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Chairperson: Honourable Ms J Hermans
The Standing Committee on Trade, Industry and Competition
Parliament of South Africa

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Dear Ms Hermans

Comments on the Companies Amendment Bill, 27 of 2023

The South African Institute of Chartered Accountants (SAICA) welcomes the opportunity to make submissions on the Companies Amendment Bill, 27 of 2023.

We welcome the amendments to the Companies Second Amendment Bill, 26 of 2023 and have no further comments on the proposals contained in this Bill.

The South African Institute of Chartered Accountants (SAICA) is South Africa's pre-eminent accountancy body which is widely recognised as one of the world's leading accounting institutes. The Institute provides a wide range of support services to more than 55 000 members and associates who hold positions as CEOs, MDs, board directors, business owners, chief financial officers, auditors and leaders in their spheres of business operation.

For ease of reference, we set our detailed comments to *the Companies Act Bill in:*

- Annexure A – Detailed comments
- Annexure B – Additional comments

We would also appreciate the opportunity engage further and we would be willing to discuss our comments, if required.

Yours sincerely

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Thandokuhle Myoli

Executive: Audit and Assurance

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ANNEXURE A: DETAILED COMMENTS

GENERAL MATTERS

Corporate reform

1. The Guidelines for Corporate Law Reform of May 2004, published on 23 June 2004 set out principles in the South African Corporate Law Reform ("the Guidelines") that represents the core around which our Companies Act, 2008 centres.

2. The Guidelines state that company law should contain a minimum of mandatory rules and maximum possible flexibility. The Guidelines also state that emphasis will be placed on access to and disclosure of information to relevant stakeholders, in particular shareholders. Shareholders of smaller companies should be able to opt out of the requirements for financial statements based on for instance a 90% majority to reduce the costs and compliance burden of smaller companies.

3. The CIPC released various notices indicating its interpretation of the Companies Act, section 30(2) ("the Act") regarding the audit of financial statements, whether mandatory in terms of the Act or voluntarily by the company's board or shareholders. There is a clear distinction between a mandatory and voluntary audit aligned to the flexible construct of the Companies Act. It is our view that the CIPC erroneously concludes that where a company chooses to have its annual financial statements (AFS) audited voluntarily, an audit in terms of the Companies Act is required. The untenable consequence of this incorrect interpretation is that all the extended requirements applicable to companies that are required to be audited in terms of the Act are triggered as follows:
    - Disclosure of directors' remuneration.
    - Submitting audited AFS to the CIPC;
    - Submitting of AFS using the " iXBRL"- system; and
    - Other enhanced requirements applicable to companies that are required to audit their AFS in terms of the Act.

4. It follows that, contrary to the philosophy and spirit of the Corporate Law Reform Guidelines, the CIPC interpretation unnecessarily overburdens smaller to medium sized companies with the cost of compliance, where they have voluntarily chosen to have their AFS audited for business and other reasons, for example to invite investment or obtain financial support from banking institutions to start a small business. The continuous use of the terminology of and reference to "companies to be audited in terms of sections 30(2) and 30(7)" in the Bill exacerbates the compliance burden unnecessarily and erroneously placed on these smaller companies.

5. SAICA requests that the DTIC clarifies the difference between an audit in terms of the Act and a voluntary audit in alignment with the principles underscored by the Corporate Law Reform Guidelines that forms the source document and foundation of our Companies Act. The references to sections 30(2) and (7) is used in the Bill in section 33(1)(a) and section 56(7)(b) which inadvertently will increase the compliance costs based on the interpretation as set out in the CIPC notice.

Ease of doing business

6. The Bill sets out as one of its objectives the ease of doing business. SAICA has engaged with various stakeholders, from members in business and practitioners managing their own accounting businesses and the conclusion reached is that the Bill does not make it easier to do business and increases the compliance costs dramatically. Also refer to the above considerations outlined under the paragraph marked “Corporate Reform”.

7. The Bill states that the proposed changes to Section 26 will eliminate the burden of compliance on certain companies. The exclusion of the application of certain sections in Section 26 is applicable to companies with a Public Interest Score (PI Score) below 100 with their AFS internally compiled and companies with a PI Score below 350 with their AFS independently compiled (“the exclusion”). The proposed changes excludes the right to inspect and copy the information as set out in section 26(1)(c) – reports to annual meetings and (d) notices and minutes of annual meetings. These exclusions were however not repeated in subsection (2) and the omission potentially nullifies the exclusion. We submit that a consequential amendment is needed in subsection 2 to rectify this small oversight.

8. Should the exclusion referred to the right to inspect and copy of other information it only refers to smaller companies with AFS compiled internally and a PI Score below 100 and companies with a PI Score below 350 with their AFS independently prepared.

9. This is further discussed under points 27 to 35 but there is no clarification on why this exclusion in not extended also to companies with a PI Score between 100 and 350 and the AFS internally compiled.

Private versus public companies

10. Various proposals in the Bill seems to diminish the distinction between a private and public company as well as between a small business and public interest companies. The proposals in section 26 to allow access to AFS and other company information is notably one of the provisions that render the distinction between private and public

companies superfluous. Healthy competition between private companies will be laid bare where the provisions allow any person to access all company records.

11. In addition, the Guidelines referred to above, states that the growth of the small business sector has created a need for simpler and more accessible law and that it should be possible for small businesses ("small business") and their advisors to understand the administrative requirements, without having to resort to expert advice.

12. The reform policy recognised and acknowledged the concept of the public interest and the distinction it creates between small business and large corporates that significantly impact the public interest. The Act also imported the concept of the public interest score, which created a divide between requirements that only apply statutorily to larger corporates and voluntarily to small business by choice.

13. This differentiation between companies based on their impact on the public interest is imported in the Act with the purpose of determining the required level of accountability and transparency for each unique company (public companies must comply with the enhanced accountability and transparency requirements, while the Act adopts a more lenient regime to small companies).

14. The requirement to have audited financial statements equally applies only to large companies where these companies pose a significant impact on the public interest. Section 30 clearly stipulates the criteria to be applied by the Minister when determining which companies (other than public and state owned companies) are required to be audited: the criteria must "take into account whether it is desirable in the public interest, having regard to the economic or social significance of the company, as indicated by any relevant factors, including - (aa) its annual turnover; (bb) the size of its workforce; or (cc) the nature and extent of its activities".

15. The Bill seeks to impose certain obligations on small business with a disregard for the concepts of flexibility and the public interest. By implication, the amendments will potentially severely prejudice the private and "informal" nature of small business if implemented. Examples of proposals in the Bill that disregards the concepts are Sections 25, 26, and 33. The Act recognises these concepts by distinctions drawn in for example Chapter III and Chapter V governing public companies and 'regulated companies' respectively. The purpose of different Chapters become obsolete if the concepts are ignored and similar accountability and transparency requirements are applied to ALL companies.

SPECIFIC COMMENTS ON THE BILL

Access to company records

Amendment of section 26

16. Section 26(2) as amended states that a person who is not a beneficial owner has the right to inspect and copy the information in the records referred to in the following subsections in section (1):

    (a) MOI
    (b) company directors
    (cA) AFS
    (e) securities register
    (f) register of disclosure of beneficial interest holder.

17. This amendment allows a third party access to information of all companies that is included in the MOI, the records of company directors, AFS, the securities register and the register of beneficial interest holders.

18. The proposed changes to the Act do not underwrite the principles of privacy, a right that is protected in the Constitution of South Africa. Anyone can access the above information including that of PRIVATE companies, circumventing the exclusion discussed in paragraph 11 above. The Bill does not allow for the information to be accessed only for the protection of rights as envisaged in the Promotion of Access to Information Act, 2000 (PAIA) for which the Act expressly makes provision in section 26. The absolute right to access information by any external THIRD party creates a problematic anomaly with the provisions of PAIA and the pre-requisite to indicate an infringement of rights before access to private information can be considered. The compulsory grounds in PAIA to refuse access to information and which is founded in the Constitution are ignored.

19. The Bill seemingly tries to keep certain information private but it is not effective. The Bill states that the right to inspect and copy information as contemplated in subsection (2) shall not apply to certain companies. The exclusion then refers to subsection 1(c) and (d). This leads to the exclusion only of the reports to annual meetings as set out in subsection 1(c) and the notices and minutes of annual meetings (d), which are in any event mostly public documents. The amendment consequently includes no exemption as subsection 1(c) and (d) is not included from the onset in the list of accessible information.

20. The exemption to access of information as set out in subsection 1(c) and (d) applies to a private company, non-profit company or a personal liability company where the annual financial statement is internally prepared in a company with a PI Score of less

than 100; or the annual financial statement is independently prepared in a company with a PI Score of less than 350. As set out in point 7 the exemption is of no consequence as subsection 1(c) and (d) was not included from the onset.

21. The proposed exemption is linked to the PI Score. It is not clear why the exemption does not extend to companies with a PI Score between 100 and 350 with their AFS internally compiled. If the requirement is linked to the public interest then whether the AFS are internally or independently compiled is irrelevant. If the requirement is linked to when a company is required to have their AFS independently reviewed then it does not consider whether the company rather chooses an audit versus an independent review.

22. The requirements for companies are as follows for private, personal liability and non-profit companies:

PI Score above 350	Audit
PI Score from 100 to 349 and AFS internally compiled	Audit
PI Score from 100 to 349 and AFS independently compiled	Independent review BUT can choose to have AFS audited No independent review required if owner managed exemption apply (S30(2A))
PI Score below 100 and AFS internally or independently compiled	Independent review BUT can choose to have AFS audited No independent review required if owner managed exemption apply (S30(2A))

23. Having the exemption linked to the PI Score is also concerning as the PI Score has been static since the publication of the Companies Regulations and there has been calls for the PI Score to be increased. We are unsure on what the implications would be if the PI Score is increased as it can result in subsequent amendments to the Companies Act.

24. Submission: It is submitted that the documentation meant to be exempted from access to information should be clearly reflected in the wording of the amendments. It is further submitted that it appears that the intention of the legislature is to link the exemption to the public interest and consequently to the PI Score. We agree with this approach and submit that the wording to this effect should reflect the intention consistently throughout the Act. Any assertion that the exemptions are linked to the PI Score, should be made in recognition that a potential future increase in the PI Score may influence the outcome of exemptions.

Based on our research on the Public Interest score, SAICA would like to propose the following:

- an increase in the PI Score as soon as possible,

- that within the current legal framework the PI Score of 100 is increased to 350 and the PI Score of 350 increased to 700, and

- following the changes to the PI Score that the requirements of when companies require a social and ethics committee in terms of Companies Regulation 43 and the application of the PI Score business rescue as set out in Regulation 127 should similarly be updated.

Refer to the SAICA submission that was made to the DTIC in this regard: SAICA PI Score submission

Annual Financial Statements

Amendment of section 30

25. Section 30(4) is proposed to be amended to the effect that the remuneration and benefits received by each director or prescribed officer must be disclosed and such individual must be named.

26. Whilst SAICA supports the amendment the wording is not clear because the word “or” creates the impression that either the director or prescribed officer’s names should be disclosed. We assume that both category names should be disclosed and the wording should clearly reflect this intention.

27. Companies and its directors may misinterpret that there is an option to either disclose the director’s details OR the prescribed officer’s details.

28. The new proposed Section 30(4A) states that where directors remuneration is required to be audited, nothing will require the company policies or background statement to be audited. The amendment explicitly omits the implementation report in the context of the company policy and background statement. This is presumably a drafting error and we submit that the implementation report should expressly be inserted and reflected. This comment should not derogate from our submission made under the points 43 to 65 and does not imply that we necessarily agree to the reference and importation of the term "implementation report" in the Act. Should this term be retained we submit that the wording under this section 30(4) be rectified.

29. It is important to note that there is no policy or standard against which an implementation report can be audited and if this is required then no audit can be done.

30. Submission: The following change is suggested: "The AFS of each company that is required in terms of this Act to have its AFS audited, must include particulars showing:(a) the remuneration**,** as defined in subsection (5), and benefits received by each director, ~~or~~ and [**individual holding any prescribed office in the company**] prescribed officer in the company, and such individual must be named;"

31. Reference to the term "implementation report" should be included subject to our reservations expressed further on in this submission.

Duty to prepare and present the company's remuneration policy and the remuneration report

Insertion of section 30A

32. The proposed section 30A requires that a company prepare a remuneration report that consists of a background statement, remuneration policy and implementation report.

33. Section 30A(1) requires a public or state-owned company to prepare and present a remuneration policy for approval by ordinary resolution at the AGM. Section 30A(2) requires that the remuneration policy must be presented for approval by ordinary resolution at the AGM. Section 30A(1) and (2) repeat the same requirement and should be amended.

34. Section 30A(3)(e) requires the disclosure remuneration of the lowest paid employee as as defined by section 213 of the Labour Relations Act, 1995. The definition of an employee as per the Labour Relations Act 66 of 1995 is not clear and this has been identified as an issue in the calculation of the PI Score which requires 1 point for every one employee.

35. When performing the PI Score calculation, “employee” has the meaning set out in the Labour Relations Act 66 of 1995. In this Act, an employee is defined as:

“(a) any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and

(b) any other person who in any manner assists in carrying on or conducting the business of an employer,

and ‘employed’ and ‘employment’ have meanings corresponding to that of ‘employee’.”

36. The following additional guidance is provided in S200A of the Labour Relations Act 66 of 1995:

“Until the contrary is proved, a person who works for, or renders services to, any other person is presumed, regardless of the form of the contract, to be an employee, if any one or more of the following factors are present:

(a) the manner in which the person works is subject to the control or direction of another person;

(b) the person’s hours of work are subject to the control or direction of another person;

(c) in the case of a person who works for an organisation, the person forms part of that organisation;

(d) the person has worked for that other person for an average of at least 40 hours per month over the last three months;

e) the person is economically dependent on the other person for whom he or she (works or renders services;

(f) the person is provided with tools of trade or work equipment by the other person; or

(g) the person only works for or renders services to one person.”

37. Questions have been asked on how seasonal employees, temporary employees and part-time employees should be treated for purposes of the PI Score calculation.

38. The Constitutional Court ruling in favour of the National Union of Metalworkers of SA (Numsa) - "*that an employee who earns less than the stipulated threshold (R205,000 per annum and less) contracted through a labour broker to a client firm for more than three months becomes an employee of the firm, “employed on the same terms and conditions of similar employees, with the same employment benefits, the same prospect of internal growth and the same job security*” - also impacts the calculation.

39. The ruling states that where a company or close corporation makes use of the services of a labour broker the number of employees would need to be adjusted to reflect the

employee status after the employees meet the three months deadline and this is only for employees earning less than R205 000. The labour broker would therefor need to reduce its PI Score where employees are contracted to a client firm for more than three months otherwise the same employees would be counted twice. When the employees are no longer employed by the company or close corporation's employment the labour broker are the deemed employer and the employees would now have to be included n the labour broker's calculation as employees.

40. Farmers also raises this issue where part-time employees are required for seasonal work and in many cases these seasonal employees increase the PI Score above the 100 or 350 points and leads to a farming operation registered as a company to have to follow the additional requirements in the Act, including having a social and ethics committee and audited financial statements.

41. The requirement to therefore disclose the remuneration of the lowest paid employee needs to be cognisant of the practical implementation issues that may occur in certain industries and companies. It is also noteworthy that various critical media reports that indicated that the proposed requirement will cause employers to outsource their lowest paid employees, and in doing so reflect a more favourable pay-gap, is of no consequence in light of the impact of the Constitutional court case as discussed.

42. Whilst SAICA supports improved financial reporting and transparency in the public interest more guidance and clarity is required on the disclosure of the so called "pay gap". In jurisdictions such as the UK for example specific detail is published in the Companies Regulations, 2018 of the disclosure requirements. We believe that more clarity on issues such disclosure and calculation models should be further explored and clarified in the regulation to the Act. The interpretation of the term "employee" is but one hurdle to overcome in the disclosure requirements.

43. The new proposed subsections (4) to (9) requires the remuneration report to be approved by the board, presented to shareholders and voted on by shareholders for approval. The process if further set out that the policy and the implementation report needs to be voted on separately, but in subsection (4) it refers to the "report" which includes the background statement. The requirement on what must be voted on must be clarified. We respectfully submit that the inclusion of reference to "implementation report and background statement is cause for confusion and poses the risk of misinterpretation. Whilst SAICA supports disclosure and transparency we suggest that

the amendment should simply refer to the "remuneration policy" and the "remuneration report", with clearly defined descriptions.

44. Where the remuneration policy is not approved it must be presented at the next annual general meeting or at a shareholders meeting. The Bill is silent on the interim period, during which the policy remains unapproved .There is a risk that executive vacancies may arise if for example remuneration increases remain unapproved whilst the policy awaits the next approval opportunity at the annual general meeting.

45. A similar issue may arise where the implementation report remains unapproved. The implementation report refers to remuneration received in terms of section 30(4), (5) and (6). The implementation report is a "backward looking" document and the directors or prescribed officers would have already received the remuneration as included in the implementation report. The consequences of the implementation report not being approved under these circumstances are unclear and not specifically provided for in the Bill.

46. The concept of a remuneration committee is not defined in the Act. The Bill furthermore does not introduce a definition or description of a remuneration committee as in the case with the Social and Ethics Committee. Although the remuneration committee is a familiar concept in the context of King IV and the listed company environment, the Companies Act does not mandate companies to institute a remuneration committee, nor are the functions and constitution of such a committee described in the Act or the Bill. In the case of companies that do not have a remuneration committee or are not required to have such a committee, the position is unclear. One can only presume that such company Boards or selected company Board members will be tasked with governing of remuneration. In the event of Board members fulfilling the remuneration committee function, the application of subsection (9) of the Bill may be problematic and clarity is required. Subsection 9 states that where the implementation report is not approved the non-executive directors responsible for remuneration shall step down for re-election. It is unclear if the intention of the sanction is for directors to step down from only the remuneration committee or if it is the intention to step down from the Board where applicable. Furthermore, the Bill introduced the concept of "non-executive directors" which is not defined in the Companies Act. The use of the term "non-executive directors" would need to be defined or aligned with the rest of the act for the sake of consistent terminology. The Companies Act uses the term 'director".

47. The implications of the directors "stepping down" is not discussed. It is also not clear what is meant by the term "stepping down". Presumably the directors will have to resign and vacancies may arise that need to be filled in accordance with the requirements of the Act. An untenable situation may occur in the case of a public company that only

has three directors that all serve on the remuneration committee. The unintended consequence is that the board (if all members must step down) will not be properly constituted as required. Furthermore it is presumed that all the administrative CIPC procedures apply such as removal of these directors from the CIPC register.

48. Submission: It is submitted that reference to the lowest paid employee would require additional guidance, employers are not all aware of the Constitutional Court case and this would create various interpretations.

49. The impact of a director stepping down needs to be considered and further discussed and the use of "non-executive director" needs to be defined.

50. Reference to the background statement and implementation report should be deleted and reference should only be made to the remuneration policy and the remuneration report to remove ambiguity and keep the requirements clear.

51. Disclosure of the so called "pay gap" should be referred to and required in the main Act "as prescribed by the Minister" and the detail should be fleshed out in Regulations once more consideration has been afforded to calculation models, interpretation of the word "employee" and the format of disclosure. Consideration can also be given to other jurisdictions such as the UK for example where numerous issues are addressed in the 2018 Companies Regulations, such as the format of disclosure, the treatment of contractors and the calculation models.

Annual return

Amendment of section 33

52. The proposed amendments to section 33 create anomalies which should be clarified.

53. Section 33(1) requires that every company must file an annual return. It is further required that the annual return must include a set of AFS of either the last set of AFS or the previous financial year's set of AFS.

54. The inclusion of the two options in the Bill will consequently mean that where companies compiled their AFS in less than the six months, they will submit their most recent AFS. If in the following year their AFS were not completed in time, they would again simply submit the same set of AFS submitted the previous year.

55. The following example explains the anomaly:

Company A has a year-end of December 2020 and an anniversary date of 31 December. Annual return submission is 30 business days after anniversary date which would be 10 February 2021.

On the anniversary date only the AFS of December 2019 is available and will be submitted with the annual return. The information on the annual return will be for December 2020 together with the AFS of 2019.

Company B has a year-end of December 2020 and an anniversary date of 30 April. Annual return submission is 30 business days after anniversary date which would be 10 June.

On the anniversary date of 10 June 2021 the AFS of December 2020 is available and will be submitted. The information on the annual return will be for December 2020 together with the AFS of 2020.

In 2022 the anniversary date is again 10 June 2022 but the December 2021 AFS is not yet completed and the company will submit their annual return for 2022 with the same set of AFS for December 2020. The information on the annual return will be for December 2021 together with the AFS of 2020.

56. Therefore, the same company may submit the same set of AFS for two different annual return periods based on the amendment in the Bill.

57. The proposed inclusion also only requires public company, state-owned company and private companies whose PI Score exceeds the limits as set out in s30(2) or the regulations as contemplated in section 30(7) to submit their AFS. It is unclear what PI Scores limits are being referred to. Section 30(2) does not include a PI Score and section 30(7) refers to the regulations which then have different categories pertaining to the PI Score, i.e. below 100, from 100 to 350 and above 350. It is therefore not clear what score applies and if the section depends on both the score and the determination of whether the company chooses to have a voluntary audit or not.

58. The requirement to submit the AFS also excludes non-profit companies.

59. The proposed sections 33(aA) and (aB) seems to apply to ALL companies, therefore all companies must submit their securities register and register of disclosure of beneficial interest holders to the CIPC. Based on the recent CIPC notice on the application of the Protection of Personal Information Act, dated 30 August 2021 all this information submitted to CIPC would be available to any person or entity that request

the information from the CIPC. The requirement undermines the right to privacy as set out above and diminishes the distinction between public and private companies.

60. The submission of the securities register on an annual bases will also be outdated as the companies will submit this together with the annual return.

61. <u>Submission</u>: It is submitted that the reference to the PI Score be clarified. Clarification is also needed on which companies are required to submit their annual return together with their AFS, as well as whether all companies must submit their securities register and the register of beneficial interest holders.

Loans or other financial assistance to directors

Amendment of section 45

62. Section 45 of the Act contains requirements to be adhered to when a company, directly or indirectly, provides "financial assistance" (as envisaged in section 45(1)) to the categories of recipients as listed in section 45(2). Section 45(2) lists the categories of recipients to be

- (i) directors and prescribed officers of the company or of a related or inter-related company,
- (ii) a related or inter-related company or corporation
- (iii) to a member of a related or inter-related corporation, or
- (iv) a person related to any of the recipient categories.

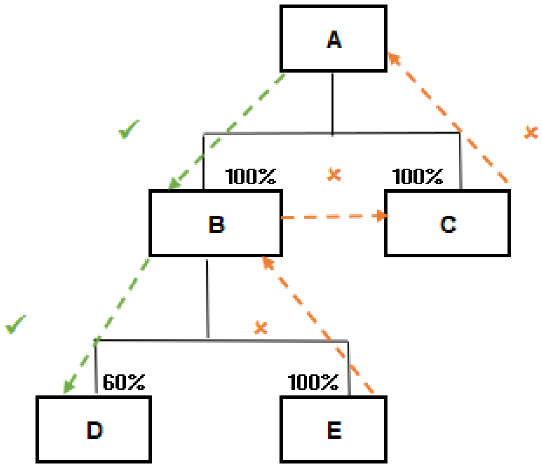
63. The term "related" is defined in section 1 to mean, "*when used in respect of two persons, means persons who are connected to one another in any manner contemplated in section 2(1)(a) to (c)*". Section 2(1)(c) provides that a juristic person is related to another juristic person if (i) either of them directly or indirectly controls the other, or the business of the other, (ii) either is a "subsidiary" of the other, or (iii) a person directly controls each of them, or the business of either of them.

64. It follows that, insofar as the recipients of financial assistance are related or inter-related companies or corporations are concerned, the provisions of section 45 currently apply in the context of financial assistance between all companies forming part of the same "group of companies". It is common for companies forming part of the same "group of companies" to provide financial assistance to each other as part of its normal business operations on a continuous, and sometimes, daily, basis. Section 45 introduced a

compliance burden in circumstances where the granting of financial assistance does not introduce the risk or governance sensitivities requiring the protection contained in section 45.

65. SAICA welcomes the acknowledgement in the Bill that the protections contained in section 45 are not required in all circumstances currently covered by this section and appreciate the willingness to alleviate the unnecessary compliance burden created by the current wide ambit thereof and in relation to the certain related parties.

66. We are, however, of the view that the suggested exclusion of financial assistance granted by a holding company to its subsidiary from the provisions of section 45 is very narrow and would not result in a meaningful reduction of the unnecessary compliance burden in the context of “related or inter-related “ companies forming part of a “group of companies”. The point can best be illustrated with reference to the below diagram containing an illustrative example:



67. In the above illustrative example, and pursuant to the proposed amendments to section 45, the financial assistance granted by A to B and by B to D (being financial assistance by a holding company to its subsidiary) will be excluded from the ambit of section 45.

68. We require clarification on whether this will include financial assistance, and in particular financial assistance by a holding company to a non-wholly owned subsidiary (B to D in the example),

69. We would like to request that financial assistance provided by C to A and by E to B (being financial assistance by a wholly owned subsidiary to its holding company) and

B to C (being financial assistance between wholly owned subsidiaries) be excluded from the ambit of section 45.

70. Submission: We submit that to make a more meaningful difference to the unnecessary compliance burden created by section 45 we propose an expansion to the exclusion from the ambit of section 45 to cover most of the circumstances where financial assistance is granted to related or inter-related companies and where the protection in section 45 is not required. As such, we propose that it be considered to expand the exclusion to cover financial assistance granted between companies who form part of the same "group of companies".

Insertion of section 72(8)

71. SAICA supports the changes to the Social and Ethics Committee and the inclusion of the requirements in the Act rather than in the Regulations.

72. The proposed section 72(8) has contradicting requirements in that it is stated that a company's social and ethics committee must include not less than 3 directors, subsection (b) then states that any other company's social and ethics committee must consist of not less than 3 directors or prescribed officers. We assume that this is a small drafting error that can readily be corrected as suggested below.

73. Submission: It is submitted that the specific wording in the Bill must be amended as follows:

(8) The social and ethics committee of a company must comprise [~~not less than three directors and may in addition include prescribed officers, provided that~~]:

(a) in the case of a public company and state-owned company of not less than three directors and may in addition include prescribed officers, provided that most of the directors are not involved in the day-to-day management of the business of the company, and must not have been so involved at any time during the previous three financial years; and

(b) in the case of any other company, not being a public company or state-owned company, [~~must consist~~] not less than three directors or prescribed officers provided that at least one of the directors must not be involved in the day to day management of the business of the company and must not have been so involved within the previous three financial years.

Insertion of section 72(13)(b)

74. Section 72(13)(b) states that the social and ethics committee report must include a statement with the following: *"that there has not been an instance of material non-compliance where there has been one or more instances of non-compliance, where such fact has been disclosed"*.

75. Clarification is required as to which non-compliance is being referred as the phrase potentially ambiguously refer to, non-compliance with the Companies Act, any other legislation or to non-compliance by the social and ethics committee in the execution of its functions.

76. Furthermore it is not clear if only material non-compliance is envisaged and how this will be determined in the context of the requirement.

77. Submission: It is submitted that the Bill must be amended to clarify what non-compliance must be disclosed and to provide guidance on what would be deemed as material non-compliance.

Insertion of section 72(13)(e)(ii)

78. Section 72(13)(e)(ii) states that where a report of the social and ethics committee was rejected a public company must publish a statement on their website and the Stock Exchange News Service. All public companies are not listed companies and can therefore not publish a notice on the Stock Exchange News Services.

79. Submission: It is submitted that the section be amended to remove the requirement for companies to publish a statement on the Stock Exchange News Service.

Post-commencement finance

80. The Bill includes proposals to amend section 135 dealing with post-commencement finance where a company is in business rescue.

81. The changes proposed favour only one class of creditor that supplies services to the company post commencement of business rescue. This prejudices the rights of other services providers to a company in business rescue.

82. The change as drafted aims to secure preferential ranking for post commencement supply by landlords. It is unclear if these rights rank ahead of or after the providers of funding in terms of section 135(2). It is also unclear as to why Landlords have been singled out for special treatment over and above that of other suppliers.

83. Whilst we agree that some changes are required to clarify the rights of suppliers to a company post commencement of business rescue it is patently unfair to propose amendments that raise one such supplier above others.

84.	Submission: It is submitted that the section be amended considering the following principles: That the ranking of creditor claims be clarified; and that all suppliers to a company post commencement of business rescue be treated fairly and equally without favour.

85. We propose that the ranking of claims should be:

- The practitioner remuneration and expenses referred to in section 143 and other costs arising out of the costs of business rescue proceedings
- Employees for post commencement finance in terms of section 135(1)
- Lenders in respect of post commencement finance in terms of section 135(1)
- Suppliers and creditors in respect of the supply of goods or services post commencement of business rescue
- Employees for pre business rescue claims as contemplated in section 144(2)
- Unsecured claims

Secured creditors continue to enjoy the rights afforded to them in terms of section 134 of the Act, uninterrupted by the proposed changes to the ranking above.

86. We therefore propose the following changes to section 135

Post-commencement finance

(1) To the extent that any remuneration, reimbursement for expenses or other amount of money relating to employment becomes due and payable by a company to an employee during the company's business rescue proceedings, but is not paid to the employee-
  (a) the money is regarded to be post-commencement financing; and
  (b) will be paid in the order of preference set out in subsection (3)(a).

(2) During its business rescue proceedings, the company may obtain financing other than as contemplated is subsection (1), and any such financing-
   (a) may be secured to the lender by utilising any asset of the company to the extent that it is not otherwise encumbered; and
   (b) will be paid in the order of preference set out in subsection (3)(b).

<u>(2A) During its business rescue proceedings, the company may, incur liability for the supply of services and / or goods, and any such liability if expressly approved by the practitioner will be paid in the order of preference set out in subsection (3)(c).</u>

(3) After payment of the practitioner's remuneration and expenses referred to in section 143, and other claims arising out of the costs of the business rescue proceedings, all claims contemplated -
   (a) in subsection (1) will be treated equally, but will have preference over-
      (i) all claims contemplated in subsection (2), irrespective of whether or not they are secured; and
      (ii) all unsecured claims against the company; or
   (b) in subsection (2) will have preference in the order in which they were incurred over:
      (i) <u>all claims contemplated in subsection (2A), and</u>
      (ii) all unsecured claims against the company.
   (c) <u>in subsection (3) will have preference in the order in which they were incurred over all unsecured claims against the company.</u>

(4) If business rescue proceedings are superseded by a liquidation order, the preference conferred in terms of this section will remain in force, except to the extent of any claims arising out of the costs of liquidation.

Participation by creditors

87. A landlord is an unsecured, and in certain circumstance a secured creditor. Landlord's are thus included and covered by section 145(4)(a). A creditor is not defined in Chapter 6 and refers to both pre and post commencement creditors.

88. If there is uncertainty as to the rights of post commencement creditors to participate, which I postulate there are not, the change should be to clarify the rights of all post commencement creditors and not just one class of supplier.

89. Submission: We therefore propose the following changes to section 145(4) "In respect of any decision contemplated in this Chapter that requires the support of the holders of creditors" voting interests-

	(a)	a secured or unsecured creditor has a voting interest equal to the value of the amount owed to that creditor by the company on the day of the vote; and

Functions of Financial Reporting Standards Council

Insertion of Section 204

90. Section 204 is amended by inclusion of the issue of financial reporting pronouncements by the Financial Reporting Standard Council.

91.	The importation of financial reporting pronouncements into section 204 requires a consequential definition as the term is not readily used in the Act and clarification is needed on the meaning of financial reporting pronouncement.

ANNEXURE B: OTHER COMMENTS

Financial distress

92. Section 128(1)(f) of the Act deals with the definition of financially distressed: "(*f*) **"financially distressed",** in reference to a particular company at any particular time, means that—

    (i) it appears to be reasonably unlikely that the company will be able to pay all of its debts as they become due and payable within the immediately ensuing six months; or

    (ii) it appears to be reasonably likely that the company will become insolvent within the immediately ensuing six months;"

93. Subclause (ii) refers to the fact that the company will become insolvent within the next six months. This is very problematic as "insolvent" is not defined and not used else in the Act. The Act refer to solvency and liquidity. Subclause (i) refers to whether the company is liquid or not, the requirement referring to "insolvent" creates confusion on whether this is technical or commercial insolvency or both. In the business world technical insolvency is accepted as companies regularly are technically insolvent.

94. Section 129(7) of the Companies Act provides that if a company is financially distressed as defined and the board has not resolved that the company voluntarily begin business rescue proceedings, the board must deliver a written notice to shareholders, creditors and representatives of the employees of the company, explaining that the company is financially distressed as contemplated in section 128(1)(f), and provide the reasons for not adopting the resolution to begin business rescue proceedings.

95. If a company is factually insolvent, then it falls within the definition of *"financially distressed"* in section 128(1)(f), and the company is required to act in the manner set out in section 129(7).

96. It is clear from the Act that business rescue is meant to be employed only where a company requires 'rehabilitation', and where there is a need to 'rescue' the company. If the purpose of the Act and the purpose of business rescue are considered, it seems unlikely that a company which is factually insolvent, but still able to service its debt, can be regarded as 'failing' or financially distressed.

97. If this approach is accepted, part (ii) of the financial distress test should consider the complete financial position of the company rather than merely pure technical insolvency. To adhere to the purpose of the Act, and considering the definition of business rescue, one must consider the complete financial position of the company when determining whether there is a "reasonable" likelihood that the company will be insolvent within six months. In terms of this approach a company will only be regarded as in "financial distress" where it is insolvent even after all other circumstances were considered, including considering alternative fair values of the assets and liabilities, factoring in reasonably foreseeable assets and liabilities, as per the solvency and liquidity test in section 4, as well as considering any other proposed measures taken by management such as subordination agreements, recapitalisation or letters of support. This approach was confirmed in a recent Supreme Court decision in the United Kingdom (***BNY Corporate Trustee Services Ltd v Eurosail*** [2013] UKSC 28) where the court found that the "balance sheet" test for insolvency must take account of the wider commercial context, and that courts must look beyond the assets and liabilities used to prepare a company's statutory accounts when deciding whether or not a company is "balance sheet" insolvent.

98. By employing the narrower definition of "financial distress" (i.e. the factual insolvency test which excludes subordination agreements and other management actions) one arrives at an answer that may not serve the best interests of affected parties (shareholders, creditors and employees).

99. Submission: We would like to request that subclause (ii) either be removed or that the DTI clarifies the requirements, an option is to refer to the solvency and liquidity test in section 4.

Functions of Companies Tribunal

100. Section 195 sets out the functions of the Tribunal.

101. Section 30(1) requires companies to compile their AFS within 6 months after year end. There is option to apply for an extension of the 6 months. There might be valid reasons why companies in some cases may not be able to complete the AFS within the required six months.

102. SAICA has in the past, advised members to approach the Companies Tribunal to request an extension to the 6 months deadline.

103. The Companies Tribunal in a decision in 2016, *Ex parte Application In re: Computershare Investor Services (Pty) Ltd, Case reference CT032May2016* ruled that the Companies Act does not make provision for the Applicant to apply to the Companies Tribunal for an extension of time where the company fails to prepare its AFS within the required 6 months.

104. The decision by the Companies Tribunal means that there are no method for companies to apply for an extension of the 6 months deadline and companies would fall foul of the Companies Act requirements should they not meet the deadline due to unforeseen circumstances.

105.	Submission: We submit that there might be instances that due to circumstances beyond the companies control the company would not be able to meet the 6 months deadline. We would like to request that the Act be amended to allow the CIPC or the Companies Tribunal to extend the 6 months due to valid reasons.