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Department:
Trade and Industry
REPUBLIC OF SOUTH AFRICA

The Companies Bill

Information Sessions
February to March 2007



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Scope

- To present high-level overview of Companies Bill to Stakeholders
- To obtain initial comments and
- Update the Bill before submission to Cabinet.



Introduction

Need for holistic review of SA Company Law:

- No substantial review of company law in 30+years (only introduction of CC Act in 1984)
- International jurisdictions undergone substantial revisions
- Global and domestic environment changed significantly since 1970s
 - Corporate structure and financial instruments
 - Electronic communication, social awareness, changing markets
 - Globalising markets, standards and expectations
 - Corporate failures and scandals in SA and elsewhere highlighted governance issues
 - Socio-political and economic change in SA
 - Other laws: Securities Services Act, Auditing Professions Act, BBBEE, PFMA, 2nd King Committee Report
 - 1973 Companies Act outdated, highly formalistic, has unnecessarily burdensome information requirements, creditor-oriented and is overly criminal.



Policy context

Registered Entities	Number	Percentage (% registered)
Close Corporations	1,276,157	40.51% (75%)
Private Companies	412,233	13.09% (24%)
Public Companies	3,757	0.12% (0.2%)
Incorporated Companies (Professional)	7,976	0.25% (0.5%)
External Companies	1,056	0.03% (0.06%)
Total Registered Entities	1,701,179	54%
Unregistered Entities	Number	Percentage
Informal economy	749,500	23.8%
Sole proprietorships	699 166	22.2%
Total Enterprises in Economy	3,149,845	100%

Of the 3757 public companies, only 440 are listed entities. These companies account for 60% of GDP

99% of registered businesses are privately owned, but not all are small or medium-sized

Aim of reform is to attract unregistered entities into the formal economy



Policy context

High-level objectives of policy are to:

- Reduce regulatory burden for small and medium-sized companies (mostly owner-managed, privately owned)
- Enhance protection of investors through enhanced governance and accountability (esp. public interest companies), minority protection and shareholder recourse
- Create a more flexible environment, without comprising regulatory standards and objectives, to enhance investment



Process

- Policy process:
 - Discussion document – published for comment, Nedlac process (Jun 2004)
 - Workshops in 9 provinces & engagement with government departments and regulators (Jun to Sept 2004)
 - Policy document internally finalised (Jun 2005)
- Legislative drafting:
 - Drafting instructions prepared (March to June 2005)
 - Bill drafted chapter by chapter – consultations with local and international experts on each chapter
 - First complete draft put out for initial inputs from focus groups (Jul 2006)
 - Additional meetings with NT and DoJ and inputs obtained from NT, DoJ, SARS, SARB, FSB, JSE, SRP
 - Draft Bill finalised at end Oct 2006 and submitted to Cabinet



Scheme of the Bill

- The Bill has 9 Chapters and 6 Schedules:
 - Chapter 1 - Interpretation, Purpose and Application
 - Chapter 2 - Formation and Registration of Companies
 - Chapter 3 - Corporate Finance
 - Chapter 4 - Corporate Governance and Financial Accountability
 - Chapter 5 –Takeovers, Offers and Fundamental Transactions
 - Chapter 6 - Business Rescue
 - Chapter 7 - Remedies and Enforcement
 - Chapter 8 - Regulatory Agencies and Administration of the Act
 - Chapter 9 - Offences, Miscellaneous Matters and General Provisions
 - Schedule 1: Forms of Memorandum of Incorporation
 - Schedule 2: Members and Directors of Not For Profit Companies
 - Schedule 3: Public Offerings of Shares and other Securities
 - Schedule 4: Consequential Amendments
 - Schedule 5: Legislation to be Enforced by the Commission
 - Schedule 6: Transitional Arrangements.



Chapter 1

Interpretation, Purpose and Application

Part A: Interpretation

- **Definitions:**(Key new definitions: act in concert, amalgamation, beneficial interest, closely held company, distribution, electronic communication, file, financial report, for profit company, incorporator, insolvency event, juristic person, Memorandum of Incorporation, merger, not for profit company, Notice of Incorporation, public interest company, rules of a company, unalterable provision)
- **Related and interrelated persons, and actions in concert;**
- **Controlling and subsidiary relationships**
- **Solvency and liquidity test**
 - Economically-based limitation on power of company to pay distribution on shares
- **General Interpretation of the Act**

Part B: Purpose and Application

- Act applies to all entities registered in terms of this Act or previously registered companies
- Limited application to not-for-profit companies (sec 10 and Schedule 2)
- Certain provisions do not apply to registered financial institutions
- Regulator may apply to Minister for exemption of provisions to industry



Chapter 1

Chapter 1 introduces categories of companies as follows:

For Profit Companies	Not For Profit Companies
(a) Widely held Companies; (b) Closely held Companies	Successor to section 21 companies and are subject to - (i) a varied application of the Act, as set out in section 11; and (ii) a special set of fundamental rules, set out in section 12.
Public Interest Companies: -All widely held companies -Closely held companies that meet at least two of the three thresholds and companies which are designated by Minister: take deposits from public or exercise public trust; have substantial impact on environment; contribute to public health; supply essential goods, services or infrastructure	



CHAPTER 1

- In **summary**, this chapter introduces two categories of companies, i.e. (a) For Profit Companies (or business corporations) and (b) Not For Profit Companies (former section 21 companies).
- **For profit companies** or business corporations may either be (i) widely held or (ii) closely held.
- All widely held companies are **public interest companies**.
- In addition, closely held companies and not for profit companies which meet certain criteria may be classified as **public interest companies**.
 - In the case of a closely held company, categorisation as a public interest company takes place when two of the following criteria are met; i.e. (a) an annual turnover of R50 million; (ii) a monetary asset value of R25 million; and (iii) an employment threshold of not less than 200 employees.
 - Two of the following three criteria qualify a 'not for profit company' as a public interest company, namely; (i) R20 million annual turnover; (ii) a monetary asset value of R10 million; (iii) an employment threshold of not less than 50 employees.



Chapter 2

Formation and Registration of Companies

- **Registration by right**
 - Permit only 1 person to form a for profit company or a business corporation.
 - Permits incorporation by adoption of (a) a prescribed form of Memorandum of Incorporation (set forth in Schedule 1) or (b) any other form complying with certain minimum requirements (set forth in Schedule 1) and with the unalterable provisions of the Act but including, if desired, other non-prohibited provisions, including the power to adopt internal rules concerning governance of the company (Section 14).
- **Minimal requirements – lodge a Notice of Incorporation with Commission**
 - Provides for simplified filing requirements of a Mol and abolishes the need for certification by notary, and the requirements for a seal.
 - In brief, the Bill only mandates a public interest company to file its Memorandum of Incorporation.
- **Maximum flexibility in the design and structure of the company**



Chapter 2

Old Company Law	New Company Law
Name reservation compulsory	Name reservation optional
Memo and articles of association must be lodged with registration	Memo of incorporation only governing doc & does not have to be lodged
Pre-incorporation contracts are complex	Pre-incorporation contracts simplified
Name approval process is complex	Name approval process simplified and clarified
Registration No is not acceptable as name	Registration No may be used as name
Negation of defense of <i>ultra vires</i>	Expanded negation of <i>ultra vires</i> defense
Requires up to 7 persons to register a company	Only 1 person required for For Profit and 3 persons for Not for Profit



Chapter 3

Corporate Finance

- Abolishes the nominal capital and par values (transitional measures in Schedule 5)
- Allows financial assistance for the purposes of share acquisitions subject to 'solvency and liquidity' and 'shareholder resolution' (to protect both creditors and shareholders)
- Outlines new general scheme for debentures designed to protect the interests of debentures holders without making unnecessary distinctions based on artificial categorization of the debt instrument they hold.
- Treats all distributions (e.g. share buy backs, dividends, redemptions, etc) in the same way by subjecting them to "the solvency and liquidity test."
- Existing scheme for registration and transfer of uncertificated securities modified considering Securities Services Act.
- Simplified and modernised scheme for primary and secondary offering of securities to the public, based on the principles of the current Act.

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Chapter 4

Corporate Governance and Financial Accountability

- Chapter retains most of the provisions found in the current law regarding corporate governance with important changes:
 - Quorum thresholds for passing an ordinary resolution 25% of all shares entitled to vote
 - Allows shareholders to participate in meetings by electronic communication.
 - Allows shareholders and directors to take binding decisions other than at a meeting.
 - Sets out a codified regime of directors' duties, which includes both a fiduciary duty, and a duty of reasonable care, which operate in tandem with existing common law duties.
 - Supplemented by provisions addressing conflict of interest, and directors' liability, indemnities and insurance
- Retains existing law with respect to financial records and statements, auditors, audit committees and company secretaries, but relieves closely held companies from the requirements of appointing auditors, unless they are also public interest companies as defined.

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Chapter 5

Takeovers, Offers and Fundamental Transactions

- Retains existing scheme largely (schemes of arrangement, mandatory offers, squeeze-out transactions, Takeover Code and Takeover Regulation Panel)
- Main changes:
 - Notification of share purchases
 - Approval of fundamental transactions (the disposal of substantially all of its assets or undertaking, a scheme of arrangement, or a merger or amalgamation) by a court only required if a significant minority opposed (at least 15%) or if procedural irregularity or a manifestly unfair result found.
 - Supported by a remedy of appraisal rights for dissenting minority shareholders.
 - Introduces concepts of merger and amalgamation of companies



Chapter 6

Business Rescue

- Replaces the current judicial management with a modern business rescue regime, largely self-administered by the company, under independent supervision within constraints set out in the chapter, and subject to court intervention at any time on application by any of the stakeholders.
- Recognises the interests of shareholders, creditors and employees, and provides for their respective participation in the development and approval of a business rescue plan.
- Notably, the chapter protects the interests of workers by -
 - recognising them as creditors of the company with a voting interest to the extent of any unpaid remuneration,
 - requiring consultation with them in the development of the business rescue plan,
 - permitting them an opportunity to address creditors before a vote on the plan, and
 - according them, as a group, the right to buy out any dissenting creditor who has voted against approving a rescue plan.



Remedies and Enforcement

- High Court remains the principal forum for remedies
- Retains existing remedies, but introduces new remedies, including:
 - right to seek a declaratory order as to a shareholder's rights
 - right to apply to have a director declared delinquent or under probation
 - Appraisal rights for dissenting shareholders to certain actions
 - Right to commence or pursue legal action in the name of the company (common law derivative action)
- Establishes an extended right of standing to commence an action on behalf of an aggrieved person, and a regime to protect "whistle blowers" who disclose irregularities or contraventions of the Act.



Regulatory Agencies and Administration of Act

- Companies and Intellectual Property Commission (currently CIPRO & dti)
 - Registration, enforcement of law, education
- Takeover Regulation Panel (currently SRP)
 - Approval of certain offers
- Financial Standards Reporting Council (same)
 - Advice on reporting standards
- Companies Ombud (new)
 - Resolution of shareholder disputes
 - Appeal of administrative decisions



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Conclusion

Anticipated impact of new law:

- Reduce cost of registration and maintenance of companies
- Reduce regulatory burden for small & medium-sized firms
- Improve transparency and accountability of public interest firms
- Improve regulatory oversight, enforcement and redress for shareholders, esp. minorities

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THANK YOU