

# GUIDE TO THE MEMORANDUM OF INCORPORATION



**KILGETTY**

STATUTORY SERVICES (PTY) LTD

## **Our products and services**

### **Companies**

Kilgetty Statutory Services (Pty) Ltd is a subsidiary of Grant Thornton Cape Inc and our office is equipped to ensure that the statutory records of your entity complies with the requirements of the Companies

Act by providing any of the following requested services:

- Registration of new companies, providing shelf companies and attending to statutory changes thereto;
- Conversion of private companies into public companies;
- Conversion of close corporations into private companies;
- Maintaining the statutory registers and minute books at our offices;
- Restructuring of groups of companies;
- Appointment/resignation of directors, public officers, company secretaries, etc.
- Transferring shares, allotment of shares, issuing of share certificates and the payment of the Securities Transfer Tax to the South African Revenue Service through E-Filing;
- Special resolutions relating to the amendments of the Memorandum of Incorporation in order that your MOI complies with the provisions of the Companies Act, No 71 of 2008;
- Special resolutions relating to name changes;
- Acquisition of shares by the company;
- Changing the financial year-end of the Company;
- Appointing/resigning the auditor of the Company;
- Changing the registered office and postal addresses of the Company;
- Attending meetings of the Directors and the taking of the minutes;
- Attending Annual General Meetings and acting as an independent scrutineer and assisting in the compilation of the proxy register, vote reconciliation and the taking of minutes of the meeting;
- Submission of CIPC annual returns and if so required, the cancellation of the deregistration process;
- Deregistration of companies;
- Director training on the duties and responsibilities of Directors;
- Director training on the King Code and Report on Governance for South Africa ("King III").

### **Close Corporations**

- Conversion of close corporations into (Pty) Ltd Companies in terms of the Companies Act No 71 of 2008;
- Attending to the transfer of member's interest;
- Resigning/appointing the Accounting Officer, public officer, changing the registered office or postal addresses;
- Registering a close corporation with a trust as a member or transferring a member's interest to a trust;
- Submission of annual returns for CC's as required in terms of the Close Corporations Act;
- De-registration of close corporations.



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Your Professional Guide through the Statutory Jungle

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In association with Grant Thornton Cape Inc.

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## PURPOSE AND STRUCTURE OF THE GUIDE

The Act requires all companies to convert their existing Memorandum and Articles of Association to a Memorandum of Incorporation (MOI).

This guide is intended to serve as a guideline to the drafting of a new MOI as required by the Act (read together with the Companies Amendment Act and Companies Regulations).

The Act gives companies a two year “transitional” or “grace” period – in which to comply with the new Act. The contents of a Memorandum and Articles of Association of a pre-existing company may thus remain unchanged for two years calculated from the effective date of the Act, being 1 May 2011 until 1 May 2013.

Pre-existing companies (see definition on page 39) can during the two year period, comply with the new Act by lodging their new MOI with the Commission.

New companies formed after 1 May 2011 will need to comply with the new Act – which creates new rules for incorporation, registration, organisation and management of companies in SA.

The guide is structured in such a way as to provide the reader with an overview of:

- the transitional arrangements over the two year grace period for pre-existing companies;
- the legal status of pre-existing shareholders agreements, rules of a company, and the Memorandum and Articles – both before and after the two year grace period has expired;
- the new rules for incorporation of a new company under the new system, and conversion of pre-existing close corporations to companies;
- the doctrine of constructive notice and ring-fencing;
- the MOI and how to draft it so that it meets a company’s requirements and yet remains compliant with the Act. To this end, we have taken the Form CoR 15.1B – Long Standard Form for Profit Companies – (as published in the Companies Regulations, 2011), as an example of an MOI – see pages 14 to 35, and have provided commentary and extracts from the Act on each Article;
- The second half of the guide deals, inter alia, with anti-avoidance provisions and civil actions.

Please note that the information contained herein is a summary of some of the key sections of the legislation, as they relate specifically to the MOI.

It does not purport to cover every aspect relating thereto, and is issued to clients as a general overview.

## IMPORTANT NOTE

Due to fundamental reforms brought about by the Act we recommend that professional advice be sought before making any decisions based on this guide’s contents or when dealing with any matters relating thereto.

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

# 1. OVERVIEW OF LEGISLATION

The Act was signed by the President on the 9th April 2009 and gazetted in Gazette No. 32121 (Notice No. 421) and came into operation on 1 May 2011.

The Companies Regulations, 2011 were published on the 20 April 2011. They deal with the functions of the Commission, the Takeover Regulation Panel and the Companies Tribunal, qualifications of Business Rescue Practitioners and Financial Reporting standards for the various categories of company.

The Companies Amendment Act, 2011 purports to rectify certain provisions of the Act so as to ensure its improved administration, and establish a proper foundation for certain necessary regulations. In addition it attempts to address significant errors and ambiguities that could have resulted in the misapplication of the Act.

The Amendment Act and Companies Regulations came into effect on the general effective date of the Act. The Act should thus be read together with the Amendment Act and Regulations.

Throughout the text, specific reference is made to the sections of “the Amendment Act” or “the Regulations” where applicable, otherwise any reference to a section in general means that it is in reference to the Companies Act, 2008, or “the Act”.

## Definitions and Abbreviations:

- “previous Act” – Companies Act no 61, 1973
- “Act” – Companies Act no 71, 2008
- “Amendment Act” – Companies Amendment Act no 3, 2011
- “Regulations” – Companies Regulations, 2011
- “MOI” – Memorandum of Incorporation
- “CC’s” – Close Corporations
- “CC’s Act” – Close Corporations Act, 1984
- “Members” – Members of Close Corporations or of a non-profit company (as the context indicates)
- “JP” – Juristic Person
- “AFS” – annual financial statements
- “AGM” – annual general meeting

## Regulatory Bodies

- The Commission – the Companies Intellectual Property Commission (CIPC, previously CIPRO)
- Tribunal – the Companies Tribunal
- The Panel – the Take-Over Regulation Panel
- FRSC – the Financial Reporting Standards Council

## 2. TRANSITIONAL ARRANGEMENTS AND PRE-EXISTING COMPANY'S

Some key aspects relating to pre-existing company's and their transition to the new regime are as follows:

### 2.1 CONTINUATION OF PRE-EXISTING COMPANY'S

*[Schedule 5, Item 2 of the Act]*

- Item (2)(1): Every pre-existing company incorporated under the previous Act or recognised as an existing company will continue as if incorporated and registered under the new Act with the existing name and registration number, subject to Item 4 of Schedule 5.

### 2.2 MOI, RULES AND SHAREHOLDERS AGREEMENTS OF PRE-EXISTING COMPANY'S

*[Schedule 5, Item 4 of the Act]*

#### THE MOI

- A pre-existing company may file within two years of the general effective date of the new Act (without charge)\* an amendment to its MOI to harmonise it with the Act, and if necessary a notice of name change and copy of a special resolution under Section 16 to alter its name to meet the requirements of the Act;
- The following companies will be deemed to have amended their MOI's from the general effective date of the new Act, and to have changed their names in so far as required to comply with Section 11(3) as follows:
- A Section 21 company – to expressly state that it is a non-profit company (NPC);
- A Section 53(b) company – to expressly state that it is a personal liability company (Inc);
- A company falling within the definition of a State Owned Company in terms of new Act – to have changed its name (SOC Ltd);
- A company limited by guarantee (other than a Section 21 company) may file a notice within 20 business days after the general effective date electing to become a Profit company. If not, it is deemed to have amended its MOI from the effective date to expressly state that it is a “NPC” and to change its name accordingly.

*[Refer to Table A page 40 for further detail on the categorisation of companies per the new Act];*

*\*Lodgement of the MOI post the two year period will attract a prescribed fee.*

#### BINDING PROVISIONS / RULES

- A pre-existing company may have adopted any binding provisions under whatever style or title, comparable in purpose and effect to the rules of the company contemplated in Section 15(3), [additional rules relating to the governance of the company – see pages 12 and 13]. These provisions continue to have the same force and effect for the two year “grace” period.
- Such “binding provisions” could be located in the Articles of Association, shareholders agreement or agreement between the director and the company.

## SHAREHOLDER AGREEMENTS

[Schedule 5, Item 4(3A) inserted by Amendment Act]

- If, before the general effective date, the shareholders of a pre-existing company had adopted any agreement between or amongst themselves under whatever style or title, comparable in purpose and effect to an agreement contemplated in section 15(7) – [i.e a shareholders agreement concerning any matter relating to the company], – then any such agreement continues to have the same force and effect as of the general effective date for a period of two years despite Section 15(7) {which states that it would be void to the extent of its inconsistency with the Act or the company’s MOI}, or until changed by the shareholders who are party to the agreement.

### 2.3 TWO YEAR “GRACE” PERIOD AND ENFORCEMENT

|                               | TWO YEAR “GRACE” PERIOD  | POST GRACE PERIOD   |
|-------------------------------|--|---|
|                               | <ul style="list-style-type: none"> <li>• from General effective date of Act for two years thereafter 1 May 2011 to 1 May 2013</li> </ul>   | <ul style="list-style-type: none"> <li>• end of two year “grace” period from 1 May 2013</li> </ul>  |
|                               | <b>DURING GRACE PERIOD, IF THERE IS CONFLICT BETWEEN:</b>  | <b>POST GRACE PERIOD, IF THERE IS CONFLICT:</b>   |
| <b>MOI</b>                    | (i) a provision of the Act and a provision of the pre-existing company’s MOI, the latter will prevail to the extent that Schedule 5 provides otherwise   | (i) the Act will take precedence over the MOI if there is a provision therein which is inconsistent with the Act                                |
| <b>RULES</b>                  | (ii) a binding provision [or rules of governance] and the Act, the binding provision will prevail for the period of two years or until changed by the company  | (ii) the binding provisions will continue to have the same force and effect only to the extent that they are consistent with the Act            |
| <b>SHAREHOLDER AGREEMENTS</b> | (iii) a provision of a pre-existing shareholders agreement – and the Act or the company’s MOI, the provision of the agreement prevails, except to the extent that the agreement or MOI provides otherwise or until changed by the shareholders who are party to it [despite Section 15(7)]   | (iii) the agreement will only continue to have the same force and effect to the extent that it is consistent with the Act and the company’s MOI |
| <b>COMPLIANCE NOTICES</b>     | <ul style="list-style-type: none"> <li>• despite Chapter 7, until a pre-existing company has filed amendment to its MOI to bring it in harmony with the Act, no compliance notice will be issued by the Commission or Panel during this time in respect of conduct which is inconsistent with the Act but consistent with a provision that prevails over the Act in terms of (i) to (iii) above</li> </ul> | <ul style="list-style-type: none"> <li>• a compliance notice will be issued by the Commission or Panel where necessary</li> </ul>               |



## 2.4 COMPANY TO MAKE APPLICATION TO TRIBUNAL FOR DIRECTIONS DURING TWO YEAR “GRACE” PERIOD

*Schedule 5, Item 2(5) inserted by the Amendment Act provides that:*

If as a consequence of the coming into effect of the Act and the repeal of the previous Act, a conflict, dispute or doubt arises within two years after the effective date concerning the particular manner or form in which, or time by which a pre-existing company is required to: –

|  |
|--|
| a) Prepare its annual financial statements, convene an annual general meeting, provide to its shareholders copies of its annual financial statements, any notice or any other document, or |
| b) File a particular document with the Commission  |
| c) Take any other particular action required in terms of this Act or the company's MOI   |

The company may apply to the Tribunal for directions and a member of the Tribunal may make an administrative order that is appropriate and reasonable in the circumstances.

## 2.5 PAR VALUE SHARES, CAPITAL ACCOUNTS AND SHARE CERTIFICATES

*[Schedule 5, Item 6 and Item 2(4) of the Amendment Act]*

- **Section 35(2):** specifies that no shares shall have a nominal or par value, except for banks, as defined in the Banks Act, which entails that a pre-existing company needs to convert its existing par value shares to shares with no par value within the two year grace period;

**Schedule 5, Item 6(2):** Despite Section 35(2) any shares of a pre-existing company that have been issued with a nominal or par value, and are held by a shareholder immediately before the effective date, continue to have the nominal or par value assigned to them when issued, subject to the regulations made in terms of sub-item (3);

**Item 6(3) as amended by the Amendment Act:** The Minister, in consultation with the member of Cabinet responsible for national financial matters, must make regulations to take effect as of the general effective date, providing for the optional conversion and transitional status of any nominal or par value shares, and capital accounts of a pre-existing company, but any such regulations must preserve the rights of shareholders associated with such shares, as at the effective date, to the extent doing so is compatible with the purposes of this item;

### **Regulation 31: Conversion of nominal or par value shares, and related matters**

Regulation 31 does not apply to a bank, as defined in the Banks Act, 1993;

#### **Regulation 31(2):**

A pre-existing company may not authorise any par value shares or shares having a nominal value on or after the effective date;

### **Regulation 31(3):**

Form CoR 31 (Notice of Board Resolution to Convert Par Value Shares) may be filed with the Commission at any time but only in respect of classes of authorised shares from which shares have not been issued or if issued are no longer outstanding. There is no fee for filing the form if it is filed within two years after the effective date of the Act.

The Board of the company is required to pass a resolution to convert the class or classes of authorised shares to shares having no nominal or par value, and filing the Form CoR 31 with the Commission at any time after the effective date.

It is important to note that the rights attached to any par value shares, held by a shareholder are not affected by the conversion, to the extent that it is compatible with the purposes of Item 6.

## **2.6 COMPANY FINANCE AND GOVERNANCE**

*[Schedule 5, Item 7]*

- A director, alternate director, prescribed officer, company secretary and auditor of a pre-existing company will continue to hold office as such subject to the MOI and the Act;
- But if such a person is, in terms of the new Act, ineligible or disqualified from being a director, alternate director, prescribed officer, company secretary or auditor, that person is regarded as having resigned from every such office in any company as from the effective date;
- As from the effective date, a pre-existing company is deemed to have a number of vacancies on the board equal to the difference between –
  - a) the minimum number of directors required by or in terms of this Act;
  - b) the actual number of directors of that pre-existing company immediately before the effective date, if that number is less than the minimum referred to in (a);

## **2.7 PROVISIONS WHICH APPLY IMMEDIATELY – NO TRANSITIONAL PERIOD:**

- The following provisions of the new Act will apply immediately as from the effective date to **all pre-existing companies** {irrespective of what is stated in the company's MOI}, in other words no "grace" period is afforded to company's in regard to the following:
  - a) the duties, conduct and liability of directors will apply to every director (and prescribed officer);
  - b) the rights of shareholders to receive any notice or have access to any information will apply (see Table C page 42);
  - c) meetings of shareholders or directors and adoption of resolutions apply;
  - d) Chapter 5 (fundamental transactions/take-overs) will apply except to the extent exempted by or in terms of Chapter 5.

*[Schedule 5, Item 7(5)]*

- In addition the right of a person to seek a remedy in terms of the new Act will apply in respect of conduct pertaining to a pre-existing company which occurred prior to the effective date, (i.e retrospectively) if that person did not institute proceedings before 1 May 2011 *[Schedule 5, Item 7(7)]*.

## **2.8 AUDIT REQUIREMENT AND TIMING**

*[Schedule 5, Item 2(7)]*

If, immediately before 1 May 2011, a particular pre-existing company has passed its financial year end, but has not completed the requirements in terms of the previous Act for publishing, audit and approval of its annual financial statements for that financial year –

- a) the provisions of the previous Act continue to apply with respect to the publishing, audit and approval of those statements, and
- b) the provisions of this Act will apply to each subsequent financial year end and annual financial statements of that company.

### **Item 7 (11): inserted by the Amendment Act:**

The five consecutive financial years contemplated in Section 92(1) – (Rotation of auditors – the same individual may not serve as the auditor or designated auditor of a company for more than five consecutive financial years) – must be calculated from the date of commencement of this Act.

## **2.9 NAMES AND NAME RESERVATIONS**

*[Schedule 5, Item 8]*

All names reserved before the effective date [reserved per Section 42 of the previous Act] will continue as if reserved in accordance with Section 12 of the new Act, unless the Commissioner believes that such name does not satisfy the requirements of Section 11 of the new Act, he may then notify the person for whose use the name was reserved and invite him/her to substitute the reservation with another name that satisfies the requirements of the new Act, such a person may then file a request for substitution of the name at no charge, any time within 120 business days after the date of the Commission's notice.

## **2.10 CONTINUED APPLICATION OF PREVIOUS ACT TO WINDING UP AND LIQUIDATION**

*[Schedule 5, Item 9]*

Despite the repeal of the previous Act, winding up and liquidation of companies will remain governed by Chapter 14 thereof (until the Bankruptcy Act is a reality) and subject to the provision that if any conflict arises between Chapter 14 and the Act, the provisions of the Act will prevail;

### **Item 2(3) inserted by Amendment Act provides that:**

A company being wound up by Court or voluntarily or under Judicial management continues be allowed to use the following subjoined names “in liquidation” / “in Voluntary Liquidation” or “Under Judicial Management” as per previous Act [Sections 49(5) to (7)] if it was immediately before the effective date engaged in circumstances contemplated in those provisions.

## **2.11 PRESERVATION AND CONTINUATION OF COURT PROCEEDINGS AND ORDERS**

*Item 10, Schedule 5*

Any proceedings in any court in terms of the previous Act immediately before the effective date, are continued in terms of that Act, as if it had not been repealed;

Any order of court in terms of the previous Act, and in force immediately before the effective date, continues to have the same force and effect as if that Act had not been repealed, subject to any further order of court.

## **3. NEW RULES RELATING TO INCORPORATION, REGISTRATION AND THE MOI IN GENERAL**

### **3.1 AS FROM 1 MAY 2011:**

- All pre-existing companies will be required to convert to the new system, and shall be given a two year “grace” period in order to do so, as per 2.2 on page 4;
- All existing Close Corporations (CC’s) will continue to exist, or may be converted to a company, however no new registrations of CC’s will be allowed as from the effective date;
- All new company registrations – will be required to comply with the provisions of the Act;

### **The Act provides for two categories of companies:**

#### ***For Profit Companies:***

- 1 or more persons or an organ of State may incorporate;

#### ***NOT For Profit Companies:***

- an organ of state, a juristic person, or 3 or more persons acting in concert, may incorporate;

Incorporation occurs by the completion and signature of the MOI by the requisite number of persons and by filing it together with the prescribed Notice of Incorporation at the Commission, together with payment of the prescribed fee (a pre-existing company may file its amended MOI with the Commission without charge during the two year “grace” period).

#### ***Domesticated Foreign Companies:***

Section 13(5) as inserted by the Amendment Act provides that a foreign company may apply in the prescribed manner and form, accompanied by the prescribed fee, to transfer its registration to the Republic from a foreign jurisdiction and thereafter exists as a SA company, governed by the Act, subject to it meeting certain criteria to do so;

### **3.2 INCORPORATION AND LEGAL STATUS**

- A company is constituted in accordance with –
  - ◆ The unalterable provisions of the Act;
  - ◆ The alterable provisions of the Act subject to any negation, restriction, limitation, qualification, extension or other alteration that is contemplated in the alterable provision, and has been noted in the company’s MOI and
  - ◆ Any further provisions of the company’s MOI.

## **Legal Status of companies**

- A company becomes a juristic person from the date and time that its incorporation is registered, as stated in its Registration Certificate;
- A person who is an incorporator, shareholder or director is not liable for the obligations of the company except to the extent that the Act or the company's MOI expressly provide otherwise;
- Section 13(10) – as inserted by the Amendment Act: Upon compliance of the requirements for registration of a domesticated foreign company in SA, the Commissioner must issue to such company a registration certificate to the effect that its registration has taken place and that it is deemed that the company has been incorporated under the Act.

## **3.3 GENERAL PROVISIONS RE THE MOI**

- A brief MOI replaces a 2 part Memorandum and Articles of Association;
- It may be in the prescribed form or in a form unique to the company;
- It sets out the rights, duties and responsibilities of shareholders, directors and others;
- It is the sole governing document of the company;
- Section 15(1)(a) and (b): It must be consistent with the Act and is void to the extent it contravenes or is inconsistent with the Act – see page 36 – Section 218, and Section 6 – any action taken which contravenes or is inconsistent with the Act may give rise to a civil action or an application to court to declare the action void – subject to Section 6(15) which deals with public regulation or listed company's exchange requirements;
- Section 15(2)(a)(i): It may deal with any matter that the Act does not address;
- Section 15(2)(a)(ii): It may also alter the effect of any alterable provision in the Act, or
- Section 15(2)(a)(iii): It may contain a provision which imposes on the company a higher standard, greater restriction, longer period of time or any similarly more onerous requirement than would otherwise apply to the company in terms of an unalterable provision of the Act;
- If a company elects to accept all the default provisions of the Act without limitation, extension or variation per category of company – it may do so, and these default provisions will apply if not specifically altered;

### **Section 15(2)(b), (c) and (d):**

- A company's MOI may also include:
- S15(2)(b) – any restrictive conditions applicable to the company, and any requirements for the amendment of such condition in addition to the requirements set out in section 16;
- S15(2)(c) – the amendment of any particular provision of the MOI, or
- Section 15(2)(d): The MOI must not include any provision that negates, restricts, limits, qualifies, extends, or otherwise alters the substance or effect of an unalterable provision of the Act, except where such a provision would impose on the company a higher standard, greater restriction, longer period of time or any similarly more onerous requirement, than would otherwise apply to the company in terms of an unalterable provision of the Act.

- It may thus incorporate “restrictive conditions” applicable to the company and any requirement for the amendment of any such condition. It may prohibit the amendment of any particular provision of the MOI. In such cases the Notice of Incorporation must clearly point this out, and also indicate the particular clause’s location in the MOI. The name of the company must have RF immediately following it (Ring fencing).

**All persons or the public are then regarded as having notice and knowledge of such a provision in the company’s MOI.**

## 4. RING-FENCED AND PERSONAL LIABILITY COMPANY’S – DOCTRINE OF CONSTRUCTIVE NOTICE

- Under the previous Act the public was deemed to be fully acquainted with the Memorandum and Articles of the company, and consequently any limitation of powers of the directors – in other words they are deemed to have “constructive notice” of the company’s public documents;
- A party contracting with a director who acts on behalf of the company, beyond the scope of his powers (acts ultra vires), cannot therefore state that he did not have knowledge of the director’s lack of authority to act or limitation;
- the company would not be bound by the contract, unless it chose to ratify it (or unless the director fraudulently did not disclose his limitation);
- On implementation of the new Act, the public will **not** deemed to be acquainted with or having knowledge of any provision of a company’s MOI merely because it is filed with the Commission or is available for inspection at the company’s office, **except** for the following two specific scenarios:

| RING-FENCING (RF)  |  |
|--|--|
| Restrictive Provision in MOI   | Personal liability Company   |
| <ul style="list-style-type: none"> <li>• if a company’s MOI includes any restrictive provision contemplated in Section 15(20(a)(iii) and Section 15(2) (b) to (d) – as detailed in pages 10 and 11.</li> </ul> | <ul style="list-style-type: none"> <li>• All persons are regarded as having notice and knowledge of the fact that a personal liability company (Inc) means that the directors and past directors are jointly and severally liable, together with the company, for any debts and liabilities of the company as are or were contracted during their respective periods of office.</li> </ul> |
| <p>Pre-existing companies may thus need to identify specific conditions which may be applicable to them and if necessary register a name change (RF) on implementation of the Act.</p>                         |  |

## 5 NON-PROFIT COMPANY'S

### ***Provisions that must be in MOI of NPC***

- That the company is not for profit;
- That sets out one or more of the public benefit objects of the company;
- That applies all of its assets and income (however derived) to advance its stated objects as set out in its MOI and;
- That names a particular not for profit company or trust or voluntary association to receive any net assets upon the winding up of the company or sets out the manner in which the directors at the time of winding up the company may determine which not for profit company or trust or voluntary association will receive such net assets.

### **Regulations – Forms CoR 15.1C and D – template MOI's for non profit companies – with or without members**

- A non profit company with or without members can be incorporated;
- Can have voting or non-voting members;
- Membership can be held by juristic persons, including a profit company or an organ of state;
- Each voting member has at least one vote and the vote of each member is of equal value to the vote of each other voting member on any matter to be determined by vote of the members – except to the extent that the company's MOI provides otherwise.

## 6. ADDITIONAL RULES AND SHAREHOLDER AGREEMENTS

### **RULES**

- Section 15(3): Except to the extent that a company's MOI provides otherwise, the Board may make, amend or repeal any necessary or incidental **rules relating to the governance** of the company in respect of matters not addressed in the Act or the MOI;
- These rules cannot pertain to any similar issue relating to governance that is already stated in Part F of Chapter 2 of the Act;
- The Board of Directors are required to publish a copy of these rules to the shareholders in any manner required or permitted by the MOI or the rules, and to file a copy with the Commission;
- Such rules would form a "Company Charter" of Governance;
- A rule takes effect on the date that is the later of 10 business days after the rule is filed or the date specified in the rule and is binding on an interim basis until it is put to vote at the next general shareholders meeting and has been ratified by an ordinary resolution at such meeting – at which point it becomes permanently binding;
- If a rule has been filed and is ratified by shareholders, the board must file a notice of ratification within 5 business days in the prescribed manner or form;

- If a rule has been filed but is not ratified by shareholders when put to vote, the board must file a notice of non-ratification within 5 business days after the vote in the prescribed manner or form and may not make a substantially similar rule within the ensuing 12 months, unless it has been approved in advance by ordinary resolution of the shareholders;
- Section 15(5A) – inserted by the Amendment Act: Any failure to ratify the rules does not affect the validity of anything done in terms of those rules during the period that they had interim effect as provided in subsection 4(c)(i);
- Any provision in any rules which are inconsistent with the Act or the MOI is VOID to the extent of its inconsistency.

## BINDING EFFECT OF RULES AND MOI

### Section 15(6)

- the MOI (and, once ratified, any rules of the company) are binding between the company and the shareholder(s) and between the shareholders themselves (if more than one) and between the company and each director or prescribed officer or any other person serving the company as a member of a committee of the board – in the exercise of their respective functions within the company.

## SHAREHOLDERS AGREEMENTS

- Section 15(7): The shareholders may also enter into any shareholders agreement with one another but such an agreement must be consistent with the Act and the MOI, concerning **any** matter relating to the company;
- **Any provision in any shareholders agreement which is inconsistent with the Act or the MOI is VOID to the extent of its inconsistency.**

## 7. AMENDMENT OR ALTERATIONS TO MOI

- Section 16(1): A company's MOI may be amended –
  - a) In compliance with a **court order** by the passing a resolution of the company's board to give effect to that court order {and will not require a special resolution to be passed by shareholders};
  - b) In the manner contemplated in Section 36(3) and (4) – in other words by the Board filing a **Notice of Amendment with the Commission** setting out the changes (to increase or decrease the number of authorised shares of any class of shares, reclassify any classified shares that have been authorised but not issued, classify any unclassified shares that have been authorised but not issued or determine the preferences, rights, limitations or other terms of shares in a class). [This is an alterable provision – i.e unless MOI provides otherwise];  
at any other time
  - c) If a special resolution to amend it is:
    - (i) proposed by –
      - (aa) the board of the company, or
      - (bb) \*shareholders entitled to exercise at least 10% of the voting rights that may be exercised on such a resolution, and



- (ii) is adopted at a shareholders meeting, or in accordance with in accordance with Section 60 (shareholders acting other than at a meeting i.e by informal special resolution) subject to subsection (3), i.e this requirement is not applicable to NPC's – that have no voting members, in which case the board shall amend the MOI;
- A company's MOI may provide different requirements than those set out above\* in respect to proposals for amendments.

## **Amendment of MOI of a personal liability company:**

### **Section 16(10) – inserted by the Amendment Act:**

If an amendment to the MOI of a personal liability company has the effect of transforming that company into any other category of company, the company must give at least 10 business days advance notice of the filing of the notice of amendment to –

- a) any professional or industry regulatory authority that has jurisdiction over the business activities carried on by the company, and
- b) any person who –
  - (i) in its dealings with the company, may reasonably be considered to have acted in reliance upon the joint and several liability of any of the directors for the debts and liabilities of the company; or
  - (ii) may be adversely affect if the joint and several liability of any of the directors for the debts and liabilities of the company is terminated as a consequence of the amendment to the MOI.

### **Section 16(9) – as amended by the Amendment Act:**

An amendment to a company's MOI takes effect:

- a) in the case of an amendment that changes the name of the company, on the date set out in the amended registration certificate issued by the Commission in terms of subsection (8) read with Section 14(1)(b)(iii); or
- b) in any other case, on the later of –
  - (i) the date on, and time at, which the Notice of Amendment is filed; or
  - (ii) the date, if any, set out in the Notice of Amendment.

## **Alterations**

- The board or a person authorised by the board may alter the MOI or rules to correct any patent errors (spelling, punctuation, grammar or similar defect on the face of the document) by publishing a notice of the alteration, in any manner required or permitted by the MOI or the rules of the company, and filing a notice of the alteration.

## **8. THE MOI FORM**

The MOI forms are issued in terms of Section 13 of the Act and Regulation 15 as follows:

- **Form CoR 15.1A** – Short standard form for private companies
- **Form CoR 15.1B** – Long standard form for profit companies
- **Form CoR 15.1C** – Short standard form non-profit companies without members
- **Form CoR 15.1D** – Long standard form non-profit companies without members

- **Form CoR 15.1E** – Long Standard form non-profit companies with members

### **Form CoR 15.1B:**

For purposes of this guide, we have taken the Form CoR 15.1B as an example of an MOI and how it can be drafted and tailored to meet the specific requirements of a profit company;

This section only applies only to for profit companies (private, personal liability or public company's), that wish to extend, limit or vary the alterable provisions in the Act in its MOI, and comprises a detailed explanation for each Article in the CoR 15.1B form, of which there are 6. There are also 5 Schedules in the form – where alterations and additions to the MOI are expanded upon. The Schedules form part of the MOI.

Commentary on the options available with reference to relevant sections in the Act are inserted and are displayed in grey shaded boxes.

### **Cover page of the MOI:**

The incorporators must complete the form by –

- a) filling in the name of the company, unless it has to be completed by the Commission in terms of Regulation 14(b)(i) or (iii),
- b) inserting the number of directors and alternate directors in the spaces provided,
- c) inserting the number of authorised shares in the space provided,
- d) each signing and dating the form on a line in a table on the front page of the form.

The MOI states that words appearing to the right of an optional check line are void unless that line contains a mark to indicate that it has been chosen as the applicable option.

## **ARTICLE 1 – INCORPORATION AND NATURE OF THE COMPANY**

### **1.1 Incorporation**

The MOI states:

- (1) the date of incorporation and category of company (private, personal liability or public company). An indication of which category of company is applicable is reflected by making a mark next to the appropriate category;
- (2) that company is incorporated in accordance with and governed by the unalterable provisions of the Act, and the alterable provisions (subject to limitations, extensions, variations set out in the MOI), and the provisions of the MOI;

Section 19(2) of the Act – Default provision – A person is not, solely by reason of being an incorporator, shareholder or director, liable for the obligations of the company **except to the extent that the Act or the company's MOI expressly provide otherwise**. A personal liability company would be required to specify that the directors are jointly and severally liable with the company for any of its debts and liabilities in this Article.

## 1.2 Powers of the Company

(1) The MOI must state:

..... either that the company is not subject to any provisions of Section 15(2)(b) or (c) – **Ring-fenced company** (see page 11, relating to Ring-Fenced companies and the doctrine of constructive notice) –

OR

..... if it is subject to S15(2)(b) or (c), then the restrictions or limitations must be set out clearly in the Schedule attached to the MOI (Schedule 1 Part A);

Any Ring-fencing provisions as contemplated in Section 15(2) of the Act shall be set out in Part A of Schedule 1 – for example, the company could state that the main object and business cannot be amended, making it a special purpose company. The suffix “RF” or Ring-Fenced would then sub-join the name of the company;

(2) Whether the purposes and powers of the company:

..... are not subject to any restrictions, limitations or qualifications per S19(1)(b)(ii) –

[which states that a company shall have all the legal powers and capacity of an individual except to the extent that a juristic person is incapable of exercising any such power or having such capacity]

OR

..... If the company’s MOI restricts, limits or qualifies such powers of the company to act as an individual than such restriction or limitation must be clearly set out in Schedule 1 Part A attached to the MOI.

## 1.3 Memorandum of Incorporation and Company Rules

(1) The MOI of the company

..... may be altered or amended in the manner as set out in the Act i.e per Section 16, 17 (see page 13) or 152(6)(b) – [which relates to amendment during business rescue plan proceedings];

OR

..... may be so altered or amended in the manner set out in Section 16, 17 or 152(6)(b), subject to the provisions contemplated in Section 16(1)(c), as stated in Part B of Schedule 1 of the MOI;

In other words, if the company decides to provide different requirements in respect to **proposals** for amendments to the MOI [by way of special resolution – in terms of Section 16(1)(c)] – see page 13, then these requirements must be specifically set out in Part B of Schedule 1.

(2) The MOI may state that the authority of the company’s Board of Directors to make **rules** for the company as contemplated in Section 15(3) to (5) – see page 12 – is not limited or restricted in any matter in the MOI

OR

It may state that such authority is restricted or limited – in which case any provision relating thereto must be clearly stated in Part B of Schedule 1;

- (3) The MOI may state that the Board must publish such rules in terms of Section 15(3) to (5), by delivering a copy thereof to each shareholder by ordinary mail;

OR

may set out additional or alternative requirements in Part B Schedule 1.

- (4) The MOI may state that the company must publish a notice of any alteration of the MOI or rules (see page 13), made in terms of Section 17(1) – by:

..... delivering a copy of those rules to each shareholder by ordinary mail;

..... in accordance with the requirements set out in Part B of Schedule 1;

(applicable option to be ticked in the MOI);

## 1.4 Application of optional provisions of Companies Act, 2008

*[This sub-article is not to be used in the case of a public company]*

- (1) The company –

..... does not elect in terms of Section 34(2) to comply voluntarily with the provisions of Chapter 3 of the Act [Enhanced Accountability and Transparency];

OR

..... does elect in terms of Section 34(2) to comply voluntarily with the provisions of Chapter 3 of the Act, to the extent set out in Part C of Schedule 1;

In other words, if the company voluntarily decides to appoint a company secretary or appoint an auditor and establish an audit committee, then these requirements must be specifically set out in Part C of Schedule 1.

### **Notes on enhanced accountability:**

**Section 34(2)** states that a private company, personal liability company or non-profit company is not required to comply with the extended accountability requirements set out in Chapter 3 ... “except to the extent that the MOI provides otherwise”. In other words, a company not required to have an audit or audit committee, or company secretary, can opt to do so voluntarily in its MOI.

Section 34(1): Every public company and state-owned company is required to comply fully with the extended accountability requirements set out in Chapter 3.

Section 84(1)(c): Chapter 3 also applies to every private company, personal liability company or non-profit company that is required by the Act or Regulations to have its annual financial statements audited every year – to the extent contemplated in Section 34(2) – in other words – such a company is not also required to comply with the extended accountability requirements set out in Chapter 3 – appointing a company secretary, audit committee etc, unless the MOI provides otherwise;

In addition, the company may elect voluntarily to incorporate the provisions of **Section 159** relating to Confidential disclosures and the protection of whistle-blowers. Section 159 states that it is compulsory for a SOC or public company to directly or indirectly –

- Establish and maintain a system to receive confidential disclosures of any person as contemplated in Section 159 and act on them, and
- Routinely publicise the availability of that system to directors, secretaries, other officers, employees, registered trade unions of the company, a supplier of goods or services to a company or an employee of such a supplier;
- Any provision of a SOC or public company’s MOI or an agreement is void to the extent it purports to limit or negate this Section 159.

Certain companies are required to set up a Social and Ethics Committee (unless exempted). Section 72(4) and Regulation 43: Every SOC Ltd company, and every listed company and any other company that has in any two of the previous five years, scored above 500 points in terms of Regulation 26(2);

Refer to Table H on page 46 for Public Interest Score card per Regulation 26.

- (2) The company, being a private company, does or does not elect [in terms of Section 118(1)(c)(ii) to submit voluntarily with the provisions of Parts B and C of Chapter 5 of the Act – [Fundamental Transactions and Takeovers], and to the Take-Over Regulations and if does elect to do so, then to the extent set out in Part C of Schedule 1.

## ARTICLE 2 – SECURITIES OF THE COMPANY

*\*Refer to page 38 for definitions of beneficial interest, securities, shareholder and debt instrument;*

### 2.1 Shares

The MOI (in the schedule) could set out in detail any provisions regarding the classes of authorised shares, the maximum number of authorised shares of each class, and the preferences, rights, limitations and other terms of each class of shares, as contemplated in section 15(2) of the Act;

**(1) The MOI could therefore either state that the company is authorised to issue no more than:**

- ..... shares of a single class of common shares each of which entitles the holder to –
  - (a) Vote on any matter to be decided by a vote of shareholders of the company;
  - (b) Participate in any distribution of profit to the shareholders;

OR

- ..... the maximum number of each of the classes of shares set out in Part A of Schedule 2, subject to the preferences, rights, limitations and other terms associated with each such class also set out in Part A of Schedule 2;

## **Applicable sections in the Act:**

### **Section 36 of the Act: Authorisation for shares**

- A company's MOI must set out:
  - the classes of shares and the number of shares that it is authorised to issue (authorised share capital),
  - may authorise a stated number of unclassified shares which are subject to classification by the board,
  - In respect of each class of shares, a distinguishing designation for that class and the preferences, rights, limitations and other terms of that class,
- The authorization and classification of shares, the numbers of authorised shares of each class and the preferences, rights, limitations and other terms associated with each class of shares as set out in the MOI may be changed only by:
  - An amendment of the MOI by special resolution of the shareholders or
  - The board in circumstances set out in Section 36(3) in which case the company must file a Notice of Amendment of its MOI with the Commission, except to the extent that the MOI provides otherwise

**The MOI could thus clearly set out which shares have which voting rights or perhaps that a certain class of shares do not have voting rights attached.**

### **Section 37 of the Act: Preference rights, limitations and other share terms**

- All of the shares of any particular class authorised by a company have preferences, rights, limitations and other terms that are identical to those of other shares of the same class. **This is NOT an alterable provision – in other words the MOI of a company cannot alter this;**

### **Section 37(2) of the Act: Voting rights**

- Each issued share of a company regardless of its class has associated with it one general voting right except to the extent provided otherwise by:
  - This Act or
  - The preferences, rights, limitations and other terms determined by or in terms of the company's MOI in accordance with Section 36;

### **Section 38: Issue of shares**

The board has the power to issue shares but only within the classes and to the extent that the shares have been authorised by or in terms of the company's MOI in accordance with Section 36; [See also Table I on page 46 relating to circumstances where shareholder approval is required for issuing shares in certain cases];

If a company issues shares that have not been authorised in terms of Section 36 or in excess of the number of authorised shares for any particular class, the issuance of those shares may be retrospectively authorised in accordance with Section 36 within 60 business days after the date on which the shares were issued;

**(2) The authority of the Company's Board of Directors to increase or decrease the number of authorised shares of any class of the Company's shares, to reclassify any shares that have been authorised**

**but not issued, to classify any unclassified shares, or to determine the preferences, rights, limitations or other terms of any class of shares, as set out in section 36(2)(b) and (3)(c) –**

..... is not limited or restricted by this MOI;

..... is limited or restricted to the extent set out in Part A of Schedule 2;

*[in the case of a public company]*

**The company may elect to limit or restrict the authority of the board to exercise powers relating to shares, as contemplated in Section 36(3)(a) of the Act;**

**Section 36(3) Authority of Board**

*Except to the extent that a company's MOI provides otherwise, the board may*

- a) *Increase or decrease the number of authorised shares of any class of shares*
- b) *Reclassify any classified shares that have been authorised but not issued but not issued*
- c) *Classify any unclassified shares that have been authorised*
- d) *To determine the preferences, rights, limitations or other terms of shares in a class*

In other words, this authority could either be

- Not limited or restricted in the MOI
- Or limited or restricted to the extent set out in Part A of Schedule 2

**The board may thus be given wide powers in this regard as per the MOI, or limited powers.**

**The MOI may also insert any provisions relating to the pre-emptive right of shareholders to be offered and to subscribe to additional shares of the company as follows:**

**(3) The shareholders of the company –**

..... do not have any pre-emptive right to be offered and to subscribe additional shares of the company;

..... have a common pre-emptive right to be offered and to subscribe for additional shares of the company, as set out in Part A of Schedule 3;

..... have only such pre-emptive rights to be offered and to subscribe additional shares of the company, if any, as are set out in the preferences, rights, limitations and other terms associated with their respective classes of shares;

*[in the case of a private or personal liability company];*

(Appropriate box to be ticked by the company);

**(4) The pre-emptive right of the Company's shareholders to be offered and to subscribe for additional shares, as set out in Section 39 –**

..... is unconditional, and is not limited, negated or restricted in any manner contemplated in subsection (2) of section 39;

..... is subject to the condition, limitation, or restrictions set out in Part A Schedule 2;

..... does not apply with respect to any shares of the Company;  
(Appropriate box to be ticked by the company);

**Applicable Section in the Act:**

**Section 39: Pre-emptive right to be offered shares**

*(this section does not apply to a public company or SOC except to the extent the company's MOI provide otherwise – ie unless a SOC or public company's MOI specifically states that this section applies to it, it will not so apply);*

- S39(2) – **default/statutory provision** – Every shareholder in a private company (and a personal liability company) has a pre-emptive right to be offered and to subscribe (within a reasonable amount of time) for a % of any shares issued or proposed to be issued equal to the voting power of that shareholders general voting rights immediately before the offer was made;
- However, a private or personal liability company's MOI may limit, negate or restrict or place conditions on this right with respect to any or all classes of shares of that company;

In other words the company's MOI may state that the pre-emptive right of the company's shareholders to be offered and to subscribe to additional shares as set out in S39 is unconditional and not limited in any way, OR it may state that the shareholders do not have such a pre-emptive right at all or may have a common pre-emptive right as set out in Part A of Schedule 3 (ie subject to conditions, limitations or restrictions as set out in that Schedule) or that they only have such pre-emptive rights as are set out in the preferences, rights, limitations and other terms associated with their respective classes of shares (in the case of a personal liability or private company).

**Section 39(4) – Subscription of Shares**

In exercising a pre-emptive right as per S39(2) above, a shareholder may subscribe for fewer shares than the shareholder would be entitled to subscribe for under that subsection and shares not subscribed for by a shareholder within the reasonable time contemplated therein may be offered to other persons to the extent permitted by the MOI (except to the extent that a private or personal liability company's MOI provides otherwise);

- The MOI may also insert any provisions restricting or limiting the authority of the board to provide financial assistance to any person in relation to the subscriptions of securities or options of the company or a related or inter-related company as contemplated in Section 44 of the Act.

**(5) The authority of the Company's Board of Directors to authorise the Company to provide financial assistance in relation to the subscription of any option or securities of the Company or a related or inter-related company, as set out in Section 44 –**

..... is not limited or restricted by this MOI;

..... is limited or restricted to the extent set out in Part B of Schedule 2;

[See Table B on page 41 for definition of related and inter-related persons and control];



- The MOI may also insert any provisions restricting or limiting the authority of the board with respect to the issuing of capitalisation shares as contemplated in section 47 (1) of the Act;

**(6) The authority of the Company's Board of Directors to approve the issuing of any authorised shares of the Company as capitalisation shares, to issue shares of one class as capitalisation shares in respect of shares of another class, and to resolve to permit shareholders to elect to receive a cash payment in lieu of a capitalisation share, as set out in section 47(1) –**

..... is not limited or restricted by this MOI;

..... is limited or restricted to the extent set out in Part C of Schedule 2;

**Section 47(1)** – except to the extent that the MOI provides otherwise, the board may by resolution approve the issuing of any authorised shares of the company as capitalisation shares on a pro rata basis to the shareholders of one or more classes of shares. Shares of one class may be issued as capitalisation share in respect of shares of another class and when resolving to award a capitalisation share the board may at the same time resolve to permit any shareholder entitled to receive such an award to elect to instead receive a cash payment at a value to be determined by the board – subject to subsection 2 – which states that the board must have considered the solvency and liquidity test on assumption that every shareholder would elect to receive cash and is satisfied that the company would meet the test after the distribution);

- The MOI may also insert any provisions relating to the issue of shares and their format – which can either be in uncertificated form or certificated form as the Board may determine;

**(7) Securities of the Company are to be issued –**

..... in uncertificated form, as contemplated in Section 49(2)(b);

..... in either certificated or uncertificated form, as the Board may determine;

**2.2 Debt Instruments**

The MOI may provide that : –

- (1) The authority of the company's board of directors to authorise the company to issue secured or unsecured debt instruments as set out in section 43 (2) – is either:

..... not limited or restricted by this MOI;

..... is limited or restricted to the extent set out in Part D of Schedule 2;

- (2) the authority of the company's board of directors to grant special privileges associated with any debt instruments to be issued by the company as set out in section 43(3) is either:

..... not limited or restricted by this MOI, or

..... is limited or restricted by the MOI and if the latter, then to the extent set out in Part D of Schedule 2;

For example, the MOI might set out additional privileges associated with a debt instrument relating to attending and voting at general meetings and the appointment of directors or allotment of securities, redemption by the company or substitution of the debt instrument for shares of the company, provided that the securities to be allotted or substituted in terms of any such privilege are authorised by or in terms of the MOI in accordance with Section 36;

### 2.3 Registration of beneficial interests

The MOI may provide that : -

- The authority of the company’s board of directors to allow the company’s issued securities to be held by, and registered in the name of, one person for the beneficial interest of another person, as set out in section 56(1) - is either:

..... not limited or restricted by this MOI, or

..... is limited or restricted by the MOI and if the latter, then to the extent set out in Part E of Schedule 2;

Refer to Definitions on page 38 for definition of beneficial interest;

## ARTICLE 3 – SHAREHOLDERS

### 3.1 Shareholders’ right to information

In addition to the rights to access information set out in section 26(1), every person who has a beneficial interest in any of the Company’s securities has the further rights to information, if any, set out in Part A of Schedule 2 of this MOI;

Refer to Table C on page 42 Access to Information;

### 3.2 Shareholders’ authority to act

- (1) If, at any time, there is only one shareholder of the Company, the authority of that shareholder to act without notice or compliance with any other formalities, as set out in section 57(2), is not limited or restricted by this MOI;
- (2) The default provision would state that if at any time every shareholder of the company is also a director as contemplated in Section 57(4) [see Table G page 45] the authority of the shareholders to act without notice or compliance with any other internal formalities as set out in that section is not limited or restricted by the MOI.

The MOI could however state that such authority is restricted or limited and set these out in Part A of Schedule 3 - in which case the formal processes required or protocol for shareholders would need to be set out clearly.

refer to Table G on page 45 (leniency);

### 3.3 Representation by concurrent proxies

The right of a shareholder of the company to appoint persons concurrently as proxies, as set out in section 58(3)(a) –

..... is not limited, restricted or varied by this MOI;

..... is limited, restricted or varied to the extent set out in Part B of Schedule 3;

#### General provisions in the Act relating to Proxies

- A shareholder or an agent of the shareholder may appoint one or more proxies to participate in and vote at a meeting of shareholders;
- **Section 58(3)(a)** – except to the extent that the MOI provides otherwise, a shareholder may appoint two or more persons concurrently as proxies and may appoint more than one proxy to exercise voting rights attached to different securities held by the shareholder;

*This right of the shareholder to appoint a proxy or concurrent proxies can either be limited or restricted or varied in the MOI (in part B of Schedule 3) or not varied or limited or restricted at all.*

### 3.4 Authority of Proxy to delegate

**Section 58(3)(b)** – ... a proxy may delegate the proxy's authority to act on behalf of the shareholder to another person subject to any restriction set out in the instrument appointing the proxy;

*This authority to delegate may also be restricted (or not) by the MOI (Part B of Schedule 3).*

(The tick box must be ticked to indicate the appropriate option for the company);

### 3.5 Requirement to deliver proxy instrument to the Company

**Section 58(3)(c)** – ... a copy of the instrument appointing a proxy must be delivered to the company or to any other person on behalf of the company before the proxy exercises any rights of the shareholder at a shareholders meeting.

This requirement may be varied in the MOI to the extent set out in Part B of Schedule 3.

(The relevant tick box must be ticked to indicate whether the requirement set out in Section 58(3)(c) is varied or not varied in the Schedule);

### 3.6 Deliberative authority of proxy

**Section 58(7)** (Default provision): Generally speaking, a proxy is entitled to exercise or abstain from exercising any voting right of the shareholder without direction, except if the MOI or the instrument appointing the proxy directs him or her. The MOI may therefore limit or restrict the proxy's right to act without direction in this regard, and would set out to what extent the limitation or restriction applies in the applicable Schedule;

The MOI can therefore deviate from the defaults by inserting in Schedule 3 Part B any provisions relating to the powers of shareholders to appoint proxies, the appointment of proxies and the powers of any such proxy as contemplated in section 58 of the Act.

### 3.7 Record date for exercise of shareholder rights

The default clause states that if at any time the company's board of directors fails to determine a record date as contemplated in Section 59, the record date for the relevant matter is determined in accordance with Section 59(3);

**Section 59(3)** – if the board does not determine a record date for any action or event, the record date is:

- In the case of a meeting, the latest date by which the company is required to give shareholders notice of that meeting or
- The date of the action or event in any other case
- Unless the MOI or rules provide otherwise

However, the MOI can specifically state in Part C of Schedule 3 any provisions respecting the fixing of a record date as contemplated in Section 59, ie can set out a different record date to the default as set out in Section 59(3);

## ARTICLE 4 – SHAREHOLDERS MEETINGS

*The Act introduces flexibility regarding the manner and form of shareholder meetings, and standards for the adoption of ordinary and special resolutions;*

### 4.1 Requirements to hold meetings

The MOI may state that the company is not required to hold any shareholders meetings other than those specifically required by the Act OR may state that it is required to hold additional shareholders meetings to those specifically required in the Act, and may set out these requirements in Part A of Schedule 4. The company is required to indicate which option it chooses by ticking the appropriate box.

### 4.2 Shareholders' right to requisition a meeting

Section 61 of the Act states that the board or any other person specified in the company's MOI or rules, may call a shareholders' meeting at any time;

- (1) Section 60 relates to scenario's of shareholders acting other than at a meeting (informally) – (i.e "round robin" shareholders resolutions may be allowed);

Section 61(2) states that subject to Section 60, a company must hold a shareholders' meeting:

- a) At any time that the board is required by the Act or the MOI to refer the matter to the shareholders for a decision – **see Table I on page 46;**
- b) Whenever required in terms of S70(3) to fill a vacancy of the board and
- c) When otherwise required in terms of the company's MOI or in terms of Subsection (3) or (7), or by the company's MOI;
  - **Section 61(7):** When an AGM of a public company is required;

- **Section 61(3):** When one or more written and signed demands for a meeting are delivered to the company which demand describes the purpose of the meeting and the aggregate of the demands for substantially the same purpose are made and signed by the holders, as of the earliest time specified in any of those demands, of at least 10% of the voting rights entitled to be exercised in respect of the matter that is proposed for consideration at the meeting;

The MOI may specify a lower percentage in substitution for that set out in the default provision, and would indicate the % in its MOI. In fact the MOI, in Part A of Schedule 4 would insert any provisions imposing a requirement to hold a shareholders meeting;

### 4.3 Location of shareholders' meetings

The MOI may provide the Board with unlimited authority to determine the location of the shareholders meeting and such location could be in any foreign country as set out in Section 61(9);

OR

The MOI may insert any provision limiting or restricting the authority of the board to determine the location of shareholders meetings, or the authority of the Company to meet outside the Republic, which prohibition or limitation would be set out in Part B of Schedule 4.

### 4.4 Notice of shareholders' meetings

The minimum number of days for the Company to deliver a notice of shareholders meeting to the shareholders, as required by Section 62 - ..... is provided in Section 62(1);

..... is ..... business days before the meeting is to begin (appropriate box to be ticked in the MOI);

**Section 62(1):** The company must deliver a notice of each shareholders meeting in the prescribed manner and form to all of the shareholders of the company as of the record date for the meeting as follows: -

|  |                         |                                |
|--|-------------------------|--------------------------------|
| Public companies or NPC (that has members) | <b>15 business days</b> | before the meeting is to begin |
| All other categories of companies          | <b>10 business days</b> |                                |

**Section 62(2)** - the MOI may provide for longer minimum notice periods, but not shorter periods.

A company's MOI may provide (in Schedule 4) for failure to give required notice or a defect in the notice may be condoned if:

- All the holders of the shares entitled to be voted in respect of each item on the agenda acknowledge actual receipt of the notice and;
- Are present at the meeting and;
- Waive notice of the meeting or;
- In the case of a material defect in the manner and form of the notice, ratify the defective notice.

The Notice of meeting to shareholders may be “in writing or electronic form” unless the MOI provides otherwise – the Board is thus given authority to determine the form of the notice ie to state whether notice by electronic means is acceptable (e.g via email). Refer to Table K on page 48.

### 4.5 Electronic participation in shareholders meetings

The MOI can also state in detail the requirements for meetings of shareholders and specific guidelines for their electronic participation, as contemplated in Section 63 OR may state that electronic communications and meetings are prohibited, restricted or limited, and would then insert provisions limiting or restricting the authority to do so in Part C of Schedule 4 of the MOI;

**See Table K on page 48 relating to electronic communication or participation in both shareholder and director meetings.**

### 4.6 Quorum for shareholders meetings

#### (1) Section 64(1) Votes quorum (default provision):

- *The quorum for all shareholders meetings to begin is the presence at the meeting of the holders of at least 25% of all of the voting rights that are entitled to be exercised in respect of at least one matter to be decided on at the meeting, and a matter to be decided on at the meeting may not begin to be considered unless sufficient persons are present at the meeting to exercise in aggregate at least 25% of all of the voting rights that are entitled to be exercised on that matter at the time when the matter is called on the agenda*
- **NOTE: the MOI may lower or higher the % required above (in Part D of Schedule 4 of the MOI)**
- **Person quorum**
- *Irrespective of the votes quorum if a company has more than two shareholders, a meeting may not begin or a matter may not be debated unless at least three shareholders are present and the requirements of the “votes” quorum above or the MOI (if different), are also met. In other words despite any percentage figures as per the votes quorum or in any provisions of the company’s MOI, if there are more than two shareholders, a meeting may not begin unless at least three shareholders are present.*

**Thus the MOI may insert any provision in Part D of Schedule 4, in respect to the quorum requirements for shareholders meetings, or varying the provisions of Section 64 of the Act.**

Refer to Table I on page 46 for a list of actions requiring to be ratified by special resolution in terms of Section 65(11).

### 4.7 Adjournment of shareholders meetings

The maximum period allowable for an adjournment of a shareholders meeting is –  
..... as set out in Section 64(13), without variation (default provision);  
..... as set out in Section 64(13), subject to the variations set out in Part E of Schedule 4;

The MOI may incorporate different time periods allowed for adjournment in the Act which states:

The period of one hour contemplated in S64(4) and (5) or

The period of one week contemplated in S64(4);

The MOI may also incorporate the provisions of Section 64(9) which states that after a quorum to begin a meeting has been established, or a matter to be considered – so long as at least one shareholder with voting rights entitled to be exercised at the meeting or on that matter is present at the meeting, the meeting may continue or the matter considered OR the MOI (or rules) may limit or restrict this authority to continue with the meeting.

**Section 64(12)** states that a meeting cannot be adjourned beyond the earlier of –

- a) A date that is 120 business days after the record date determined in accordance with section 59 or
- b) The date that is 60 business days after the date on which the adjournment occurred

**Section 64(13)** states that the MOI may provide for different maximum periods of adjournment of meetings or unlimited adjournment of meetings in Part E of Schedule 4.

#### 4.8 Shareholders resolutions

- (1) For an ordinary resolution to be adopted at a shareholders meeting, it must be supported by the holders of at least –

..... 50% of the voting rights exercised on the resolution, as provided in section 65(7);

..... % of the voting rights exercised on the resolution, despite section 65(7);

..... the minimum percentage of the voting rights exercised on the resolution, as set out in Part F of Schedule 4;

The company may thus insert in the Schedule any provision establishing different requirements for adoption of ordinary resolution for different matters;

- (2) For a special resolution to be adopted at a shareholders meeting, it must be supported by the holders of at least –

..... 75% of the voting rights exercised on the resolution, as provided in section 65(9);

..... % of the voting rights exercised on the resolution, despite section 65(9);

..... the minimum percentage of voting rights exercised on the resolution, as set out in Part F of Schedule 4;

- (3) A special resolution adopted at a shareholders meeting is –

..... not required for a matter to be determined by the Company, except those matters set out in section 65(11), or elsewhere in the Act;

..... required, in addition to the matters set out in section 65(11), for the matters set out in Part G of Schedule 4. (The appropriate box to be ticked).

*Note: the minimum % of 50% will however still apply in the removal of a director under S 71;*

In other words, the MOI could either incorporate the default provisions set out in the Act as per Section 65 OR insert any provision establishing different requirements for adoption of an ordinary resolution for different matters and for the adoption of a special resolution for different matters – as long as there is a margin of at least 10% points between the two;

The MOI may also adopt the provisions of Section 65(11) wholly which sets out the scenario's where a special resolution is required, and may state that a special resolution is only required for those matters or may impose additional matters which will also require a special resolution in Part G of Schedule 4 of the MOI. [see Table I page 46 for matters listed in Section 65(11), and also page 39 which sets out Section 65 requirements in more detail regarding special and ordinary resolutions].

## ARTICLE 5 – DIRECTORS AND OFFICERS

### 5.1 Composition of the Board of Directors

- (1) The Board of Directors of the company comprises of ..... directors, and ..... alternate directors, to be elected by holders of the companies securities entitled to exercise voting rights, as contemplated in Section 68;

**Section 66(2)** states that the board of a company must comprise –

- a) In the case of a for profit company (private or personal liability company), one or more directors are to be appointed;
- b) and in the case of a public or non-profit company, at least three directors,

in addition to the minimum number of directors that the company must have to satisfy any requirement whether in terms of the Act or the MOI, to appoint an audit committee or a social and ethics committee as contemplated in section 72(4);

S66(3) – Unless the MOI specifies a higher minimum requirement. The MOI may therefore increase the minimum number of directors (and alternate directors) per category of company,

- Note: Decisions of the Board shall be valid even if the number of directors is below the minimum set out by the Act or the MOI;

Section 66(12): inserted by the Amendment Act: Any particular director may be appointed to more than one committee and when calculating the minimum number of directors required for a company, any such director who has been appointed to more than one committee must be counted only once;

The MOI may name a specific person or persons in Part A of Schedule 5 who shall have a right to appoint a director;

- (2) In addition to the elected directors –
- ..... there are no appointed or ex officio directors of the company, as contemplated in section 66(4);
  - ..... there are ..... appointed, and ..... ex officio directors of the company, as contemplated in section 68, to be designated in the manner specified in Part A of Schedule 5;



**Ex officio directors**

**S66(4)(a)** – The MOI may also state that in addition to the elected directors, there will or will not be ex officio directors that may be appointed – and if it states that there are, then such ex officio directors are to be designated in the manner specified in Part A of Schedule 5 of the MOI, which would also establish the right of any person to be an ex officio director of the company. Regarding the ex officio director's election – the MOI may state name a specific person who could appoint / remove him/her.

**S66(5)(b)(i)** – an ex officio director has all the powers and functions of any other director of the company except to the extent that the MOI restricts these powers and functions or duties – in other words the MOI can limit the duties, powers or functions of the ex officio director, however cannot limit the liabilities attached to the office as he/she will be subject to all the liabilities of any other director of the company.

- (3) In addition to satisfying the qualification and eligibility requirements set out in section 69, to become or remain a director or a prescribed officer of the company, a person –
- ..... need not satisfy any further eligibility requirements or qualifications;
  - ..... must satisfy the additional eligibility requirements and qualifications set out in Part B of Schedule 5;

**Eligibility / Qualification requirements**

The MOI may insert any provision imposing additional grounds of ineligibility or disqualification requirements over and above those set out in the Act (Section 69) for directors and prescribed officers(see Table E on page 43 for definition of prescribed officer, as per Regulation 38) of the company, and also minimum qualifications to be met by directors of that company.

See Table F on page 44 setting out the grounds for ineligibility and disqualification as per section 69 of the Act;

- (4) Each elected director of the company serves for –
- ..... an indefinite term, as contemplated in section 68(1);
  - ..... a term of ..... years;
- (5) The manner of electing directors of the company is –
- ..... as set out in section 68(2);
  - ..... as set out in Part C of Schedule 5;

**Election –**

Directors (other than the first directors or ex officio directors) are to be elected by the persons entitled to exercise voting rights in such an election, as contemplated in Section 68 – (Election of Directors of Profit Companies). The manner for electing directors is as per Section 68(2), unless the MOI provides otherwise (of a profit company). The MOI could therefore set out alternative manner of electing directors (in Part C of Schedule 5).

**NOTE: Section 66(4)(b)** – A profit company {not a SOC Ltd} 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;

**The King 111 report recommends that the majority of directors should be non-executive directors so as to ensure that the Board operates independently and is not an extension of the day to day management of the company.**

- (6) The authority of the company's board of directors to fill any vacancy on the Board on a temporary basis, as set out in section 68(3) –  
..... is not limited or restricted by this MOI;  
..... is limited or restricted to the extent set out in Part D of Schedule 5;

**Note:** the person who fills the vacancy on a temporary basis has all the powers, functions and duties of a director and is subject to the liabilities of any other director of the company;

**Some further notes on Removal from the board of directors:**

**Removal by Board of directors – Section 71(3)**

- *The Board may discharge a director for various reasons, including negligence or dereliction of duty [Section 71(3)];*

**Removal by Shareholders – Section 71**

- *Despite anything to the contrary in the MOI or rules or agreement between a company and director or between any shareholders and a director, a director may be removed by an ordinary resolution adopted at a shareholders meeting by the persons entitled to exercise voting rights in an election of that director provided that director has been given notice of the meeting and the resolution and has been afforded a reasonable opportunity to make a presentation in person or through a representative to the meeting before the resolution is put to vote.*

**5.2 Authority of the Board of Directors**

- (1) The authority of the board to manage and direct the business and affairs of the company as set out in Section 66(1) may either be unlimited – in which case the board would possess all powers and perform any of the functions of the company;

OR

such authority could be limited / restricted as per the MOI – Per Part E of Schedule 5;

- Any specific restrictions on the Board would then be set out in the Schedule, and the name of the company, where applicable, be subjoined by the suffix Ring-Fenced to indicate the restriction – see page 11.

- (2) Where the company has only one director, as per Section 57(3), the authority of that director to act without notice or compliance with any other internal formalities as set out in that section is not limited or restricted by the MOI or may be limited or restricted as set out in Part F of Schedule 5. In other words, the company may set out in the Schedule any provision limiting or restricting such a lone director to act without regard to formalities [as is contemplated in Section 57(3)];

See Table G on page 45 (leniency);

### 5.3 Directors' Meetings and Committees

#### (1) Decisions other than at a board meeting

The authority of the company's board of directors to consider a matter other than at a meeting as set out in Section 74 (informally) may be allowed and not limited or restricted in the MOI – whereby a decision is adopted by written consent of the majority of directors given in person or by electronic communication, provided each director has received notice of the matter to be decided – (i.e “round robin” directors resolutions may be allowed);

OR may be limited or restricted to the extent set out in the MOI (Part G of Schedule 5).

#### (2) Board Meetings

**Section 73(2):** The right of the company's directors to requisition a meeting of the board as set out in Section 73(1) may be exercised by at least 25% of the directors in the case of a board that has at least 12 members or two directors in any other case;

A company's MOI may state a higher or lower % or number (whichever is applicable), and would indicate the figure in the MOI;

#### (3) Electronic communication

**Section 73(3)** – see comments re electronic communication and participation in meetings in Table K on page 48;

The MOI may give unrestricted authority to the board to conduct a meeting entirely by electronic communication or to provide for participation therein by electronic communication or may restrict this authority entirely or partially and would set out to what extent it does so in Part H of Schedule 5;

#### (4) Notice

The authority of the board to determine the manner or form and time of the notice of meetings as set out in Section 73(4) may be unrestricted and unlimited or may be limited in the MOI (to the extent set out in Part H of Schedule 5);

The company thus needs to determine whether the board's authority to determine the form and timing of notice of meetings is limited in the MOI by stipulating specific requirements in the MOI relating thereto, otherwise the Board has a free discretion to determine the form and time for giving the notice;

No meeting may be convened without notice to all directors unless the specific circumstances set out per Table G page 45 are met – whereby the board may proceed with a meeting despite a failure or defect in giving notice however this provision may be varied/ limited by the MOI as well.

(5) Conduct of meetings:

The authority of the Company's Board of directors to proceed with a meeting despite a failure or defect in giving notice of the meeting, as set out in section 73(5) –

..... is not limited or restricted by this MOI;

..... is limited or restricted to the extent set out in Part H of Schedule 5;

(6) The quorum requirement for a directors meeting to begin, the voting rights at such a meeting, and the requirements for approval of a resolution at such a meeting are –

..... as set out in section 73(5);

..... as set out in section 73(5) subject to the variations set out in Part H of Schedule 5;

**Section 73(5) :**

- A majority of the directors must be present at a meeting before a vote may be called;
- Each director has one vote on a matter before the board;
- A majority of the votes cast on a resolution is sufficient to approve that resolution and in the case of a tied vote – the chair must cast a deciding vote, if the chair did not initially have or cast a vote or the matter voted on fails in any other case;

The MOI may thus provide alternative provisions to the above relating to conduct of meetings and set these out in Part H of Schedule 5 – such as the quorum requirement for the meeting to begin, and the voting rights at such a meeting and the requirements for approval of a resolution.

## 5.4 Directors compensation and financial assistance

The MOI may state that it does not limit or restrict the company's authority to:

- a) Pay remuneration to the company's directors in accordance with a special resolution approved by the company's shareholders within the previous two years as set out in Section 66(9) and (10);
- b) Provide financial assistance to a director or prescribed officer or other person referred to in Section 45 – see Table J page 47;

OR it may limit or restrict the company's authority in regard to (a) to (b) above – which limitations or restrictions would be set out in Part I of Schedule 5 of the MOI.

## 5.5 Indemnification of Directors

The MOI may state that the company's authority is unlimited in relation to:

- a) Advancing expenses to a director\* or indemnify a director in respect of the defence of legal proceedings as set out in Section 78(3) – [arising out of director's service to the company];
- b) To indemnifying a director in respect of liability as set out in Section 78(5) or
- c) Purchasing insurance to protect the company, or a director, as set out in Section 78(6);

OR it may limit or restrict the company's authority in regard to (a) to (c) above – which limitations or restrictions would be set out in Part J of Schedule 5 of the MOI.

### **Some further notes relating to Section 78 and Indemnification of directors**

*[\*director in this section refers to a former director, alternate director, prescribed officer or a person who is a member of a committee of a board of a company, or of the audit committee of a company, irrespective of whether or not the person is also a member of the company's board];*

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

- Any agreement, provision in the MOI, resolution is void if it directly or indirectly purports to:
  - (a) relieve a director of liability in regard to the duties contemplated in sections 75 (personal financial interests) and 76 (codified regime of directors duties) and liability contemplated in section 77;
  - (b) negate limit or restrict any legal consequences arising from an act or omission that constitutes wilful misconduct or wilful breach of trust on the part of the director;

#### **Section 78(3) – as amended by the Amendment Act – *Payment of fine for director***

**Subject to Subsection (3A) – A company may not indirectly or directly pay any fine that may be imposed on the director or a director of a related company who has been convicted of an offence in terms of national legislation.**

*S78(3A) – inserted by Amendment Act*

*Subsection (3 (above) does not apply to a private or personal liability company if:*

- a) a single individual is the sole shareholder and sole director of that company or
- b) two or more related individuals are the only shareholders of that company and there are no directors of the company other than one or more of those individuals.

#### **Section 78(6) A company may *not* so indemnify the director if:**

- (i) the director has had proceedings instituted against him/her regarding Sections 77(3)(a) to (c) – i.e:

Acted in the name of the company, signed anything on behalf of the company or purported to bind the company or authorise the taking of any action by or on behalf of the company despite knowing that the director lacked authority to do so;

Acquiesced in the carrying on of the company's business despite knowing that it was being conducted in a manner prohibited by Section 22(1);

Been a party to an act or omission by the company despite knowing that the act or omission was calculated to defraud a creditor, employee or shareholder of the company or had another fraudulent purpose;

(ii) for wilful misconduct or breach of trust (unless (s)he has been exculpated);

**Section 78(7): Directors' Insurance:**

*the company may purchase insurance:*

- to protect the company, or the director against liability and expenses as contemplated in Section 78(5);
- to protect the company against any expenses that it is permitted to advance as per Section 78(4).

## 5.6 Committees of the Board

Section 72(1): Except to the extent that the MOI provides otherwise, the board of a company may: (a) appoint any number of committees of directors and (b) delegate to any committee any of the authority of the board;

The MOI may state that the Board is allowed to appoint and delegate authority to committees as per Section 72(1);

OR may not do so – Part K of Schedule 5 of the MOI would then set out any provision limiting or restricting the authority of the board to establish committees.

If the MOI provides for unlimited authority to the board to appoint and delegate committees, the Board may:

include such persons who are not directors on the committee, but

- as long as he/she is not ineligible or disqualified in terms of Section 69 – (see Table F page 44);
- and no such person has a vote on a matter to be decided on the committee;

Such a person is not required to be a director of the company unless the MOI also specifically states that such persons are required to also be directors on the board.

**Notes:**

*Members of committees who are not directors may therefore incur the same liabilities as directors in terms of the Act, yet these persons are not entitled to vote at a Board meeting in terms of the Act. The King 111 Report recommends that only directors be appointed to Committees;*

The MOI can set out the types of Committees the board could appoint, such as a nomination committee;

Audit and Social and Ethics Committees are statutory committees to be established in terms of the Act, and Regulations;

The creation of a committee, delegation of authority or action taken does not alone satisfy or constitute compliance by a director with the required duty of a director to the company.

## ARTICLE 6 – GENERAL PROVISIONS

- **Insert any further provisions desired in the MOI or additional articles.**

## 9. SECTION 6 – ANTI-AVOIDANCE

A court on application by the Commission, Panel, or an exchange in respect of a company listed on that exchange, may declare any agreement, transaction, arrangement, resolution or provision of a company's MOI or rules –

- a) To be primarily or substantially intended to defeat or reduce the effect of a prohibition or requirement established by or in terms of an unalterable provision of the Act;
- b) Void to the extent that it defeats or reduces the effect of a prohibition or requirement established by or in terms of an unalterable provision of this Act.

*Inserted – Amendment Act – Section 6(15)*

To the extent that the specific content or particular effect of any provision of a company's MOI –

- a) Is required of the company by or in terms of any applicable public regulation or by the listing requirements of an exchange and
  - b) Has the effect of negating, restricting, limiting, qualifying extending or otherwise altering the substance or effect of an unalterable provision of the Act,
- that provision of the company's MOI must not be construed as being contrary to Section 15(1)(a) – which states that the MOI must be consistent with the Act and is void to the extent it contravenes or is inconsistent with the Act.

**An agreement that does not have the effect of amending the MOI, and is still consistent with the MOI and Act will still be valid and binding on parties – as long as also not fall foul of Section 6, even if it is not a shareholder's agreement.**

***Aspects to bear in mind when considering the effects of Section 6 (anti-avoidance):***

- The MOI and rules are public documents, subject to access by the public (see Table C on page 42), and any amendments thereto are required to comply with the Act, as set out at page 13;
- A shareholders agreement is an agreement executed between the shareholders as parties thereto and is therefore a private contractual arrangement, which may be varied or amended by agreement between the parties thereto.

## 10. SECTION 218 – CIVIL ACTIONS

- Section 218(1): Subject to any provision of this Act specifically declaring void an agreement, resolution, provision of an agreement, MOI or rules of a company, nothing in the Act renders void any other agreement, resolution or provision of an agreement, resolution, MOI or rules of a company that is prohibited, voidable or that may be declared unlawful in terms of this Act, unless a court has made a declaration to that effect regarding that agreement, resolution or provision.
- Section 218(2): Any person who contravenes any provision of this Act is liable to any other person for any loss or damage suffered by that person as a result of that contravention;
- Section 218(3): The provisions of this section do not affect the right to any remedy that a person may otherwise have;

- A shareholder (and any other stakeholder) can therefore have a claim against the directors or any person who contravenes the Act for damages for any loss or damaged suffered as a result of that contravention – i.e the action does not need to be fraudulent or carried out with gross negligence for a valid claim in terms of this Section.

**Sections 20 and 218 of the Act enable shareholders to sue directors/officers for civil damages, or any losses suffered by them.**

## 11. TRANSITIONAL ARRANGEMENTS AND CC'S

- Existing CC's at the date of implementation of the Act will continue to exist indefinitely, or until such time as their members may determine that it is in their interest to convert to a company;
- No new CC's will be able to be registered, and no company converted to a CC, as of the effective date of the Act;

### **Conversion of CC to Company**

- From the date of operation of the Act, existing CC's may convert to a company by filing a Notice of Conversion together with:
  - a) a written statement of consent approving the conversion of the CC signed by members of the CC holding in aggregate at least **75%** of the members' interest in the CC;
  - b) a MOI consistent with the requirements of the Act;
  - c) the prescribed filing fee.
- Every member of a converted CC is entitled to become a shareholder of the company, but the shares to be held in the company by the shareholders individually need not necessarily be in proportion to the members' interests as stated in the founding statement of the CC.

### **Financial Statements and accounting records of CC's**

- The same requirements as per Section 28, 29, 30 of the Act apply to CC's;
- The CC may also voluntarily make the enhanced accountability and transparency provisions of Chapter 3 applicable.

### **Business Rescue and winding up of CC's**

- Chapter 6 will also apply to CC's (Business Rescue).

### **Transparency and accountability of CC's**

Section 10 of the CC's Act is amended by the insertion of the following:

- Any Regulations made by the Minister in terms of Section 29(4) and (5) and 30(7) of the Companies Act 2008 will apply equally to a CC;
- Section 62 of the CC's Act is amended to include – Section 34(2) of the Companies Act apply to a CC, and Chapter 3 also applies to CC's where it has voluntarily determined to take action contemplated in Section 34(3) of the Companies Act.

### **Reckless or Fraudulent Trading – Section 64 of the CC's Act**

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, 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. This Section has been amended by Schedule 3 of the Companies Act – every person who is knowingly a party to the carrying on of the business in any such manner, shall be guilty of an offence.

**Sections 3(1), 11, 16, 22(2) and (4), 41, 47(7), 49(5), 55 and 58(4) of the CC's Act are repealed – Schedule 3.**

## 12. DEFINITIONS

### SOME IMPORTANT DEFINITIONS IN THE ACT

(Section 1 of the Act, as amended by the Amendment Act)

**accounting records** means information in written or electronic form concerning the financial affairs of a company as required in terms of this Act, including but not limited to, purchase and sales records, general and subsidiary ledgers and other documents and books used in the preparation of financial statements;

**all or greater part of the assets or undertaking** when used in respect of a company, means – (a) in the case of the company's assets, more than 50% of its gross assets fairly valued, irrespective of its liabilities, or (b) in the case of the company's undertaking, more than 50% of the value of its entire undertaking, fairly valued;

**audit and auditor** has the meaning set out in the Auditing Profession Act, but "audit" does not include an independent review of annual financial statements as contemplated in S30(2)(b)(ii)(bb);

**beneficial interest** when used in relation to a company's securities, means the right or entitlement of a person through ownership, agreement, relationship or otherwise, alone or together with another person to –

- receive or participate in any distribution in respect of the company's securities;
- exercise or cause to be exercised, in the ordinary course, any or all of the rights attaching to the company's securities; or
- dispose or direct the disposition of the company's securities, or any part of a distribution in respect of the securities but does not include any interest held by a person in a unit trust or collective investment scheme in terms of the Collective Investment Schemes Act 2002;

**debt instrument** includes any securities other than the shares of a company irrespective of whether they are issued in terms of a security document or not such as a trust deed, but does not include promissory notes and loans whether constituting an encumbrance on the assets of the company or not;

**knowing, knowingly or knows** when used with respect to a person, and in relation to a particular matter, means that the person either (a) had actual knowledge of the matter, or (b) was in a position in which the person reasonably ought to have (i) had actual knowledge (ii) investigated the matter to an extent that would have provided the person with actual knowledge, or (iii) taken other measures which, if taken, would reasonably be expected to have provided the person with actual knowledge of the matter;

**pre-existing company** means a juristic person that immediately before the effective date of the Act (1 May 2011), was registered in terms of the previous Companies Act of 1973, or was registered in terms of the Close Corporations Act of 1984 (if it has subsequently been converted), or was in existence and recognised as an existing company in terms of the previous 1973 Act;

**securities** means any shares, debentures or other instruments irrespective of their form or title issued or authorised to be issued by a profit company;

**shareholder** subject to section 57(1) means the holder of a share issued by a company and who is entered as such in the certificated or uncertificated securities register as the case may be.

## 13. SPECIAL AND ORDINARY RESOLUTIONS OF SHAREHOLDERS

### Ordinary resolution

Section 65(7): means a resolution adopted with the support of more than 50% of the voting rights exercised on the resolution, or a higher percentage as contemplated in the MOI, or one or more higher percentages of voting rights to approve ordinary resolutions concerning one or more particular matters, respectively, –

provided there must at all times be a margin of at least 10 percentage points between the highest established requirement for approval of an ordinary resolution on any matter, and the lowest established requirement for approval of a special resolution on any matter –

- a) at a shareholders meeting or (b) by holders of the company's securities acting other than at a meeting, as contemplated in Section 60.

### Special resolution means,

- a) in the case of a company, a resolution adopted with the support of at least 75% of the voting rights exercised on the resolution or a different percentage as contemplated in section 65(10);
  - (i) at a shareholders meeting OR
  - (ii) by holders of the company's securities acting other than at a meeting, as contemplated in Section 60, OR
- b) in the case of any other juristic person a decision by the owner or owners of that person or by another authorised person that requires the highest level of support in order to be adopted in terms of the relevant law under which that juristic person was incorporated;

A company's MOI may permit (a) a different percentage of voting rights to approve a special resolution or (b) one or more different percentages of voting rights to approve special resolutions concerning one or more particular matters respectively –

provided there must at all times be a margin of at least 10 percentage points between the requirements for approval of an ordinary resolution and a special resolution on any matter.

**Table A**

| <b>CATEGORISATION OF COMPANIES</b> |  |
|------------------------------------|--|
| <b>FOR<br/>PROFIT</b>              | Section 8(2)<br>a) state owned company (SOC Ltd);  |
|                                    | b) a private company [(Pty) Ltd] if:<br>(i) its not a state owned company;<br>(ii) its Memorandum of Incorporation (MOI);<br>(aa) prohibits it offering any of its securities to the public and<br>(bb) restricts the transferability of its securities,<br><b>{note: no limit on no. of shareholders (previously was limit of 50) and a share no longer has a nominal or par value}</b>   |
|                                    | c) a personal liability company (Incorporated or Inc) if<br>(i) it meets the criteria for a private company;<br>(ii) its MOI states that it is a personal liability company {i.e that the directors and past directors are jointly and severally liable together with the company, for the debts and liabilities of the company that were contracted during their respective terms of office}.<br><b>{note: these are the old Section 53(b) companies}</b> |
|                                    | d) a public company, (Ltd) in any other case;<br><b>{note: min number of incorporators is reduced from 7 to 1}</b>   |
| <b>NOT FOR<br/>PROFIT</b>          | Name to be followed by suffix “NPC”, {previously Section 21 Companies};<br><br>{Incorporated for a public benefit or an object relating to one or more cultural or social activities, or communal or group interests}.<br><br>{Can be incorporated with or without members}  |

**External Company** means a foreign company (for profit or not for profit) that is conducting business or non-profit activities within the RSA, as set out in Section 23(2) for example, if such a company is party to one or more employment contracts within the RSA. The company does business in the RSA while remaining primarily regulated by its country of origin or registration.

Regulation 20 – sets out requirements for registration at the Commission.

**Domesticated Company** means a foreign company whose registration has been transferred to the RSA in terms of Section 13(5) to (11). It is regulated as if it had been incorporated in the RSA.

**Table B**

| <b>RELATED AND INTER-RELATED PERSONS AND CONTROL</b>  |
|---|
| 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 two degrees of natural or adopted consanguinity or affinity;  |
| Section 2(1)(b): an individual is related to a juristic person if the individual directly or indirectly controls the juristic person [as determined in accordance with subsection (2)] – 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 other or the business of the other – see below* (ii) either is a subsidiary of the other or (iii) a person directly or indirectly controls each of them or the business of each of them – see below*   |
| <p><b>* control:</b> a person controls a juristic person (JP) or its business if</p> <p>a) in the case of a JP that is a company, (i) that JP is a subsidiary of that 1st person (ii) that 1st person together with any related or inter-related person is (aa) directly or indirectly able to exercise or control the exercise of a majority of voting rights associated with the securities of that company whether pursuant to a shareholder agreement or otherwise, (bb) or has the right to appoint or elect or control the appointment or election of directors of that company who control the majority of votes at a meeting of the Board;</p> <p>b) in the case of a JP that is a CC, the 1st person owns the majority of members interest or controls/has right to control majority of members votes in the CC;</p> <p>c) in the case of a JP that is a trust, the 1st person has the ability to control the majority of votes of trustees or appoint majority of trustees or appoint or change the majority of beneficiaries of the trust; or</p> <p>d) that 1st person has the ability to materially influence the policy of the JP in a manner comparable to a person who in ordinary commercial practice, would be able to exercise an element of control referred to in (a), (b) or (c).</p> |
| <p><b>Definition of “inter-related” – per Section 1(1)(o) of the Amendment Act:</b></p> <p>when used in respect of three or more persons, means persons who are related to one another in a linked series of relationships, such that two of the persons are related in a manner contemplated in Section 2(1) and one of them is related to the third in any such manner, and so forth in an unbroken series.</p>   |

**Table C****ACCESS TO INFORMATION**

- Section 26 of the Act states that a person who holds or has a beneficial interest in any securities issued by a profit company or who is a member of a non-profit company has a right to inspect and copy without any charge for any such inspection or upon payment of no more than the prescribed maximum charge for any such copy, the information contained in the records of the company, as are specifically listed in Section 24(3) and (4) of the Act;
- Any other person has a right to inspect or copy the securities register of a profit company, or the members register of a non-profit company that has members, or the register of directors upon payment of an amount not exceeding the prescribed maximum fee for any such inspection;
- Any such right of access may be exercised only in accordance with The Promotion of Access to Information Act 2000;

Regulation 23 sets out in detail the information to be kept concerning directors such as addresses for service, and in the case of a company that is required to have an audit committee any professional qualifications and experience of the director, to the extent necessary to enable the company to comply with Section 94(5) and Regulation 42;

This information is over and above that information required by Section 24(5), which states that a company's record of directors must include in respect of each director, that persons full name, former names, identity number or date of birth, (if not a SA, then passport number and nationality), occupation, date of most recent election as director, name and registration number of every other company or foreign company of which the person is a director and any other prescribed information;

**Regulation 24:**

Where a company receives a request for access, it must within 14 business days comply with the request. It is an offence for a company to fail to accommodate any reasonable request or otherwise interfere with, impede, frustrate such a person's right (also in re access to financial statements - Section 31).

**Table D**

| <b>SOLVENCY AND LIQUIDITY TEST</b>  |
|---|
| <p>Section 4(1): a company satisfies the solvency and liquidity test at a particular time if, considering all reasonably foreseeable financial circumstances of the company at that time –</p> <ol style="list-style-type: none"> <li>a) the assets of the company as fairly valued, and equal or exceed the liabilities of the company, as fairly valued, and</li> <li>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) twelve months after the date on which the test is considered; or (ii) in the case of a distribution contemplated in para (a) of the definition of “distribution” in section 1, twelve months following that distribution.</li> </ol>  |
| <p>Section 4(2): for the purposes contemplated in (1)</p> <ol style="list-style-type: none"> <li>a) any financial information to be considered concerning the company must be based on –           <ol style="list-style-type: none"> <li>(i) accounting records which satisfy requirements of S28;</li> <li>(ii) financial statements which satisfy requirements of S29;</li> </ol> </li> <li>b) subject to para (c) the board or any other person applying the solvency and liquidity test to a company must (i) consider a fair valuation of the company’s assets and liabilities including any reasonably foreseeable contingent assets and liabilities irrespective of whether or not arising as a result of the proposed distribution and (ii) may consider any other valuation of the company’s assets and liabilities that is reasonable in the circumstances and</li> <li>c) unless the MOI provides otherwise, when applying the test in re of a distribution contemplated in para (a) of the definition of “distribution” in S1 a person is not to include 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 on liquidation are superior to the preferential rights on liquidation of those receiving the distribution.</li> </ol> |

**Table E**

| <b>PRESCRIBED OFFICERS – REGULATION 38:</b>  |
|--|
| <ul style="list-style-type: none"> <li>• Draft Regulation 38 – sets out the definition of a prescribed officer of a company (despite not being a director), for all purposes of the Act as follows: if that person: –       <ol style="list-style-type: none"> <li>a) exercises general executive control over the management of the whole, or a significant portion, of the business and activities of the company, or</li> <li>b) regularly participates to a material degree in the exercise of general effective control over, and management of the whole, or a significant portion, of the business and activities of the company.</li> </ol> </li> <li>• The Regulation applies to such a person irrespective of any particular title given by the company to –       <ol style="list-style-type: none"> <li>a) an office held by that person in the company, or</li> <li>b) a function performed by the person for the company.</li> </ol> </li> </ul> |

**Table F**

**NON-ELIGIBLE AND DISQUALIFIED DIRECTORS**

- The Act sets out qualifications and disqualifications of Directors, (Section 69);
- Section 69 specifically states that a company may in its MOI impose additional grounds of ineligibility or disqualification on its directors, and set out minimum qualifications to be met by directors of that company;
- A person who becomes ineligible or disqualified while serving as a director ceases to be entitled to continue to act as a director; (subject to Section 70(2) –
- A person is ineligible if the person is –
  - A juristic person;
  - An unemancipated minor or under similar legal disability or
  - Does not satisfy any qualification set out in the MOI;
- The Act sets out disqualifications 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 (or member of a CC);
- Section 69(8)(b):

1. an unrehabilitated insolvent;
2. is prohibited in terms of any public regulation to be a director;
3. any person removed from an office of trust because of misconduct involving dishonesty;
4. 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 Act, the Insolvency Act, CC's Act, Competition Act, FICA, Security Services Act, Prevention and Combating of Corruption Activities Act. [Draft regulation 39(4) – the prescribed minimum value of a fine upon conviction for certain offences which would result in automatic disqualification as a director as per 4 is R1000].

The disqualifications listed in 3 and 4 will end at the later of 5 years after the date of removal from office or the completion of any sentence imposed for the relevant offence, or at the end of one or more extensions as determined by a court.

**Note:** on application, a court may exempt a person from the application of any of the provisions listed in the block above [S69(8)(b)].

**Table G****LENIENCY RE GOVERNANCE FOR CERTAIN COMPANIES – (S57)****A for Profit company (other than SOC)**

- **has only one shareholder**

**S57(2)(a)** that shareholder may exercise any or all of the voting rights pertaining to that company on any matter at any time without notice or compliance with any other internal formalities except to the extent the company's MOI provides otherwise and

- less onerous reporting requirements;
- no notice requirements (simplified decision making);
- S59–65 do not apply to the governance of the company (re shareholders meetings – notice, conduct, quorum, resolutions) ie no need for compliance with internal formalities;

- **where there is only one director who is also the sole shareholder**

- no notice requirements for board meeting;
- S75(2)(b):** requirement for disclosure of directors personal financial interest does not apply if one person holds all the beneficial interests of all of the issued securities of the company and is the only director of that company (however where the only director of a company does not hold all the securities, (s)he 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).

**Section 78(3) – as amended by the Amendment Act – Payment of fine for director**

Subject to Subsection (3A) – A company may not indirectly or directly pay any fine that may be imposed on the director or on a director of a related company as a consequence of that director having been convicted of an offence unless the conviction was based on strict liability.

**S78(3A) – inserted by Amendment Act**

Subsection (3) (above) does not apply to a private or personal liability company if:

- a single individual is the sole shareholder and sole director of that company or
- two or more related individuals are the only shareholders of that company and there are no directors of the company other than one or more of those individuals.

- **where there is only one director in a profit company (not a SOC)**

**Section 57(3(a))** – That director may exercise any power or perform any function of the board at any time without notice or compliance with any other internal formalities except to the extent that the company's MOI provides otherwise and

Sections 71(3)–(7), S73, S74 not applicable to the governance of that company ie (i) may enter a contract in which (s)he or a related person has a personal financial interest after obtaining an ordinary resolution of shareholders.



- **and where every director is also a shareholder of a particular company [other than a SOC]**
- g) no notice or other internal formalities re referral by Board for shareholders decisions unless the MOI provides otherwise [Section 57(4)(a)];
- h) when acting in capacity as shareholders, no need to comply with S73-78 relating to meetings, duties, obligations, standards of conduct, liabilities and indemnification of directors;
- i) S30(2A) – exempted from audit or independent review of FS or AFS (unless voluntarily decides to do so) – see page 00 above;
- j) diminished need to seek shareholder approval for certain board actions.

**Table H**

| <b>PUBLIC INTEREST SCORE<br/>(for purposes of Regulations 27-30, 43, 127 and 128)</b>   |
|---|
| <p>Every company must calculate its public interest score for each financial year, calculated as the sum of the following:</p> <ul style="list-style-type: none"> <li>a) number of points equal to the average number of employees of the company during the financial year;</li> <li>b) one point for every R1 million (or portion thereof) in third party liability of the company at the financial year end;</li> <li>c) one point for every R1 million (or portion thereof) in turnover during the financial year, and</li> <li>d) one point for every individual who at the end of the financial year, is known by the company – <ul style="list-style-type: none"> <li>(i) in the case of a profit company, to directly or indirectly have a beneficial interest in any of the company’s issued securities, or</li> <li>(ii) in the case of a non-profit company, to be a member of the company or a member of an association that is a member of the company.</li> </ul> </li> </ul> |

**Table I**

| <b>SPECIAL RESOLUTIONS REQUIRED IN TERMS OF THE ACT<br/>SECTION 65(11) (AS AMENDED IN THE AMENDMENT ACT)</b>  |
|---|
| <p>A special resolution is required to –</p> <ul style="list-style-type: none"> <li>a) amend the company’s MOI to the extent required by section 16(1)(c) and section 36(2)(a);<br/>(authorisation and classification of shares);</li> <li>b) ratify a consolidated revision of a company’s MOI as contemplated in section 18(1)(b);</li> <li>c) ratify actions by the company or directors in excess of their authority as contemplated in section 20(2);</li> <li>d) approve an issue of shares or grant of rights in the circumstances contemplated in section 41(1);</li> <li>e) approve an issue of shares or securities as contemplated in section 41(3);</li> <li>f) authorise the board to grant financial assistance in the circumstances contemplated in section 44(3)(a)(ii) or 45(3)(a)(ii).</li> </ul> |

- g) approve a decision of the board for re-acquisition of shares in the circumstances contemplated in section 48(8);
- h) authorise the basis for compensation to directors of a profit company as required by section 66(9);
- i) approve the voluntary winding up of the company as contemplated in section 80(1);
- j) approve the winding up of a company in the circumstances contemplated in section 81(1);
- k) approve an application to transfer the registration of the company to a foreign jurisdiction as contemplated in section 82(5);
- l) approve any proposed fundamental transaction to the extent required by Part A of Chapter 5, or
- m) revoke a resolution contemplated in section 164(9)(c).

**Table J**

| <b>CONDITIONS FOR LENDING FINANCIAL ASSISTANCE</b>  |
|---|
| <p>Despite any provision in a Company's MOI to the contrary, the board may not authorise financial assistance unless:</p> <ul style="list-style-type: none"> <li>a) the particular provision of financial assistance is –               <ul style="list-style-type: none"> <li>(i) pursuant to an employee share scheme that satisfies the requirements of Section 97; or</li> <li>(ii) pursuant to a special resolution of the shareholders adopted in the previous two YEARS which approved such assistance for the specific recipient or generally for a category of potential recipients and the specific recipient falls within that category and</li> </ul> </li> <li>b) the board is satisfied that –               <ul style="list-style-type: none"> <li>(i) immediately after giving the financial assistance, the company would be in compliance with the solvency and liquidity test, and</li> <li>(ii) the terms under which the financial assistance is proposed to be given are fair and reasonable to the company.</li> </ul> </li> </ul> <p>In addition to these requirements, the Board must ensure that any conditions or restrictions respecting the granting of financial assistance set out in the company's MOI have been satisfied.</p> |
| <b>CONSEQUENCES OF LENDING FINANCIAL ASSISTANCE<br/>CONTRARY TO PROVISIONS OF THE ACT</b>   |
| <p>Any resolution by the Board or agreement to provide financial assistance that is inconsistent with Section 44 OR Section 45 or any prohibition, restriction or requirement in the company's MOI is VOID and any director who voted in favour of such a resolution or approved an agreement providing the assistance is liable to the extent set out in section 77(3)(e)(iv) in re Section 44 and Section 77(3)(e)(v) in re Section 45 – if the director (a) was present at the meeting when the board approved the resolution or agreement, or participated in the making of such a decision in terms of section 74; and (b) failed to vote against the resolution or agreement despite knowing that the provision of financial assistance was inconsistent with this section or a prohibition, condition or requirement contemplated in the MOI.</p>  |

**Table K**

**ELECTRONIC SIGNATURES, COMMUNICATION AND  
SUBSTANTIAL COMPLIANCE**

- Section 6(10): If, in terms of the Act, a notice is required or permitted to be given or published to any person, it is sufficient if the notice is transmitted electronically directly to that person in a manner and form such that the notice can be conveniently printed by the recipient within a reasonable time and at a reasonable cost;
- A notice of meeting to shareholders as contemplated in Section 62 may be “in writing or electronic form” (unless the company’s MOI provides otherwise);
- Faxes, telephone communications and conference calls – are all electronic communications which are suitable for establishing a “virtual” presence for purposes of meetings as contemplated in the Act;
- Section 63 relates to shareholders meetings and Section 73 refers to Board meetings of Directors and provides that a meeting of shareholders and directors respectively may be conducted entirely by electronic communication or if held in person, one or more of the shareholders, directors or proxies may participate by electronic communication – so long as the methods employed enables all persons participating to simultaneously communicate with each other without an intermediary and to participate reasonably effectively in that meeting (and so long as the MOI allows for it). In such a case the notice of that meeting must inform shareholders/directors (whichever is applicable) of the availability of that form of participation, and provide any necessary information to enable shareholders or their proxies/directors – to access the available medium or means of electronic communication. Such access is at the expense of the shareholder or proxy/director, except to the extent that the company determines otherwise;
- Thus the definition of “present at a meeting” includes a “virtual presence” or representation by electronic proxy.