



the dti

Department:
Trade and Industry
REPUBLIC OF SOUTH AFRICA

Companies Bill, 2008

Scope of the Bill

The Bill is structured as follows:

- 1. Chapter 1**
 - Types of companies
- 2. Chapter 2**
 - Incorporation and Registration
 - Company Names
 - Corporate Finance
 - Corporate Governance
 - Transparency and Accountability
- 3. Chapter 3**
 - Enhanced Transparency and Accountability
- 4. Chapter 4**
 - Public Security Offerings



Scope of the Bill cont..

- 5. Chapter 5**
 - Fundamental Transactions
- 6. Chapter 6**
 - Business Rescue
- 7. Chapters 7**
 - Enforcement and remedies
- 8. Chapter 8**
 - Institutions / Agencies
- 9. Chapters 8**
 - Penalties and transitional arrangements

Plus 7 schedules



Need for reform

Need for reforming our corporate legislation informed by following observations:

- 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



Need for reform cont...

- 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 and the Nel Commission of Inquiry.
- 1973 Companies Act outdated, highly formalistic, has unnecessarily burdensome information requirements, is creditor-oriented and overly criminal.

Policy objectives

The following objectives were identified in the Policy Framework:

- Simplification of the procedures for forming companies
- Reduction of costs associated with the formalities of forming a company and maintaining its existence
- Promoting innovation and investment in South African markets and companies by providing for –
 - (a) **flexibility** in the design and organisation of companies; and
 - (b) a **predictable and effective regulatory environment.**
- Promoting the **efficiency** of companies and their management
- Encouraging **transparency** and high standards of corporate governance
- Making company law compatible and harmonious with best practice jurisdictions internationally local conditions into account



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

Interpretation & application

- The Bill aims to:
- **Reduce formality and improve flexibility: s6 provides for –**
- (i) Companies to be granted exemptions from specific provisions if the requirements are inappropriate to the company, given its nature and structure;
- (ii) electronic documents to be used in place of originals; and
- (iii) electronic publication of documents, or electronic delivery of notices.
- **(b) Enhance compliance and prevent avoidance: s6 also provides –**
- (i) a general anti-avoidance remedy, which allows a scheme to be declared void if it seeks to evade a requirement or prohibition in the Bill; and
- (ii) a plain language requirement for documents, prospectuses and other notices required by the Bill.



Purposes of Bill

- s7 outlines the purposes of the Bill in line with the identified policy objectives, as being:
 - Promotion of economic development by:
 - encouraging entrepreneurship and enterprise efficiency
 - encouraging transparency and high standards of corporate governance
 - Promotion of innovation and investment in South Africa; (b)
 - Reaffirming role of company in achieving social and economic benefits
 - Balancing rights and obligations of shareholders and directors
 - Providing for efficient rescue of financially distressed companies
 - Providing a predictable and effective regulatory environment



Types of Companies

Companies incorporated in the Republic

- Non Profit Companies:
 - Subject to special requirements set out in Schedule 2
 - Must have at least one public benefit or social/cultural object.
 - Must apply all assets to its stated objects
 - Residual value must be distributed to like organisations
 - May not merge with, or convert to a profit company
- Profit Companies:
 - Public Companies
 - State Owned Enterprises
 - Personal Liability Companies
 - Private Companies

Companies incorporated outside the Republic

- Foreign Companies
- External Companies

Company registration

- Incorporation is a right
- Policy is to maximize freedom of association and contract - see s.13
- One or more person may incorporate a profit company, 3 or more may incorporate a non profit company.
- Incorporation is by signing a Memorandum of Incorporation, and filing a Notice of Incorporation with fee.
- Memorandum may be pro forma or bespoke, but form does not suggest or impose any provisions
- Memorandum of a profit company must set out number of authorised shares, and rights, terms, etc of shares.
- Memorandum may be in Schedule 1 form, which provides simple check box approach.



Company registration cont..

- Bill contemplates future internet based completion and filing of Notice and Memorandum of Incorporation - 6 (13)
- All companies must file Memorandum of Incorporation
- Notice of Incorporation may be rejected only if incomplete, or if it names too few directors, or initial directors are disqualified.
- Commission has no authority to judge the merits of the company's structure.
- Commission must register company, even if chosen name is unavailable, by assigning registration number as interim name of the company.



Legal status of companies

- All companies have all compatible legal powers, unless restricted by its Memorandum of Incorporation
- Company exists continuously as a juristic person until de-registered
- Pre-incorporation contracts by company are binding unless rejected, and are deemed to have been ratified 3 months after incorporation, unless rejected before that.
- Reckless trading, or trading while insolvent is an offence.

Company Names

Requirements for Names

- Policy is to allow freedom of expression See s. 11
- No limits except to prevent fraud and misrepresentation, and to avoid use of hate speech, and similar offensive names
- Company name may be the Registration Number
- Company name may include numbers or symbols as well as words
- Company Name must end with designating abbreviation

Use of Names

- Policy is to abandon formalities, but prevent misrepresentation and fraud - see s. 32
- Company is free to use its name as and when it sees fit
- Name and registration number must be provided accurately on request - offence to fail to do so.
- Offence to misrepresent by use of a company's name
- Offence to pass off as a company, when not incorporated in terms of the Act.



Name Reservations

- Reservation is optional
- Reservation is for 6 months, and may be extended
- Reservation is transferable
- Provisions included to address cases of name squatting and trading

Name reservations cont..

Comparison of current and proposed provisions:

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

Office and records

- Company must maintain a registered office in the Republic.
- Company must keep records at its registered office, or another disclosed location.
- Records must be kept for 7 years, in written form, or accessible for printing.
- Shareholders have right of access to listed records s26

Transparency

Accounting records and statements

- All companies must maintain accurate accounting records.
- Offence to falsify or fail to keep proper records.
- All companies must have a financial year.
- All financial statements given to another person must bear a disclosure statement See s. 29
- Offence to publish false financial statement.
- Bill now revised to require all companies to produce annual financial statements.

Annual Return

- Company must file an annual return See s. 33
- Annual return must include AFS, unless company is exempt.
- Commission may deliver notice requiring exempt company to produce AFS in future years.
- Public Companies are subject to additional transparency requirements set out in Chapter 3.

Financial Statements

- Who should prepare Annual Financial Statements (AFS)?
 - Initially exempted personal liability companies, owner managed companies, and those where all executive directors are shareholders of the company (effectively small companies)
 - Need for small companies to prepare AFS:
 - To encourage sound financial management
 - To ensure sustainability of companies of all sizes
 - To comply with other regulatory requirements
 - However reduce regulatory burden by
 - Exempting these companies from having AFS audited or reviewed
 - Differential reporting standards: small companies will comply with less onerous standards; s29(5)

Corporate Governance & 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 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 small or private companies from the requirements of appointing auditors, unless they are required by the Minister to do on public interest grounds

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.
- Business rescue is based on a test of the company being “financially distressed”, rather than being contingent on the ambiguous and confusing concept of “an insolvency event”.
- The profession of ‘business rescue supervision’ is to be recognised and regulated.
- Recognises the interests of shareholders, creditors and employees, and provides for their respective participation in the development and approval of a business rescue plan.



Business rescue cont..

- 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..

Companies and Intellectual Properties Commission

- Maintains and operates Registry
- Monitors and promotes compliance with Act
- Enforces Act by receiving and investigating complaints, issuing compliance orders and referring offences for prosecution
- Conducts research, promotes education, co-ordinates with other agencies, and reports to Minister

Takeover Regulation Panel

- Replaces current SRP
- Regulates affected transactions and offers
- Advises Minister on Takeover Regulations



Companies Ombud

- Adjudicates disputes over Commission decisions and compliance notices
- May serve as an ADR agent between private parties in dispute under the Act

Financial Reporting Standards Council

- Receives reports from Commission concerning compliance with FRS
- Advises Minister on FRS



RELATIONSHIP WITH CLOSE CORPORATIONS ACT

- The Bill provides for -
 - the co-existence of the new Companies Act and the Close Corporations Act;
 - amendments to the Close Corporations Act to harmonize the two laws with respect to regulation, while preserving the existing internal features of close corporations;
 - existing close corporations are free to retain their current status until such time as their members may determine that it is their interest to convert to a company; and
 - In order to avoid regulatory arbitrage, the Close Corporations Act to be closed as an avenue for the incorporation of new entities, or for the conversion of companies into close corporations, as of the effective date of the Bill.



Offences: Decriminalization of Company Law:

- In accordance with the objectives and goals, the proposed Act de-criminalizes company law. There are very few remaining offences, those arising out of refusal to respond to a summons, give evidence, perjury, and similar matters relating to the administration of justice in terms of the Act. Any such offences must be referred by the Commission to the National Public Prosecutor for trial in the Magistrate's Court.
- Generally, the Act uses a system of administrative enforcement in place of criminal sanctions to ensure compliance with the Act. The Commission, or the Takeover Panel, may receive complaints from any stakeholder, or may initiate a complaint itself.



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THANK YOU