

REPUBLIC OF SOUTH AFRICA

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# COMPANIES AMENDMENT BILL

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*(As amended by the Portfolio Committee on Trade and Industry (National Assembly))*

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(MINISTER OF TRADE AND INDUSTRY)

**[B 32B—98]**

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REPUBLIEK VAN SUID-AFRIKA

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# MAATSKAPPYWYSIGINGS- WETSONTWERP

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*(Soos gewysig deur die Portefeuljekomitee oor Handel en Nywerheid (Nasionale Vergadering))*

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(MINISTER VAN HANDEL EN NYWERHEID)

**[W 32B—98]**

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**GENERAL EXPLANATORY NOTE:**

[                    ]    Words in bold type in square brackets indicate omissions from existing enactments.

                        Words underlined with a solid line indicate insertions in existing enactments.

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# **BILL**

**To amend the Companies Act, 1973, so as to further define certain words used in the Act; to further provide for the reservation and registration of a translation of a company name and the substitution of the memorandum of association of a company with a translation thereof; to require that stamp duty be paid in certain circumstances where preference shares are redeemed; to further regulate the indemnification and warranty furnished for the transfer of securities of any company; to redefine offers of shares not being offers to the public; to increase the additional fees payable in the event of a company having failed to hold its annual general meeting within the prescribed time limits; to provide that the disposal of the undertaking or greater part of the assets of a company shall be an affected transaction regulated by the Securities Regulation Panel; to allow a company to insure itself against liability; to extend the powers of an inspector in relation to an investigation into the affairs of a company; to provide for the appointment of an acting executive director of the Securities Regulation Panel; to provide anew for the composition of the Securities Regulation Panel; to enable the Securities Regulation Panel to require from a person to lodge any book, document or other object necessary for an investigation with the Panel; to further provide for the signing of summonses; to provide anew for the circumstances under which certain information may be disclosed; to provide anew for the limitation of liability of the Securities Regulation Panel, its members, employees and representatives in the performance of their functions; and to further regulate and prescribe penalties for offences; and to provide for matters connected therewith.**

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**B**E IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

**Amendment of section 1 of Act 61 of 1973, as amended by section 1 of Act 76 of 1974, section 1 of Act 64 of 1977, section 26 of Proclamation 234 of 1978, section 1 of Act 84 of 1980, section 1 of Act 83 of 1981, section 1 of Act 29 of 1982, section 1 of Act 31 of 1986 and section 1 of Act 82 of 1992** 5

1. Section 1 of the Companies Act, 1973 (hereinafter referred to as the principal Act), is hereby amended—

(a) by the substitution in subsection (1) for the definition of “external company” of the following definition: 10

“ ‘external company’ means a company or other association of persons, incorporated outside the Republic, the memorandum of which was lodged with the Registrar under the repealed Act, or which, since the commencement of this Act, has established a place of business in the Republic and for purposes of this definition establishing a place of business shall include the acquisition of immovable property;” 15

(b) by the insertion in subsection (3) after paragraph (c) of the following paragraph:

“(cA) For the purposes of this subsection ‘hold’ or any derivative thereof refers to the registered or beneficial holder (direct or indirect) of shares conferring a right to vote.” 20

**Amendment of section 42 of Act 61 of 1973, as amended by section 6 of Act 83 of 1981**

2. Section 42 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection: 25

“(1) [The] Subject to the provisions of section 41, the Registrar [may] shall, on written application on the prescribed form and on payment of the prescribed fee, reserve a name (approved by [him] the Registrar) or literal translation into [the] not more than one other official language of the Republic of a name of a company or a shortened form of the name or name so translated of a company, pending the registration of a memorandum or a change of name by that company or the registration of another form of the name or translated name.” 30

**Amendment of section 43 of Act 61 of 1973, as amended by section 2 of Act 84 of 1980, section 7 of Act 83 of 1981 and section 3 of Act 63 of 1988**

3. Section 43 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection: 35

“(1) The memorandum of any company to be incorporated may contain a literal translation into [the] not more than one other official language of the Republic of the company’s name and one shortened form of that name or the name so translated (hereinafter in this Chapter referred to as the translated name), and any company may, on the prescribed form and on payment of the prescribed fee, apply to the Registrar for the registration of such translated name and shortened form of its name or translated name, if in each case the translated name and shortened form of the name or translated name concerned is not in the opinion of the Registrar undesirable.” 40 45

**Amendment of section 50 of Act 61 of 1973, as amended by section 12 of Act 83 of 1981 and section 1 of Act 29 of 1985**

4. Section 50 of the principal Act is hereby amended by the substitution for subsection (2) of the following subsection:

“(2) If a translated name of a company has been registered, the use of that translated name, and if the name of a company consists of or contains words in one of the official languages of the Republic, the use of a name consisting of or containing a literal translation of such words into [the] not more than one other official language, shall be deemed to be sufficient compliance with the requirements of this section.” 50 55

**Substitution of section 57 of Act 61 of 1973**

5. The following section is hereby substituted for section 57 of the principal Act:

**“Substitution of memorandum in other language**

57. A company may, by special resolution, substitute for its existing memorandum in [either] any of the official languages of the Republic, a translation thereof in [the other] another official language: Provided that the memorandum in the original language shall be decisive in the construction of the memorandum so substituted therefor.”. 5

**Amendment of section 98 of Act 61 of 1973, as amended by section 4 of Act 64 of 1977 and section 15 of Act 69 of 1989** 10

6. Section 98 of the principal Act is hereby amended by the addition to subsection (2) of the following proviso:

“Provided that, where new shares are issued before the redemption of the old shares, the new shares shall not for purposes of any law relating to stamp duty be deemed to have been issued in pursuance of this subsection, unless the old shares are redeemed within thirty days after the issue of the new shares.” 15

**Substitution of section 138 of Act 61 of 1973**

7. The following section is hereby substituted for section 138 of the principal Act:

**“Warranty and indemnity by persons lodging documents of transfer**

138. [Any] (1) Subject to the provisions of subsection (2), any person who, for the purposes of the transfer of any security of any company, as principal or agent, lodges with that company any document relating to that transfer, shall be deemed thereby to warrant that such document, excluding a certificate of ownership or any other document evidencing title to such security, is genuine and that he or she, or when he or she is acting as agent, his or her principal jointly and severally with him or her, indemnifies the said company against any claim made upon it and against any loss or damage suffered by it arising out of a transfer registered by the company of the security referred to in such document. 20 25

(2) The indemnification contemplated in subsection (1) shall not apply where it is proved by the person who lodged the documents concerned that he or she acted in good faith and that the company acted negligently in registering the transfer of the securities referred to in those documents: Provided that if the Court holds that the loss or damage contemplated in subsection (1) is caused partly by the negligence of such company and partly by the negligence of such person the damage recoverable in respect thereof shall be reduced by the Court to such extent as the Court may deem just and equitable having regard to the degree in which the company or such person, as the case may be, was negligent in relation to the damage.” 30 35

**Substitution of section 144 of Act 61 of 1973, as amended by section 8 of Act 111 of 1976 and section 7 of Act 64 of 1977** 40

8. The following section is hereby substituted for section 144 of the principal Act:

**“Offers not being offers to the public**

144. An offer of shares in relation to an offer for subscription for or sale of any shares, shall not be construed as an offer to the public— 45  
(a) if the offer is made to—

- (i) a bank registered or provisionally registered in terms of the Banks Act, 1990 (Act No. 94 of 1990); or
- (ii) a mutual bank registered or provisionally registered in terms of the Mutual Banks Act, 1993 (Act No. 124 of 1993); or
- (iii) an insurer registered or provisionally registered in terms of the Insurance Act, 1943 (Act No. 27 of 1943),  
which is acting as principal, and also to a wholly owned subsidiary of such bank, mutual bank or insurer when it acts as agent in the capacity of authorised portfolio manager for a pension fund registered in terms of the Pension Funds Act, 1956 (Act No. 24 of 1956), or for a unit trust scheme managed by the said wholly owned subsidiary which is registered as a management company in terms of the Unit Trusts Control Act, 1981 (Act No. 54 of 1981);
- (b) if the offer for subscription is of such a nature that the total acquisition cost of the shares for a single addressee acting as principal is at least R100 000 or such higher amount as the Minister may, by notice in the *Gazette*, determine in order to counter the effect of inflation;
- (c) if it is a single once-off offer for subscription and the offer is accepted by a maximum of fifty persons acting as principals: Provided that—
  - (i) the aggregate subscription price (including any premium) of the shares so issued does not exceed R100 000 or such higher amount as the Minister may, by notice in the *Gazette*, determine in order to counter the effect of inflation;
  - (ii) the issue of the shares shall be finalised within six months from the date the offer was first made;
  - (iii) the offer shall be in writing;
  - (iv) particulars of the offer shall be lodged in the prescribed manner with the Registrar for registration prior to the offer being made; and
  - (v) the offer shall not be accompanied by or made by means of an advertisement and no selling expenses shall be incurred in connection with the offer;
- (d) if it is a non-renounceable offer for the subscription of shares and the offer is made only to existing shareholders or debenture holders of that company;
- (e) if it is a rights offer; or
- (f) if the offer is made to any director or officer of the company, or any close relative of such director or officer: Provided that the original offer shall for purposes of this Chapter be an offer to the public if the offer is renounceable in favour of a person who is not a director or officer of the company or close relative of such director or officer.”

**Amendment of section 179 of Act 61 of 1973, as amended by section 16 of Act 64 of 1977, section 11 of Act 29 of 1982, section 9 of Act 70 of 1984 and section 48 of Act 88 of 1996**

9. Section 179 of the principal Act is hereby amended by the substitution for subsection (6) of the following subsection:

“(6) A company which has failed to hold its annual general meeting within the time or extended time prescribed by subsection (1) or (3), or as directed by the Registrar under subsection (4), shall further be liable to pay to the Registrar additional fees of **[one] fifty** rand for every day during which the default continues but not exceeding a maximum of **[twenty] one thousand** rand.”

**Amendment of section 228 of Act 61 of 1973**

10. Section 228 of the principal Act is hereby amended by the addition of the following subsection:

“(3) The requirements contained in this section in respect of transactions falling within the provisions of subsection (1), shall be in addition to any other requirements, including the limitation of voting rights, relating to such transactions that may be imposed by the Securities Regulation Panel in terms of section 440C or in terms of any other law.”. 5

**Amendment of section 234 of Act 61 of 1973**

11. Section 234 of the principal Act is hereby amended by the insertion after subsection (3) of the following subsection: 10

“(3A) For the purposes of subsection (3) ‘firm’ means a corporation as defined in section 1 of the Close Corporations Act, 1984 (Act No. 69 of 1984), or any other body corporate, association, syndicate, partnership or trust that has as its object the acquisition of gain.”. 15

**Amendment of section 247 of Act 61 of 1973**

12. Section 247 of the principal Act is hereby amended by the addition to subsection (1) of the following proviso:

“Provided that this subsection shall not be applicable to insurance taken out and kept by the company as indemnification against any liability of any director or officer towards the company in respect of any negligence, default, breach of duty or breach of trust.”. 20

**Amendment of section 259 of Act 61 of 1973, as substituted by section 23 of Act 64 of 1977**

13. Section 259 of the principal Act is hereby amended by the addition of the following subsection, the existing section becoming subsection (1): 25

“(2) For the purposes of subsection (1) the inspector may, with the approval of the Minister, also investigate the affairs of any individual, trust, partnership, close corporation or body corporate in which the directors or members of the company contemplated in that subsection have or had any interest in or association with and shall also report on the affairs of such individual, trust, partnership, close corporation or body corporate so far as the results of his or her investigation are relevant to the investigation of the affairs of the said company.”. 30

**Amendment of section 440A of Act 61 of 1973, as inserted by section 4 of Act 78 of 1989 and amended by section 1 of Act 69 of 1990** 35

14. Section 440A of the principal Act is hereby amended—

(a) by the addition at the end of paragraph (b) of the definition of “affected transaction” in subsection (1) of the word “or”, and the addition of the following paragraph:

“(c) is a disposal as contemplated in section 228;”; 40

(b) by the substitution in subsection (1) for the definition of “control” of the following definition:

“control” means, subject to subsection 2(b), a holding or aggregate holdings of shares or other securities in a company entitling the holder thereof to exercise, or cause to be exercised, directly or indirectly, the specified percentage or more of the voting rights at meetings of that company or any company controlled by it, irrespective of whether such holding or holdings confer de facto control;”; and 45

(c) by the substitution in subsection (1) for the definition of “executive director” of the following definition: 50

“ ‘executive director’ , means the executive director or acting executive director’ of the panel appointed in terms of section 440B(11);”.

**Amendment of section 440B of Act 61 of 1973, as inserted by section 4 of Act 78 of 1989**

15. Section 440B of the principal Act is hereby amended—

- (a) by the substitution for subsection (2) of the following subsection: 5  
 “(2) **[The]** Subject to the provisions of subsection (6), the members of the panel shall be appointed by the Minister and shall consist of—  
 (a) the **[chairman]** chairperson;  
 (b) the Registrar or his or her nominee;  
 (c) the **[chairman]** chairperson of the Competition Board established by section 3 of the Maintenance and Promotion of Competition Act, 1979 (Act No. 96 of 1979), or his or her nominee; 10  
 (d) **[such persons as are nominated by the bodies, associations and institutions referred to in subsection (3)]** three persons each nominated by the Johannesburg Stock Exchange and the Council of South African Banks; and 15  
 (e) **[any person co-opted in terms of subsection (6)]** one person nominated by each of such bodies, associations and institutions, limited to a maximum of fifteen such bodies, associations and institutions, which—  
 (i) the Minister in consultation with the panel, has determined as being sufficiently representative of the relevant interests in the regulation of securities; and 20  
 (ii) have been designated by the Minister by notice in the *Gazette*.”;
- (b) by the deletion of subsection (3); 25
- (c) by the substitution for subsection (4) of the following subsection:  
 “(4) The **[chairman]** chairperson, who need not be one of the nominated members, shall be designated by the members of the panel nominated in terms of paragraph (e) of subsection [(3)](2).”;
- (d) by the substitution for subsection (6) of the following subsection: 30  
 “(6) The panel shall be entitled, from time to time, to co-opt **[not more than four persons as]** additional members.”;
- (e) by the substitution in subsection (7) for the words preceding the proviso of the following words: 35  
 “Every member of the panel shall hold office for a period of not less than three and not more than five years, as the Minister may determine.”;
- (f) by the substitution for subsection (8) of the following subsection: 40  
 “(8) If, during **[such five-year]** the period contemplated in subsection (7), a member of the panel nominated pursuant to the provisions of subsection **[(3)]** (2), dies, becomes incapacitated, resigns, or becomes disqualified from being appointed or acting as a director of a company in terms of section 218, or ceases for any other reason to be a member of the panel, the vacancy arising in this manner may be filled for the unexpired period of such member’s term of office by a person nominated by the body, association or institution of which the member who ceases to be on 45  
 the panel was a nominee.”; and
- (g) by the substitution for subsection (11) of the following subsection: 50  
 “(11) The panel shall appoint an executive director to hold office for such period and on such conditions as the panel may determine and the panel may likewise appoint an acting executive director when the office of executive director is vacant or when the executive director is absent or for any reason unable to perform his or her functions.”.

**Amendment of section 440D of Act 61 of 1973, as inserted by section 4 of Act 78 of 1989**

16. Section 440D of the principal Act is hereby amended— 55

- (a) by the substitution for paragraph (a) of subsection (1) of the following paragraph:  
 “(a) summon any person who is believed to be able to furnish any information on the subject of an investigation or to have in his or her

possession or under his or her control any book, document or other object which has any bearing upon that subject, to lodge such book, document or other object with the executive director within the period specified in the summons, or to appear before the panel or a committee thereof at a time and place specified in the summons, to be interrogated or to produce such book, document or other object; and”;

(b) by the substitution for subsection (2) of the following subsection:

“(2) A summons for the attendance of any person before the panel or a committee thereof or for the production to the panel or a committee thereof of any book, document or other object shall be in the form prescribed by the panel, shall be signed by **[the chairman]** any member of the panel, by the executive director or by the chairperson of a committee and shall be served in the manner so prescribed.”.

**Amendment of section 440I, as inserted by section 4 of Act 78 of 1989** 15

17. Section 440I of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection:

“(1) No person shall disclose any information acquired by him or her in the exercise of his or her powers or the performance of his or her duties in terms of this Chapter and relating to the business or affairs of any other person, except—

(a) for the purposes of exercising his or her powers or performing his or her duties in terms of this Act;

(b) for the purposes of legal proceedings under this Act;

(c) when required to do so by any court or under any law;

(d) when co-operating with another body performing substantially the same functions as the panel, or any other body controlled by the aforementioned body, for the purpose of obtaining or furnishing any information relevant to any aspect of the functions of the panel or such body.”.

**Substitution of section 440J of Act 61 of 1973, as inserted by section 4 of Act 78 of 1989 and substituted by section 5 of Act 69 of 1990** 30

18. The following section is hereby substituted for section 440J of the principal Act:

**“Limitation of liability**

**440J.** The panel or any member thereof, any committee of the panel or member of such committee, or any employee or representative of the panel, shall not be liable for any loss sustained by or damage caused to any person as a result of anything done or omitted by the said panel, committee, member, employee or representative in the *bona fide* exercise of any power or carrying out of any duty or performance of any function under or in terms of this Act or the rules.”.

**Amendment of section 441 of Act 61 of 1973, as substituted by section 5 of Act 78 of 1989, and amended by section 7 of Act 69 of 1990 and section 14 of Act 82 of 1992** 40

19. Section 441 of the principal Act is hereby amended by the substitution for subsection (1) of the following subsection:

“(1) Any company, director, officer or person convicted of any offence referred to in any of the undermentioned sections shall be liable to be sentenced, in the case of an offence referred to—

(a) in section 440F(1), to a fine **[not exceeding R500 000]** or to imprisonment for a period not exceeding 10 years or to both such fine and imprisonment;

- (b) in section 132, to a fine **[not exceeding R40 000]** or to imprisonment for a period not exceeding 10 years or to both such fine and such imprisonment;
- (c) in section 440G(2) or 440I(2), to a fine **[not exceeding R20 000]** or to imprisonment for a period not exceeding five years or to both such fine and such imprisonment; 5
- (d) in section 37, 143, 145, 145A, 146, 146A, 147(2)(a), 148, 149, 153(4), 156, 162, 169, 218, 219, 255, 256(5), 260, 284, 424 or 440D(3) or (4), to a fine **[not exceeding R8 000]** or to imprisonment for a period not exceeding two years or to both such fine and such imprisonment;
- (e) in section 15A, 38, 141, 153(3), 165, 222, 226, 234, 237, 238, 249(1), 250, 251 or 275, to a fine **[not exceeding R4 000]** or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment; 10
- (f) in section 90, 286, 288, 297, 298, 299, 302, 308, 312(5), 363, 363A, 365, 414, 418(5) or 421, to a fine **[not exceeding R2 000]** or to imprisonment for a period not exceeding six months or to both such fine and such imprisonment; 15
- (g) in section 242 or 287, to a fine **[not exceeding R1 000]** or to imprisonment not exceeding a period of three months or to both such fine and such imprisonment;
- (h) in section 168, 185, 256(6), 312(4), or 331(1), to a fine **[not exceeding R4 000]**; 20
- (i) in section 81, 93, 164, 166, 170, 207, 211(7), 239, 291 or 295, to a fine **[not exceeding R2 000]**;
- (j) in section 112, 113, 131 or 179, to a fine **[not exceeding R800]**;
- (k) in section 49, 50, 67, 68, 147(2)(b), 181, 186, 189, 192, 206, 313 or 333(2), to a fine **[not exceeding R400]**; 25
- (l) in section 204 or 245, to a fine **[not exceeding R400]** for every meeting in respect of which the contravention has taken place;
- (m) in section 171, 200(5) or 311, to a fine **[not exceeding R200]**;
- (n) in section 215, to a fine **[not exceeding R2 000]** and an additional fine **[not exceeding R40]** for every day during which the contravention continues; 30
- (o) in section 172, to a fine **[not exceeding R400]** for every day during which the contravention continues;
- (p) in section 46, 51, 58, 80, 96, 98, 102, 139, 200(6), 213, 253, 269, 271, 309, 356 or 357, to a fine **[not exceeding R40]** for every day during which the contravention continues; 35
- (q) in section 211(6), 216(5), 252 or 276(5), to a fine **[of R20]** for every day during which the contravention continues.”.

### Substitution of word

20. The principal Act is hereby amended by the substitution for the word “chairman”, wherever it occurs in sections 440A(1), 440B(5), (10) and (12) and 440D(1) and (3), of the word “chairperson”. 40

### Transitional provision

21. The members of the Securities Regulation Panel (established by section 440B(1) of the principal Act), who held office immediately prior to the commencement of this Act, shall continue in office until the date immediately prior to the first meeting of the panel as constituted in terms of section 440B(2) of the principal Act as amended by section 15. 45

### Short title

22. This Act shall be called the Companies Amendment Act, 1998.

**MEMORANDUM ON THE OBJECTS OF THE COMPANIES  
AMENDMENT BILL, 1998**

**INTRODUCTION**

This Bill amends the Companies Act, 1973 (Act No. 61 of 1973), hereinafter referred to as “the Act”, and emanates from recommendations made by the Standing Advisory Committee on Company Law (SAC) to the Minister of Trade and Industry, after having considered various representations from interested parties. Where appropriate the names of such parties are mentioned in the discussion of each clause. The Committee also consulted widely with various experts before making the said recommendations.

**CLAUSE 1**

**Paragraph (a): Definition of “external company”**

**Present position**

There is a lacuna in respect of foreign companies acquiring fixed property in the Republic. There is a strong argument that any foreign company can in fact acquire fixed property without having to register as an external company. Such companies will not fall under the jurisdiction of our courts.

**Proposed position**

In order to provide for clarity in our law and to prevent foreign companies being able to avoid the provisions of the Act this amendment will bring such foreign companies within the ambit of the Act. (Representations by the Association of Law Societies of SA.)

**Paragraph (b): Definition of “subsidiary”**

**Present position**

The definition does not properly cater for nominee shareholding or other forms of indirect shareholding.

**Proposed position**

Beneficial shareholding, direct or indirect, will now be catered for. The SAC identified this deficiency.

**CLAUSES 2, 3, 4 AND 5**

**Present position**

In all these sections being amended, reference is made to “the other official language”, which, of course, does not reflect the current position.

**Proposed position**

In order to avoid confusion in the market place and so to enhance consumer and creditor protection, a company will only be allowed to register its name in any two official languages. In the public interest a juristic person should not be allowed to do business under a multitude of names. (Representations by the Registrar of Companies.)

**CLAUSE 6**

**Present position**

A company has the power to issue new shares to obtain the necessary funds to redeem

redeemable preference shares. No moneys are payable in respect of such an issue. The dispensation is often being misused by companies in that they do not always utilise these new funds for the redemption or only use it long afterwards.

### **Proposed position**

The proviso which formed part of this section prior to its repeal in 1989 is now being reintroduced to ensure that the new issue and redemption are treated as one transaction and that the exemption from paying any moneys is not misused. (Representations by Prof M M Katz and the Tax Commission.)

## **CLAUSE 7**

### **Present position**

Section 138 of the Act provides that any person who lodges documents relating to the transfer of listed securities of a company with that company guarantees that such documents are genuine and indemnifies the company against any loss or damage suffered by it arising out of a transfer of the security referred to in such document.

The main objection to this provision is that it imposes absolute liability on the person who lodges the document for transfer. The person is held liable whether he or she was negligent or not; the negligence of the company itself is not taken into account. This can result in an inequitable situation.

### **Proposed position**

During the South African Law Commission's investigation into "The protection of a purchaser of shares", this matter was also looked into and after consultation with the Standing Advisory Committee on Company Law, the Commission recommended in a supplementary report that section 138 be amended to provide for a more equitable distribution of the risk of damage or loss that can be involved in the registration of transfer of listed securities.

## **CLAUSE 8**

### **Present position**

Section 144 of the Act provides in rather vague terms which offers of shares are not being regarded as offers to the public. This led to a spate of so-called "private placings" during recent years in which investors lost millions of rands — Masterbond, Supreme, etc. In all these cases the offer document was titled with the wording of the exemptions contained in section 144 and no proper prospectus containing all information to make an informed decision on the investment concerned, was registered.

### **Proposed position**

It must be clear from the provisions of the Act that all public offers of shares must be accompanied by a registered prospectus. Only offers which are expressly excluded and which are now being identified in the proposed section 144 need not be accompanied by a full prospectus but in certain cases by a shortened form of prospectus containing certain basic information of the company. This provision will effectively stop private placings which are in actual fact offers to the public. This amendment was pioneered by the SAC and is also sanctioned by the Financial Services Board, the Registrar of Banks and the Policy Board for Financial Services and Regulation.

**CLAUSE 9****Present position**

A company which has failed to hold its annual general meeting within the prescribed time limits is liable to pay the Registrar of Companies a fee of one rand per day during which the default continues to a maximum of twenty rand.

**Proposed position**

Inflation has eroded these fees and it is proposed that they be increased to fifty rand per day with a maximum of one thousand rand. (Representations by the Registrar of Companies.)

**CLAUSES 10 AND 14(a)****Present position**

A company may by ordinary resolution dispose of the whole or substantially the whole of its undertaking or the whole or the greater part of its assets.

This leaves the door wide open to abuse in those cases where control (50% plus of shareholding) as well as the voting power is vested in a single shareholder or a small group of shareholders working in concert. The majority shareholders merely outvote the minorities and very often buy the undertaking or assets themselves at a price determined by them. In these cases there are no minority protection. In the case of share transactions where control of the company changes hands, the Securities Regulation Panel affords the necessary protection to minorities by applying its rules and the Code on Take-overs and Mergers.

**Proposed position**

By bringing section 228-transactions under the umbrella of “affected transactions” the Securities Regulation Panel could also regulate these transactions and thereby protect minorities against unfair treatment. The SAC and Securities Regulation Panel identified the problem and in consultation with the Johannesburg Stock Exchange made this recommendation.

**CLAUSE 11****Present position**

A director of a company has the duty to disclose any interest he or she may have in a contract which the company enters into with another company or firm of which he or she is also a member. The word “firm” is, however, undefined and vague, which leads to many cases not being disclosed.

**Proposed position**

By widely defining the word “firm” for purposes of section 234 of the Act, proper disclosure should result and if proper disclosure is not made, appropriate steps could be taken against the director concerned. (Representations by the Chartered Institute of Secretaries and Administrators.)

**CLAUSE 12****Present position**

Section 247 of the Act provides that any provision in the articles of a company or in any contract with the company which purports to exempt or indemnify any director, officer or auditor of the company from liability as a result of negligence, default, breach of duty, or breach of trust, in relation to the company, shall be void.

**Proposed position**

On the recommendation of the King Committee on Corporate Governance a proviso is now being added to the section to allow a company to protect itself by taking out insurance against liability of a director or officer towards the company in respect of negligence, default, breach of duty or breach of trust.

**CLAUSE 13****Present position**

When the Minister appoints an inspector to investigate the affairs of a company he or she may authorise the inspector to also investigate the affairs of that company's subsidiaries or holding company (or former subsidiaries or holding company), if such investigation is relevant to the investigation of the first-mentioned company.

**Proposed position**

Directors of companies often make use of the other forms for enterprise (business trusts, partnerships, close corporations and other bodies corporate) to channel through fraudulent deals and in these cases the inspector has no power to conclude his or her investigation. The Minister will now be empowered to extend the investigation also to those other forms of enterprise if it is relevant to the investigation of the company which is the subject of the investigation. (Representations by the Registrar of Companies.)

**CLAUSE 14(b) AND (c)****Present position**

The definition of "control" for purposes of take-overs and mergers does not take cognisance of shares which are indirectly held. This can lead to situations where protection cannot be afforded to minority shareholders by the Securities Regulation Panel ("the SRP").

The definition of "executive director" of the SRP makes no provision for someone to act in his or her stead when the position is vacant or when the executive director is unable to perform his or her functions.

**Proposed position**

The two definitions are now amended to cater for these deficiencies. (Representations by the SRP.)

**CLAUSE 15****Present position**

Section 440B(2) provides for the composition of the SRP. It names each body, association and institution which are to be represented on the SRP. It causes practical problems because these organisations change names and merge. Representation on the SRP then becomes uncertain.

It is also felt that the period of office of five years may in certain circumstances be too long.

**Proposed position**

By enabling the Minister and the SRP to determine a sufficiently representative body for the regulation of securities, a much more flexible situation will be created. The Minister will be able, by publication in the *Gazette*, to add new member bodies to

or to delete existing member bodies from the group of bodies comprising the constituency of the SRP without having to amend the Act every time the need to amend such constituency may arise. (Representations by the SRP.)

## **CLAUSE 16**

### **Present position**

Section 440D is not clear as to whether or not a person may be summoned to produce a book, record or other object without having to appear before the SRP or a committee thereof in person. This section also provides that all summonses must be signed by the chairperson of the SRP. The chairperson is not a full-time employee and it is extremely impractical to vest this power in that person only.

### **Proposed position**

The amendment will make it clear that a person so summoned may merely lodge such book, document or other object with the executive director within the time specified in the summons.

The proposed amendment will also empower a member of the SRP or its executive director to sign summonses. (Representations by the SRP.)

## **CLAUSE 17**

### **Present position**

Section 440I prohibits the disclosure of any information relating to the business or affairs of any person acquired by the SRP, except for purposes of the carrying out of its functions under the Act.

### **Proposed position**

This section is interpreted as to prohibit the SRP from co-operating with authorities similar to the SRP. Authorities such as the Securities and Exchange Commission (SEC) in the USA and the SRP's counterpart in London, are desirous of co-operation with the SRP as regards the regulation of securities and the international policing of insider trading. Negotiations in this regard have already been entered into with the SEC and the Treasury of the United Kingdom. This amendment will make co-operation with any other body performing substantially the same functions as the panel possible. (Representations by the SRP.)

The insertion of the proposed amendment necessitated the redrafting of the section — paragraph (d) contains the new proposal.

## **CLAUSE 18**

### **Present position**

Section 440J provides that the SRP, its members or its executive director shall not be liable in respect of anything done “in good faith” in the exercise of their duties.

### **Proposed position**

In terms of our case law “good faith” excludes negligence. Members of the SRP, although acting *bona fide*, could therefore be held liable in case of mere negligence. The SRP recommended that liability should be limited to “*bona fide* or negligent, but not grossly negligent” performance of functions. Virtual identical provisions were passed by Parliament during 1996 in regard to the corresponding sections in the Stock Exchanges Control Act, 1985 (Act No. 1 of 1985), and the Financial Markets Control Act, 1989 (Act No. 55 of 1989). However, this extension was not approved. The

amendment as approved merely extends the current limitation of liability to include employees and representatives of the SRP.

#### **CLAUSE 19**

##### **Present position**

Section 441 contains all penalties for offences in terms of the Act. The fines prescribed in this section are outdated.

##### **Proposed position**

It is proposed that, in those cases where a term of imprisonment is also prescribed, the amounts specified in the section be deleted. This will bring section 441 within the ambit of the Adjustment of Fines Act, 1991 (Act No. 101 of 1991), which empowers the Minister of Justice to determine the appropriate fines in accordance with a formula prescribed in that Act.

In those cases where no term of imprisonment is prescribed, it is proposed to delete the prescribed amounts. Thereby the courts will have an unfettered discretion to determine a suitable fine.

#### **CLAUSE 20**

The proposed amendment (by the substitution for the word “chairman” of the word “chairperson”) speaks for itself.

#### **CLAUSE 21**

This is merely a transitional provision to facilitate the composition of a future SRP as envisaged by the amendments in clause 15.

#### **PARLIAMENTARY PROCEDURE**

The State Law Advisers and the Department of Trade and Industry are of the view that this Bill must be dealt with in accordance with the procedure established by section 75 of the Constitution since it contains no provision to which the procedure set out in section 74 or 76 of the Constitution applies.