 - He/she must exercise his/her powers in an independent & objective manner;
 - A trustee must act only within the limits of his/her authority, and may not act outside the limits placed in his or her powers by the deed, TPCA and the common law;

LIABILITIES OF TRUSTEES

- If any trustee fails to comply with a written request by the Master as provided for in terms of law or to perform any duty imposed upon him / her by the deed or by law, the Master or any person having an interest in the trust property may apply to the court for an order directing the trustee to comply with such request or to perform such duty (section 19 of TPCA);
- Criminal liability may be imposed on a trustee who commits a

crime in the course of the trust administration, eg theft or fraud (in relation to misappropriation of trust money);

- Beneficiaries or third parties (e.g creditors) who have suffered a loss as a result of breach of trust are entitled to bring a damages claim against the trustees for breach of trust (they are jointly and severally liable in delict);
- Trustees can be sued by beneficiaries if they act negligently (even if they act in good faith) and/or if they intentionally act wrongfully and such action has caused damages to the aggrieved person;
- A co-trustee who was not involved with the breach of trust may nevertheless be liable for any wrongful action of his/her trustee if the “innocent” trustee’s ignorance and/or inactivity is causally connected to the damage incurred, for e.g if an “innocent” trustee leaves a matter in the hands of his/her co-trustees without inquiry, or (s)he stood by while a breach of trust (of which (s)he was aware) was being committed, or (s)he improperly allowed trust funds to remain in the sole control of co-trustees;
- An indemnity clause in the trust deed which exempts trustees from liability for breach of trust is void and does not exempt a trustee from actions involving ordinary or gross negligence or intentional wrongdoing.

RECENT CASE LAW

- A case was recently heard before the Supreme Court of Appeal, which highlights the fact that if a trust is not correctly established and managed, it could be deemed to be invalid, and in fact, not a trust at all, but is a sham.
- The case was between a husband and his ex-wife, and the Court held that the trust assets were deemed to be owned by the husband in his personal capacity, and he was consequently ordered to share same in an equitable fashion with his ex-wife in their divorce proceedings.
- The following factors contributed to the Judge’s ruling:
 - The husband (hereinafter referred to as “H”) had listed the trust assets as his own personal assets in an application for a credit facility and had insured in his own name a beach cottage owned by the trust;
 - The founder of the trust was H’s father, and the only other Trustee was H’s brother (thus the impartiality and independence of the trustees was put into question);
 - H seldom consulted with his brother regarding the administration of the trust assets and had effectively treated them as his own;
 - H had the right in terms of the deed to discharge his co-trustee(s) and appoint someone else (a unilateral act evidencing personal control especially in the light of the fact that there were only two trustees on the trust);
- Adequate records had not been maintained, nor were properly constituted trustee’s meetings held;

- As is apparent from the above, the way one administers trust assets and sets the trust deed up is of critical importance and has become the focus of attention in recent times.
- It has been held further that the Master of the High Court must employ his powers and insist on “the appointment of an independent outsider as trustee to every trust in which (a) the trustees are all beneficiaries and (b) the beneficiaries are all related to each other;
- Most inter vivos trusts are set up for various purposes such as financial and estate planning, reducing estate duty payable on death and/or protection of assets against creditors. If a trust does not have an independent trustee appointed where appropriate, and, depending on the way the deed is set out and the trust assets administered, these “benefits” or protections may fall away;
- In order to prevent such serious consequences, a trustee should acquaint him/herself with the trust deed and adhere actively to his/her duties and responsibilities as are set out above.

COMPANIES BILL, 2008

INTRODUCTION

- The proposed Bill was tabled in Parliament in July 2008 and is expected to come into operation during 2010;
- “This is the most fundamental reform of company law for over 30 years” - Tshediso Matona (Director General of the Department of Trade & Industry (DTI));
- It is intended to bring about a significant change in the corporate regulatory environment, and contains an extensive section on corporate governance including details on the election of directors and their liability;
- Upon its implementation, the existing Companies Act, and CLAA will be repealed. The CC’s Act will co-exist with the Bill, with amendments;
- Due to the fundamental reforms proposed by the Bill, substantive changes are possible and professional advice should be sought.

Note: the sections below detail some of the key provisions that a director under the proposed Bill will be required to adhere to, and does not purport to cover all aspects of the Bill. They are intended to highlight certain important provisions relating to corporate governance and specifically to directors and their duties and responsibilities as set out in the Bill.

GENERAL INFORMATION ON COMPANIES BILL, 2008

CIPRO changes to Companies & Intellectual Property Commission (the Commission)
Every company must continuously maintain a registered office in RSA (including external co's)
All companies to have a single document called the Memorandum of Incorporation (MI) in place of current Memorandum & Articles of Association
Possible to form a company which is only known by its registration number
All records must be kept for a minimum of 7 years in written form (including electronic format). Falsification of records is an offence. Prescribed standards for certain categories of records differ according to categories of companies
Annual financial statements (AFS) of public companies will continue to require an audit, all other companies may either be audited or subject to independent review (see table 7 on page 46)
Electronic communications - transmission of notice by electronic means is an acceptable form of service, shareholder and Board meetings may be conducted entirely by electronic communication (s61, s63 & s73)
Quorum for shareholders meetings: A quorum of 25% of the votes represented at a General meeting of members/shareholders is required provided that not less than 3 are present. (Currently the requirement for a quorum for an ordinary resolution is set at 3 members (unless the Articles provide for a greater number).
Certain categories of companies - diminished standards/requirements - see table 8 on page 46
Protection for whistle-blowers and provision made for a Companies Ombud-an independent organ of state, mandated to act as a forum for voluntary alternative dispute resolution in any matter arising under the Bill and to carry out reviews of administrative decisions by the Commission
A capital maintenance regime based on solvency and liquidity is to be imposed. See table 9 definition on page 47
Public companies and State Owned Enterprises (SOE's) have to comply with extended transparency & accountability requirements set out in Chapter 3 of the Bill eg compulsory company secretary, auditor, & audit committee appointments (all other companies may provide for these requirements in their MI's) (refer to page of current legislation {CLAA}) The Bill overlaps with these requirements to a large extent.

PROPOSED SCOPE & CATEGORISATION OF COMPANIES

FOR PROFIT	(a) state owned enterprise (SOE Ltd);
	(b) a private company [(Pty) Ltd] if: (i) its not a state owned enterprise (ii) its Memorandum of Incorporation (MI) (aa) prohibits it offering any of its securities to the public & (bb) restricts the transferability of its securities, or <i>{note: no limit on no of shareholders (previously was limit of 50) & a share no longer has a nominal or par value}</i>
	(c) a personal liability company (Incorporated or Inc) if (i) it meets the criteria for a private company; (ii) its MI states that it is a personal liability company <i>{note: these are the old Section 53(b) companies}</i>
	(d) a public company, (Ltd) in any other case <i>{note: min number of incorporators is reduced from 7 to 1}</i>
NOT FOR PROFIT	Name to be followed by suffix "NPC", previously Section 21 Companies

FOR PROFIT COMPANIES:

- 1 or more persons (including juristic persons) may incorporate;
- 1 or more directors required, 3 or more for public (Ltd) companies;
- no limit on number of shareholders;
- a share issued by a pre-existing company (before proposed repeal of Company's Act) & held by a shareholder immediately before the effective date of the Bill continues to have all rights associated with it immediately before the effective date;
- requires a special resolution to alter the MI

NOT FOR PROFIT COMPANIES:

- 3 or more persons (including juristic persons) may incorporate;
- 3 or more directors required,
- may have no voting members;
- if have voting members, then special resolution required to alter MI and if no voting members, Board may alter MI

SOE enterprises & Public (Ltd) companies subject to enhanced accountability and transparency requirements, similar to those set out on pages 7 - 9. Others only if MI provides for it.

DIRECTORS

The Bill reflects a trend towards personal liability for directors, and the requirement of a high standard of conduct;

NON-ELIGIBLE & DISQUALIFIED DIRECTORS: SECTION 69

- The Bill retains the existing qualifications & disqualifications of Directors, with some enhanced flexibility - see table 8;
- Section 69 specifically states that a company may in its MI impose additional grounds of ineligibility or disqualification on its directors;
- A person who becomes ineligible or disqualified while serving as a director ceases immediately to be a director;
- A person is ineligible if the person is-
 - A juristic person
 - An unemancipated minor or under similar disability or
 - Does not satisfy any qualification set out in the MI

The Bill has added certain disqualifications to the existing ones as follows:

- Section 69(8)(a):
- a person who has been declared a delinquent or a court has prohibited that person to be a director;
- The Bill has retained the following disqualifications with slight adjustments as follows:

Section 69(8)(b):

- (1) an unrehabilitated insolvent
 - (2) any person removed from an office of trust because of dishonesty;
 - (3) any person convicted of offences involving fraud, theft, forgery, perjury or an offence involving fraud, misrepresentation or dishonesty or in connection with the promotion, formation or management of a company or under this (proposed) Act, the CC's Act, FICA, Security Services Act, Prevention of Corruption Act, & the Prevention & Combating of Corrupt Activities Act.
- Note: Despite the disqualifications listed in (2) & (3) contained in S69(8)(b) above, a person may still act as a director of a private company if all the shares of that company are held by that disqualified person alone or by him and persons related to him (see table 8) and each such person has consented in writing to that person being a director. In addition, such disqualification automatically ends at the later of 5 years after the removal from office or the completion of the sentence for the offence, or at the end of 1 or more extensions (obtained at the instance of the Commission or Court), unless a Court rules otherwise.

DELINQUENT DIRECTORS & DIRECTORS ON PROBATION SECTION 162

- The Bill introduces a remedy to shareholders and other stakeholders to hold directors accountable by an application to Court, to: declare a director delinquent (& thus prohibited from being a director) or under probation (& restricted from serving as a director in terms of the conditions of the probation). Refer Tables 10&11 for specific provisions relating to these applications;
- The Commission will keep a register of all those persons declared delinquent or on probation;

BOARD OF DIRECTORS SECTION 69 & 70

- The legislation refers to "ex officio" or executive director who has

all the powers and duties of any other director. An ex officio director will cease to be a director upon ceasing to hold office;

- The Board may discharge a director for various reasons, including negligence or dereliction of duty;
- A profit company must allow for shareholders to elect a minimum of 50% of the directors, and 50% of the alternate directors (Note: as the majority of directors should be non-executive directors it would suffice for only non-executive directors to be elected). Each director to be appointed by a separate resolution;
- Decisions of the Board shall be valid even if the number of directors is below the minimum set out by the Bill or the MI. A director may be appointed on a temporary basis;

BOARD COMMITTEES SECTION 72

- Board Committees may appoint non-directors to a Committee;
- Such persons shall not have a vote. The Board may delegate to the Committee any of the authority of the Board;
- The definition of “director” in the Bill includes a member of a Committee of the Board or the Audit Committee for purposes of those sections which deal with qualification, eligibility, directors personal financial interests, liability and indemnification.

BOARD MEETINGS: SECTION 73

- A director may call a meeting of the board at any time and 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;
- 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;
- The board may determine from time to time the requirement for notice for meetings, which can be waived if all the directors consent thereto;
- 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.

REMOVAL OF DIRECTORS: SECTION 71

- The Bill retains the provisions of the existing Act (as amended). See page 5;
- In addition, the Board may remove a director:
 - whom it has determined is ineligible, disqualified, incapacitated, negligent or guilty of dereliction of duty or
 - who has as the sole South African resident director, become non-resident

PERSONAL FINANCIAL INTERESTS OF DIRECTOR: SECTION 75

- A director (including one appointed as a member of a Board Committee), is required to disclose his personal financial interest in respect of a matter to be considered at a meeting of the board (this is also applicable to a related person to him);
- He must disclose his interest before it is considered by a meeting of the Board and recuse himself by leaving the meeting, without taking part in the discussion [Note: the Companies Act 1973 does not require the director to recuse himself].
- This section does not apply to certain directors in certain circumstances (see Table 8 on page 46)

CODIFIED REGIME OF DIRECTORS DUTIES: SECTION 76

A codified regime of directors' duties is introduced in the Bill -which operates in addition to existing common law duties; (director in these sections includes alternate directors, prescribed officers, member of a committee of a board or audit committee)

Codified Regime of Directors duties

Part F, Chapter 2

Section 76(2): CONFLICT OF INTEREST

(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
(b) must communicate to the board at the earliest opportunity 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 & SKILL & GOOD FAITH

- each director is subject to a duty to exercise a degree of care, skill & diligence that would reasonably be expected of a person with general knowledge skill & experience reasonably expected of that person when carrying out the functions of a director &
- in good faith & for a proper purpose &
- in the best interests of the company
- the director's judgement as to whether an action or decision is in the best interests of the company is reasonable (i) if the director has taken diligent steps to become informed about the subject matter of the decision and (ii) does not have a material personal financial interest in the subject matter of the decision (nor does a related person) (and it is a decision that a reasonable person in a similar position could hold in comparable circumstances) and the director has

Codified Regime of Directors duties - Continued

complied with Section 75 (disclosure of financial interests-see above) and (iii) the director made a decision or supported the decision of a committee and had a rational basis for believing that the decision was in the best interests of the company;

- in discharging any duty contemplated in this section the director is entitled to rely on the performance by any of the persons to whom the board may have delegated formally or informally duties to perform 1 or more of the board's functions that are delegable under law or any financial reports or statements or 1 or more employees of the company whom the director reasonably believes to be reliable & competent, legal counsel, accountants or any financial reports or statements prepared by any of these persons, a committee of the board of which the director is not a member

GENERAL LIABILITY OF DIRECTORS & OFFICERS: SECTION 77

A director, prescribed officer and member of a Board is liable for:

- a breach of a fiduciary duty;
- for losses, damages or cost resulting from
 - S77(3)(a) acting without the necessary authority;
 - S77(3)(b) agreeing to the company carrying on business in a situation in which it is insolvent, reckless, grossly negligent or with intent to defraud any person or a fraudulent purpose (Section 22)
 - S77(3)(c) acting or omitting to act despite knowing that by doing so the effect is to defraud a creditor, employee or shareholder or for any other fraudulent purpose;
- for signing or consenting to the publication of AFS or a prospectus which contains an untrue statement;
- for knowingly consenting to the issue of shares, which had not been authorised;
- for granting unauthorised options;
- for agreeing to the granting of financial assistance to directors or other parties, when not in accordance with requirements (Section 45) [see below]
- for knowingly failing to vote against a share purchase which did not accord with legislative requirements;
- a director will only be liable for failing to vote against a distribution if immediately after so voting, the company failed to satisfy the solvency and liquidity test (see table 9) and this was reasonably predictable;
- Liability is joint and several with other parties found liable in the Bill;
- Action to recover loss, damages or costs may not commence more than 3 years after the act or omission;

INDEMNIFICATION AND DIRECTORS' INSURANCE

Section 78(2): Director may not be relieved of liability

- Any agreement, provision in the MI, resolution which directly or indirectly relieves a director of liability in regard to the duties

contemplated in sections 75 and 76 (above) and liability contemplated in section 77 is void;

Section 78(3): Indemnity of directors / Company may advance legal expenses:

- The provisions of this section are in addition to any common law consistent with the section;
- A company may, if authorised in its MI:
 - (a) advance expenses to a director to defend litigation in any proceedings arising out of his/her service to the company;
 - (b) 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, however may not so indemnify the director if:
 - (i) the director has had proceedings instituted against him/her regarding Sections 77(3)(a) to (c) [see para above] or for (ii) willful misconduct or breach of trust (unless (s)he has been exculpated);

Section 78(6): Directors' Insurance:

- the company may purchase insurance to protect the company, or the director against liability and expenses as contemplated in this section;

RECKLESS CONDUCT AND NON-COMPLIANCE SECTION 214

- In addition to personal liability, Section 214 of the Bill makes reckless management and failure to comply criminal offences subject to 10 years imprisonment and high fines.

LOANS OR OTHER FINANCIAL

ASSISTANCE TO DIRECTORS: SECTION 45

- A company may not provide a loan to or secure a debt or obligation of or otherwise provide direct or indirect financial assistance to a director of a company or related person or CC, ie the Board may not authorise it unless:
 - (a) (i) It is pursuant to an employee share scheme (S97);
 - (ii) It is pursuant to a special resolution of shareholders adopted within the previous 2 years, specifically relating to that recipient or generally for a category of potential recipients and he/she falls in that category;
 - (i) Immediately after providing the financial assistance the board must be satisfied that all the conditions that are listed on Table 9 are met;
 - (ii) The terms of the assistance are fair and reasonable
- Any resolution or agreement taken to provide financial assistance which is in contravention of this section or the company's MI will be void and the consequences of such action are that the director will be personally liable if (s)he was present at the meeting when the board approved the resolution and failed to vote against it despite knowing that the provision of financial assistance was inconsistent with the requirements of this S45.

EXTENDED NEGATION OF THE ULTRA VIRES DEFENCES

- The duty to act intra vires requires that a director must ensure that (s)he act on behalf of the company only to the extent permitted by the powers and authority conferred upon him/her by law, the company's statutes (the MI), the shareholders, and fellow directors;
- Where a director acts ultra vires, the shareholders may ratify the transaction retrospectively by special resolution 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.
- As is presently the case with CC's, companies will in the future have contractual powers of a natural person (Section 19). Consequently ultra vires will be a seldom used principle.

SHARE BUY BACKS (S48)

- Buy Backs: Section 48: If a director was present at a meeting when the board authorised a share buy back and failed to vote against it despite knowing that immediately thereafter the company would not satisfy the solvency and liquidity test (Table 9), he/she may be jointly and severally liable for legal costs relating to court proceedings to reverse the buy back and the court may order that (a) the person from whom the shares were acquired to return the amount paid by the company and (b) the company to issue to that person an equivalent number of shares of the same class as those acquired. The director may be required to reimburse the company any amount paid for the buy back if this has not been recovered from the relevant shareholder.

(Sections 75-78 "director" in these sections includes alternate directors, prescribed officers, member of a committee of a board or audit committee)

THE BILL AND THE FUTURE OF CC'S IN SA

- CC's in existence on the effective date of the Bill may continue in that form;
- The Bill provides for the indefinite continued existence of the CC's Act (referred to as the "old Act" in this section), with amendments.
- No new CC's can be registered nor will companies be able to be converted to CC's under the old Act. Effectively this means that as from 2010 (when the Bill is expected to be passed into law), no new CC's may be registered. Existing CC's at the effective date of the Bill will continue to operate and the old Act with amendments will apply, together with the Bill where applicable.
- The Bill contains the legislative framework for forming and maintaining small companies (based on the characteristics of the CC's Act), and is sufficiently streamlined and simplified as to render it unnecessary to retain the application of the CC's Act for the formation of new CC's. CC's may be converted to companies;
- The Bill exempts CC's from preparing annual financial statements (AFS) (S30), however the Commissioner may prescribe AFS for certain categories of CC's, and the Minister of Trade & Industry may also prescribe audit/independent review for certain categories of CC's.

Table 1: Definition of widely held company & limited interest company

- a) A company is a widely held company: if-
 - i) its articles provide or an unrestricted transfer of its shares;
 - ii) it is permitted by its articles to offer shares to the public;
 - iii) it decides by special resolution to be a widely held company; or
 - iv) it is a subsidiary of a company described in subparagraph (i), (ii) or
- b) A company with two or more types or classes of shares is a widely held company if its articles provide for the unrestricted transfer of shares in one or more of these types or classes.
- c) For the purposes of this subsection-
 - i) a transfer of shares is unrestricted if it is not subject to an effective right of pre-emption;
 - ii) an effective right of pre-emption is a right of pre-emption which operates in favour of all shareholders of the company and upon every proposed sale of shares to a person who is not a shareholder of the company.
- d) A company is a limited interest company if it is not a widely held company.
- e) An effective right of pre-emption contained in the articles of a limited interest company shall be deemed also to operate, with the necessary changes, upon-
 - i) the disposal of a beneficial interest in a share of the company; and
 - ii) an offer by the company of shares created in terms of section 75(1) to any person who is not a shareholder of the company.
- f) For the purposes of paragraph (e)(i), 'beneficial interest' shall be as defined in subsection 140A(1), except that it shall apply in relation to a share rather than to a security.

A widely held company, which on or prior to its annual general meeting ceases to fall within the definition of a widely held company, may by special resolution passed at that meeting become a limited interest company if the directors certify that the company will not in the following financial year seek to become a widely held company.

Table 2: Financial Reporting

WHC	IFRS accounting standards /GAAP
Limited Interest Co	IFRS for SME/GAAP for SME (voluntary) or Accounting standards (mandatory)
CC's	General accepted accounting practice as appropriate

Table 3: Disqualifications

A body corporate cannot be a director or member
An unrehabilitated insolvent or person under administration cannot be a director*, member or trustee
A minor or person with no legal capacity (e.g due to mental illness) cannot be a director, member or trustee (unless represented by his guardian or curator)
Any person whom the court has ordered cannot be a director* or member.
Such order which disqualifies a director will automatically also disqualify a member of a CC
Any person removed from an office of trust because of misconduct cannot act as director*, member or trustee
Any person convicted of offences involving fraud, theft, forgery, uttering, perjury corruption or dishonesty in connection with the formation or management of a company* or CC
Any person who has in terms of an Act of Parliament, been removed from office for not being a fit & proper person to serve as a director, due to theft...or any other act involving dishonesty*
The Master of the High Court in his official capacity cannot act as trustee;
A person who (a) acted as witness to a will (b) or signed a will on behalf of the Testator (c)who wrote the will in his/her own handwriting, in which will (s)he has been nominated a Trustee in the testamentary trust created therein, cannot act as Trustee in that Testamentary trust. The spouse of such person is also disqualified. However, under certain conditions, or by order of the Master or the Court, such a person may act as a Trustee
Where the Companies Act prohibits a director or officer of a company from being capable of being a Trustee for the holders of debentures of that company;
<i>Where a person is disqualified to act as Trustee in terms of a trust deed</i>
<i>References above to "member" means a member of a CC, "director" is a director of a company and "trustee" is a trustee of a trust</i>
<i>Any person who is disqualified in terms of the above from being a member of a CC or director of a company & still takes part in or is concerned with its management is guilty of an offence, & shall be jointly & severally liable for the debts of the entity for the period such person knew or could reasonably be expected to know of such disqualification.</i>
<i>Another person cannot hold a member's interest as nominee for any person who is disqualified from being a member.</i>
<i>* in these cases, (i.e in regard to directors of companies), the court may specifically authorise such persons to nevertheless act as directors-but unless this specific authorisation is obtained, the person will remain disqualified</i>

Table 4: Acting Independently

(Relates to a non-Executive director on an Audit Committee): A director acts independently if (s)he expresses opinions, exercises judgement and makes decisions impartially and is not related to the company or any shareholder or other director or is not related to a material supplier/customer in a way that would lead a reasonable and informed third party to conclude that that director is compromised by that relationship.

Table 5: Sources of Obligations & Duties

C	Companies Act no 61 of 1973 as amended
O	Resolutions passed at shareholders & directors meetings
M	The 2002 King Report (King II)
P	The Memorandum & Articles
A	The rules of a regulatory body (if applicable)
N	Service agreement of an executive director (if applicable)
Y	The common law and statutes Shareholders agreements (if applicable)
C	Close Corporations Act no 69 of 1984, as amended
C	Administrative regulations & practice notes of CIPRO Association agreements, (if entered into)
T	Trust Property Control Act no 57 of 1988 (the TPCA)
R	as amended
U	The Master of the High Court (the "Master")
S	The Courts
T	The Trust Deed Common law and case law (statute)
All references to "Act" under each section refers to applicable Act as per this table	

Table 6: Publication requirements for Companies and CC's

Every entity shall have in SA, a registered postal & physical office to which all correspondence to the entity can be addressed
Every entity shall display its full name & registration number in a conspicuous position outside its registered office and place of business
The abbreviation eg CC or (Pty) Ltd in capital letters or the equivalent in any other of the official languages, must be used as a suffix to the name used by the entity
The full registered name & number of the entity must appear on all prescribed documents (letterheads, adverts, business cards, bills of exchange, promissory notes, endorsements, cheques, delivery notes, invoices, receipts, credit notes, orders for money, goods or services & official publications
The forenames or initials & surname of each member/ director/ trustee (where applicable) must be stated on all business correspondences bearing the registered name of the entity
A change of name of the entity will not affect any right or obligation of the entity or any legal proceedings that have been instituted against it
If a company or CC is being wound up, the statement "In Liquidation" or "In voluntary liquidation" should be used for the duration of such winding up period, and be used as a suffix to the entity's name.
These requirements are equally applicable to company's, CC's & trusts (where relevant)

**Table 7: Reporting Requirements
(proposed in Bill)**

ENTITY	AGM	AFS*	AUD/REVIEW	CO SEC	OPTIONAL****
CC's	No	No	No	No	Yes
(Pty) (single shareholder)	No	No**	No	No	Yes
(Pty) (shareholder/director same persons)	No	No**	No	No	Yes
(Pty) Ltd - other	No	Yes	Yes - review***	No	Yes
Personal liability (Inc)	No	No	No	No	Yes
Public company (Ltd)	Yes	Yes	Yes - audit	Yes	N/A
SOE	Yes	Yes	Yes - audit	Yes	N/A

* within 6 months of FYE, prepared according to IFRS of the IASB

** S30:Commissioner direction may require AFS in these cases if to protect interest of other owners OR in public interest based on economic or social significance

*** independent review required. Minister regulation to prescribe manner, form & procedures & professional qualifications of persons who may conduct such reviews. AFS required to indicate with a note if been audited, reviewed or un-audited

**** Bill does not require it but MI can require it. Subject to Ministerial regulations that may establish different standards for profit and non-profit companies & categories of for profit companies

Table 8: Leniency /Flexibility for Certain Companies (S57)

A for Profit company (other than SOE)
<u>where all shares owned by one person (only one shareholder)</u>
<ul style="list-style-type: none"> • less onerous reporting requirements • no notice requirements (simplified decision making) • S59-65 do not apply (re shareholders meetings-notice, conduct, quorum, resolutions) • voluntary AFS • Section 75 does not apply (requirement for disclosure of personal financial interest in a contract)
<u>where there is only one director</u>
<ul style="list-style-type: none"> • no notice requirements for board meeting • S71(3) to (7), 73 & 74 do not apply (re directors meetings) • when the only director of a company does not hold all the securities he/she may only enter into a contract in which he/she or a related person has a personal financial interest after obtaining an ordinary resolution of shareholders.
<u>& where every director is also a shareholder</u>
<ul style="list-style-type: none"> • diminished need to seek shareholder approval for certain board actions • no notice or other internal formalities re referral by Board for shareholders decisions • less onerous reporting requirements (see table above) • when acting in capacity as shareholders, no need to comply with S73-78 relating to meetings, duties, obligations, standards of conduct, liabilities & indemnification of directors • no need for AFS. (Voluntary) • Also voluntary AFS for private companies not actively carrying on business, or been exempted, or a personal liability company (inc) • flexibility re disqualification: if disqualified, can still be a director See Table 11

Table 9: Solvency & Liquidity Test

Section 4(1): a company satisfies the solvency & liquidity test at a particular time if, considering all reasonably foreseeable financial circumstances of the company at that time -

- (a) the company's total assets equal or exceed its total liabilities; 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) 12 months after the date on which the test is considered; or (ii) in the case of a distribution contemplated in para (a) in S1 12 months following that distribution.

Section 4(2): for the purposes contemplated in (1)

- (a) any financial information to be considered re the Company must be based on: (i) accounting records prepared as per s28 (ii) financial statements as per S29
- (b) subject to para (c) the Board or any other person applying the solvency & liquidity test to a company - (i) must consider any fair valuation of the company's assets & liabilities, or (ii) other valuation that is reasonable in the circumstances
- (c) unless the MI provides otherwise, a person applying the test in re a distribution as per para (a) of the definition of distribution in S1 is not to regard 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 upon liquidation are superior to the preferential rights upon liquidation of those receiving the distribution.

See Sections 44, 45, 46, 47, 48 and 113 of the Bill, in terms of which directors and shareholders will be held liable in the event that the solvency and liquidity test is not met in the circumstances set out in these sections.

Table 10: Probationary Directors

A court may make an order placing a person under probation if:

- (a) while serving as a director (s)he (i) improperly supported a resolution despite the inability of the company to satisfy the solvency & liquidity test (ii) acted in a manner inconsistent with the duties of a director (iii) acted in a manner or supported the company in an action contemplated in section 163 or
- (b) within a period of 10 years after the effective date, (s)he had been a director of more than 1 company or managing member of more than 1 CC and 2 or more of such companies or CC's failed to fully pay all of its creditors or meet any of its obligations (except under a business rescue plan) during the time (s)he was a Director or member

an order made re (a) & (b) above shall be made subject to the court's being satisfied that certain circumstances existed to justify the declaration

an order made re (a) & (b) above may be subject to any conditions the court considers appropriate & subsists for 5 years from the date of the order

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

Table 11: Delinquent Directors

A court may make an order declaring a person a delinquent director if:
 (a) (s)he consented to serve as a director or acted as director while ineligible or disqualified as contemplated in Section 69 unless (s)he was acting as per a court order ito S69(11) or unless all the Shares are held solely by him (or persons related to him), the latter having consented to the appointment
 (b) while under a court order of probation, acted as a director or member of CC in a manner contravening that order.

an order made re (a) & (b) above is unconditional & subsists for the lifetime of the person declared delinquent.

(c) while a director, grossly abused that position, took personal advantage of information, contrary to Section 76, intentionally or by gross negligence inflicted harm on the company, acted in a manner amounting to gross negligence, willful misconduct, breach of trust, or acted in a manner as set out in Section 77(3)(a) (b) or (c) ref page 40 & section dealing with liability of directors
 (d) has repeatedly been subject to a compliance notice for similar contraventions of the Bill;
 (e) has at least twice been personally subject to an administrative fine as contemplated for failure to carry out the requirements of a compliance notice
 (f) within a period of 5 years (concurrent, sequential or unrelated times) was a director of 1 or more companies or member of 1 or more CC's subject to administrative fines and (s)he was a director/member of each such company / cc at the time of the contravention & the court is satisfied that the declaration of delinquency is justified.

an order made re (c) - (f) above may be subject to any conditions the court considers appropriate & subsists for 7 years from the date of the order.

a person declared delinquent in terms of (c) to (f) may apply to court to suspend the order & substitute an order of probation at any time more than 3 years after the order or to set aside the order at any time more than 2 years after it was so suspended.

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 &/or do community service &/or pay compensation to any person adversely affected by his/her conduct as a director/member.

Table 12: Related & Inter-Related Persons & 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 3 degrees of natural or adopted consanguinity or affinity (unless there is sufficient evidence to conclude that the 2 persons act independently of one another.

Section 2(1)(b): an individual is related to a juristic person if the individual directly or indirectly controls the juristic person (as "controlling" & subsidiary relationships are defined in the Bill) 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 whole or part of the business of the other (ii) either is a subsidiary of the other or (iii) a person directly or indirectly controls the whole or part of the business of both of them.

Section 2(1)(d): 3 or more persons are inter-related if the 1st and 2nd such persons are related, the 2nd and 3rd such persons are related and so forth in an unbroken series.

**control: power to substantially determine policy & direction, voting rights, subsidiary: more than 50% of the shares by 2nd juristic person, wholly owned subsidiary, nominees.*