



COMPANIES AMENDMENT BILL

PRESENTATION TO NEDLAC
27 March 2019



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Department:
Trade and Industry
REPUBLIC OF SOUTH AFRICA



PURPOSE



To brief the National Economic Development and Labour Council (Nedlac) on the Companies Amendment Bill (the Bill).

Furthermore, to seek approval for the Bill to be placed on the Nedlac programme for deliberations.



TABLE OF CONTENTS

Background

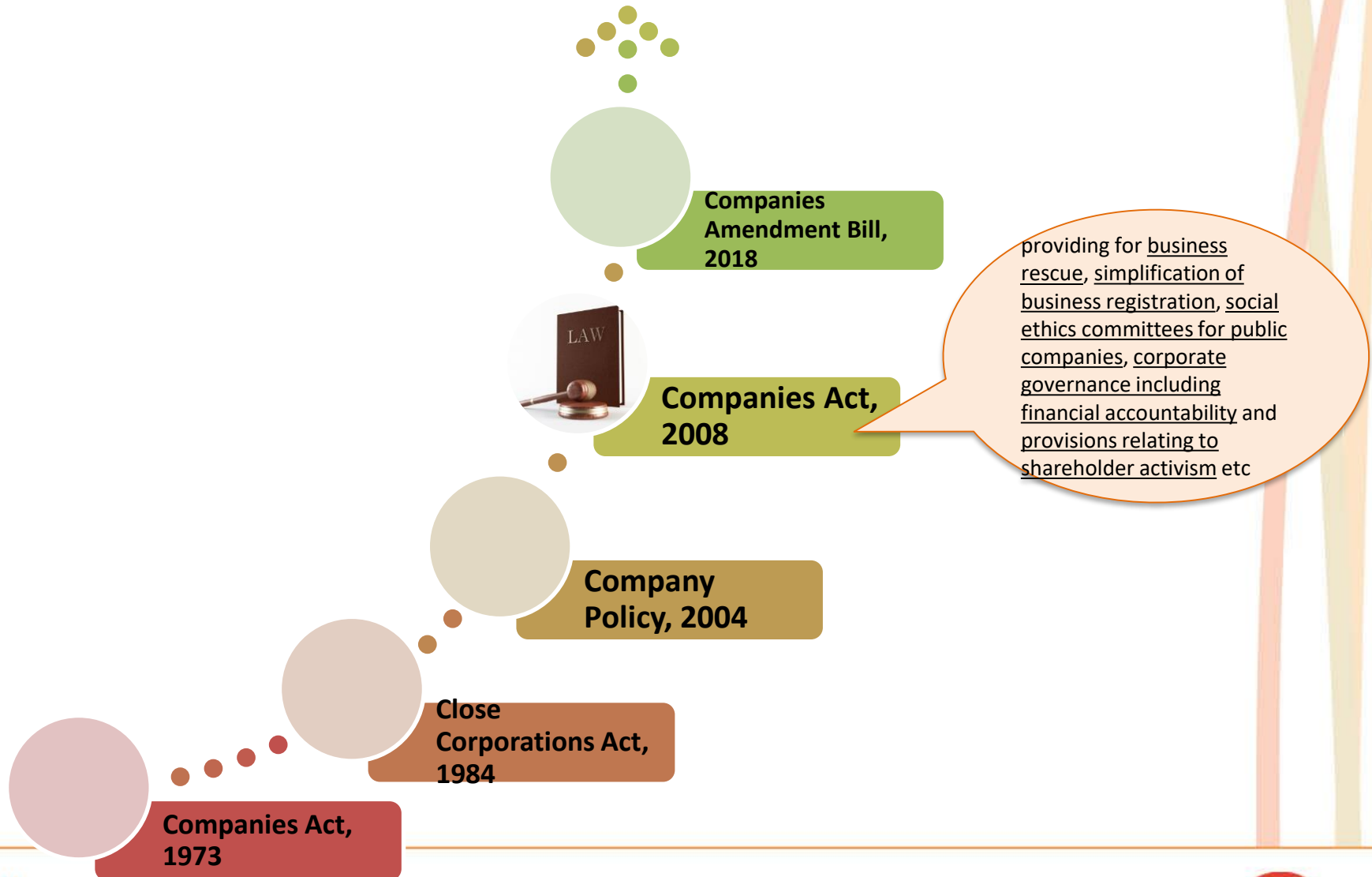
Objectives of the CAB

Proposed Amendments

Way Forward

Recommendations

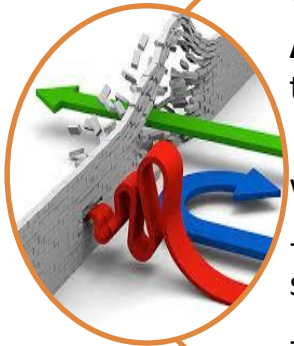
BACKGROUND



BACKGROUND

- Cabinet adopted the CAB for wider public consultation in August 2018.
- The Bill was published in the Government Gazette on 21 September 2018 for 60 days closing on 14 December 2018.
- The Department is currently at final stages of reviewing comments and updating the Bill.
 - The revised Bill to be submitted to Nedlac Trade and Industry Chamber (TIC) by 16 May 2019.
- The amendments are mainly administrative in nature with an aim to clarify, simplify and ease the business environment.
- During the Nedlac Strategic Session with the Minister 02 November 2018, the TIC requested to have the Companies Amendment Bill presented at the TIC:
 - E.g. of issues raised is the concern on director's remuneration and ratios between the highest and lowest paid.

OBJECTIVES OF THE CAB



To **address problematic areas** identified during the implementation of the Companies Act (the Act) and the Regulations as from May 2011.

Amongst others, include: To clarify when a Notice of Amendment of a Memorandum of Incorporation takes effect;

- to empower a court to validate the irregular creation, allotment or issue of shares; to clarify how shares which are not fully paid are to be dealt with;
- to extend the definition of an employee share scheme to include those where there are purchases of shares of a company;
- to deal with the composition of the social and ethics committee and its functions; and
- to limit the circumstances under which a private company will be a regulated company.



To **align the Act with international corporate trends**. The Group of Twenty's (G20) Global Framework for Tracing Beneficial Ownership, requires members and affiliated countries such as South Africa to encourage beneficial owner disclosure in all their legislation governing business and investment institutions. Department of Public Service will be spearheading the project.

PROPOSED AMENDMENTS

Amendment to the Definitions-clause 1

“**B-BBEE Act**’ means the Broad-Based Black Economic Empowerment Act 53 of 2003, as amended;”;

“**B-BBEE Commission**’ means the Broad-Based Black Economic Empowerment Commission as established in terms of the B-BBEE Act;”;

“**securities**’ means any shares[.] or debentures[or other instrument] or any options in respect thereof irrespective of their form or title, issued or authorised to be issued by a profit company;”;



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Trade and Industry
REPUBLIC OF SOUTH AFRICA



Amending Memorandum of Incorporation

Clause 2 of the Bill proposes an amendment to section 16 of the Act by requiring amendments to the MOI to be endorsed by Companies and Intellectual Property Commission (CIPC).

Rationale: The current limited role of CIPC in the amendment process contributes to submission of defective and inconsistencies in the amendment of MOI's.

Location of Company Records

Clause 3 of the Bill proposes an amendment to section 25 of the Act by requiring the CIPC to publish the location of company records in instances where the records are not kept at the company's registered office.

Rationale: This will encourage access to company records by shareholders, the public and interested parties such as the media, investors, regulatory bodies and financial institutions.

Access to Company Records

Clause 4 proposes an amendment to section 26 of the Act by enabling persons with no beneficial interests to access information mentioned in section 26(1) upon payment of a prescribed fee.

Rationale: This will facilitate access to company records by the public and interested parties such as the media, investors, regulatory bodies and financial institutions.

Annual Financial Statements

Clause 5 proposes an amendment to section 30 of the Act by requiring that the remuneration and benefits of directors and prescribed officers must be disclosed and that directors must be named.

Rationale: Encourages transparency by requiring adequate disclosure of directors and prescribed officers' remuneration.



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REPUBLIC OF SOUTH AFRICA



Directors' Remuneration Report

Clause 6 of the Bill proposes an insertion of section 30A in the Act imposing a duty to prepare directors' remuneration report and describing the manner in which the report should be compiled.

Rationale: The directors' remuneration report will provide information to the shareholders and the general public on the basis/rationale for the benefits and remuneration of directors, for transparency, accountability and good governance purposes.

Access to Information

Clause 7 of the Bill proposes and amendment to section 31 of the Act by making it an offence for directors and prescribed officers to refuse access to information.

Rationale: This will encourage access of information to the general public.

Annual Return

Clause 8 of the Bill proposes amendments to section 33 of the Act by requiring all companies to file copies of the annual financial statements and copies of the company's securities register when filing their annual return.

Rationale: This will ensure transparency and enable the use of such information in decision making by the public and interested stakeholders. Aligns with the G20 countries agreement where it has been agreed that all affiliated countries must encourage beneficial owner disclosure in all their legislation governing business and investment institutions.

Validation of irregularly created shares

Clause 9 of the Bill proposes the insertion of section 38A into the Act by giving the court the power to validate the creation, allotment or issue of shares which are otherwise invalid, upon application by a company or an interested party.

Rationale: The amendments will afford companies an opportunity to approach the courts after the 60 days have lapsed to validate irregularly created or allotted shares.

Consideration for Shares

Clause 10 of the Bill proposes an amendment to section 40 to clarify that ‘the trust’ entails funds held by the third party in terms of a stakeholder agreement but not as agent of the company or of the subscribing party.

Rationale: Use of the term “Trust” has created confusion with a Trust as registered with the Master of the High Court.

Loans or other financial assistance to subsidiaries

Clause 11 of the Bill proposes an amendment to section 45 of the Act in that the requirement of a special resolution should not be applicable when a company is giving a loan to its subsidiary.

Rationale: It is currently difficult for companies with many shareholders to provide loans for the benefit of the subsidiaries as this requires costly meetings.

Company or subsidiary acquiring company's shares

Clause 12 of the Bill proposes an amendment to section 48 of the Act by requiring that a special resolution should not be necessary when the company is implementing a *pro rata* share-buyback where the shareholders affected are also the directors of the company.

Rationale: The amendment will provide clarity and remove the unnecessary regulatory burden.

Beneficial interest in securities

Clause 13 of the Bill proposes an amendment to section 56 in that the requirement to disclose and maintain a register of beneficial owners is extended to all companies and not only regulated companies.

Rationale: This will align the Companies Act with international requirements.

Shareholders acting other than at meeting

Clause 14 of the Bill proposes an amendment to section 61 so that social and ethics committee (SEC) and the Remuneration Report should be presented at the Annual General Meeting rather than just being included in the written report.

Rationale: The two reports are crucial corporate governance instruments.

Exemption from appointing a social and ethics committee

Clause 15 of the Bill proposes amendments to section 72 of the Act by requiring that a company must apply for exemptions to the Tribunal in a prescribed manner.

Rationale: To ensure transparency to stakeholders when companies apply to the Tribunal for exemption from appointing a social and ethics committee. This will alleviate tensions and contestations between companies and labour unions/communities over the social and ethical responsibilities of companies.

Social Ethics Committee Report

Clause 15 of the Bill also proposes amendments to section 72 of the Act to require the SEC to prepare a report that must be externally assured and presented to the shareholders.

There are other amendments to section 72 that include the composition of the SECs to strengthen corporate governance.

Rationale: Strengthening the functioning and reporting of the SECs will ensure that companies are held accountable and carry out their duties with regards to the promotion of social and economic development; anti-corruption; employment equity; BBBEE; good corporate citizenship; labour and employment conditions; consumer relationships and the environment, health and public safety.

Appointment of auditor

Clause 16 of the Bill proposes an amendment to section 90 of the Act requiring the company to appoint an auditor annually at a shareholders meeting.

Rationale: To enhance accountability, transparency and shareholder activism.

The clause also proposes the reduction of the five years cooling off period for former directors, prescribed officers and auditors and substitute it with two years. The amendment is for alignment since there is no need for reference to Subsection 1.

Application and interpretation of Chapter (Public offerings of company securities)

Clause 17 of the Bill proposes an amendment to section 95 in order to include purchased shares in the definition.

Rationale: The definition of an “employee share scheme” includes only shares issued by the company for participation by employees and officers and other people closely involved in the business of the company. Shares that are purchased by employees, officers and other people closely involved in the business of the company are currently excluded from the definition. The amendment will provide clarity on the definition of “employees share schemes.”



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REPUBLIC OF SOUTH AFRICA



Application of this Part, Part C and Takeover Regulations

Clause 18 of the Bill proposes an amendment to section 118 in that only companies that are required to be audited and those whose MOI stipulate, will be subject to Takeover Regulations.

Rationale: Application of Takeover Regulations in as far as private companies are concerned are not clear as they are now applicable to all private companies. Private companies below a certain threshold have to be excluded. The amendment will reduce regulatory burden on private companies that fall below a certain threshold.



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Post- commencement finance

Clause 19 of the Bill proposes an amendment to section 135 of the Act by inserting subsection (1A), providing that any amounts due by the company under business rescue to any owner of the property in terms of a contract which the owner of the property has with any third party during the business rescue proceedings, will be regarded as post-commencement financing.

Rationale: In business rescue proceedings landlords who own business premises are crucial service providers and if companies that are in financial distress are evicted from the leased premises, the whole business rescue proceedings collapse. Claim by landlords should to a certain extent be secured and classified as post-commencement finance. Landlords will not evict the businesses that are renting the premises as this will defeat the business rescue process.



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Participation by creditors

Clause 20 of the Bill proposes an amendment to section 145 to include creditors who provided finance during the business rescue proceedings in that their voting rights are equal to the amount referred to in that section.

Rationale: Voting rights of creditors who provided finance during the business rescue proceedings are not clarified in the relevant section.

Disputes concerning reservation or registration of company names

Clause 21 of the Bill proposes amendments to section 160 of the Act by allowing the applicant to approach the Commission to substitute the name of the respondent where the company fails to change the name in terms of an administration order of the Tribunal.

Rationale: The amendment provides recourse in cases where a respondent does not comply with the administrative order issued by the Companies Tribunal over a name dispute.

Alternative dispute resolution

Clause 22 of the Bill proposes amendments to section 166 to clarify on the appeal mechanism where the parties are not satisfied with the outcome of the process.

Rationale: The amendment will also provide clarity on the powers of the Companies Tribunal and on the appeal mechanism where the parties are not satisfied with the outcome of the process.

Alternative dispute resolution Dispute resolution may result in consent order

Clause 23 of the Bill proposes amendments to section 167 to remove the accreditation of other entities as it is now unnecessary.

Rationale: There is no need to legislate that there must be other entities for alternative dispute mechanism while parties are in general allowed to use an entity of their choice.

Appointment of Companies Tribunal

Clause 24 of the Bill proposes amendments to section 194 of the Act by inserting subsection (1A) conferring certain powers on the chairperson of the Tribunal and the executive director.

Rationale: There is no executive authority to take care of administrative matters in the Companies Tribunal. Executive powers are all vested in the part time Chairperson which make the administration inefficient.

Functions of Companies Tribunal

Clause 25 of the Bill proposes amendments to section 195 of the Act by giving the Tribunal the power to adjudicate cases referred to by the B-BBEE Commission.

Rationale: Cases where there is a violation of the Companies Act can be addressed effectively by the Commission through an administrative process of making findings and recommending sanctions to the Tribunal instead of addressing them through the criminal system which takes long.

Functions of Financial Reporting Standards Council

Clause 26 of the Bill proposes amendments to section 204 of the Act by giving the Financial Reporting Standards Council the power to issue financial reporting pronouncements.

Rationale: This will ensure that financial reporting by companies not only complies with international financial reporting standards but that it is also adapted to respond to circumstances unique to South Africa such as B-BBEE requirements.



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WAY FORWARD

1. To seek approval of **Nedlac** to commence the **Nedlac** consultative process on the CAB and be placed on the programme for deliberations.

3. **Present Bill to ESEIDC** for consultation and approval to introduce to Cabinet. This is the 2nd tabling to Cabinet after public consultation process.

2. **Revise the** Bill in accordance with the inputs from all stakeholders including those from the formal public participation process & resubmit the revised Bill to NEDLAC TIC during 16 May 2019

4. Refer the Bill together with a NEDLAC approved report to Parliament for recommendation & adoption for President to assent

THANK YOU



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