

Tutorial letter 501/3/2013

LEGAL ASPECTS CONCERNING AUDIT PRACTICE

AUE302Q


Semesters 1 & 2

Department of Auditing

IMPORTANT INFORMATION:

This tutorial letter is one of two tutorial letters and
replaces the study guide

BAR CODE



CONTENTS

Page

1.	TOPIC 1 - GENERAL OVERVIEW	3
2.	TOPIC 2 - INTERPRETATION, PURPOSE, APPLICATION AND FORMATION OF A COMPANY	10
3.	TOPIC 3 - COMPANY RECORDS.....	25
4.	TOPIC 4 - SHAREHOLDERS AND SHARES.....	32
5.	TOPIC 5 - DIRECTORS	49
6.	TOPIC 6 - ENHANCED ACCOUNTABILITY AND TRANSPARENCY	66
7.	TOPIC 7 - TRANSACTIONS	83
8.	TOPIC 8 - BUSINESS RESCUE, COMPROMISE WITH CREDITORS, WINDING UP AND DEREGISTRATION OF COMPANIES	96
9.	TOPIC 9 - REGULATORY AGENCIES, OFFENCES AND PENALTIES	106
10.	TOPIC 10 - SCHEDULES TO THE COMPANIES ACT AND OTHER LEGISLATION APPLICABLE TO COMPANIES	112

1. TOPIC 1 - GENERAL OVERVIEW

This Auditing module deals with the legal aspects concerning audit practice. Tutorial letter 501 is the first of two tutorial letters for this module. The Companies Act, Companies Regulations and other acts regarding companies are dealt with in tutorial letter 501. The Auditing Profession Act, the Code of Professional Conduct, the Disciplinary Rules and certain International Standards on Auditing are dealt with in tutorial letter 502.

This tutorial letter should be used as your first point of reference for each topic covered in this part of the module. Read each topic carefully. Various activities have been included under each topic. Here you need to pause and review what you have learned.

The focus of this part of the module is on company law, and students are required to develop the ability to interpret the law that regulates companies. This is a new challenge that can initially make learning difficult, but once you understand what a company is and how company law fits in, it will be easier.

A company is a form of a business organisation. After a company has been formally registered, it becomes a legal entity or a so-called "legal person". A company exists separately from the person/s who formed it and it can buy and sell inventory; own property; and perform other business transactions similar to those of other types of business organisations. Company law deals with the formation and continuing regulation of companies.

The Companies Act consists of various chapters and sections (225 in total) that regulate the formation and all the responsibilities of companies, their directors, secretaries, etc. This Act deals with the formation of a company, accountability and transparency, fundamental transactions, share capital, and business rescue, to name but a few aspects. The Companies Regulations to the Act serve the purpose of explaining the applications of the Act and providing more information, where necessary.

1.1 OBJECTIVE OF THIS PART OF THE MODULE

The aim of this part of the module is to enable learners to gain insight into aspects of the Companies Act 71 of 2008, Companies Regulations, 2011, Close Corporations Act 69 of 1984 and other legislation that are all of importance to companies, their directors, accountants, auditors, the company secretary, and other parties. The learning outcome for this module is that students should be able to comprehend, apply and integrate the different topics prescribed in this module. As mentioned above, the focus of this tutorial letter will be more specifically on the Companies Act and the Companies Regulations.

It is important for accountants/auditors to have a sound knowledge of laws and regulations that govern the profession as well as of their clients; otherwise, they may not be able to perform their duties properly.

You do not have to study all of the sections of the Act, as your studies will be limited to the specific sections of the Act as indicated in the table on page 6. You will also have to study certain Schedules and Regulations to the Act, which relate to the sections of the Act on which you will be examined.

1.2 RANGE STATEMENT

The outcomes that we have formulated (which are also applicable to tutorial letter 502) indicate what you should do to be able to complete each module successfully. We have also indicated the learning outcomes for each topic in this tutorial letter (as well as in tutorial letter 502). The learning outcomes are based on the different levels of mastery that you will have to achieve in this module. These levels vary from basic to advanced. The learning objectives are ultimately reflected in the examination paper that you will have to pass in order to complete the module successfully.

The examination will consist of questions testing knowledge and comprehension (level 1), application questions (level 2) and integration questions (level 3). You should bear in mind that learning objectives merely indicate the highest level of mastery, and that particular topics may be examined at a lower level of mastery. For examination purposes, a maximum of 70% of the paper will consist of application and or integration questions while the balance will consist of questions concentrating on knowledge and comprehension.

The various levels of mastery used to set range statements for learning outcomes and assessment criteria are defined as follows in the *Education requirements of the South African Institute of Chartered Accountants* (2010:13–14):

Level 1: Basic

At this level, the candidate has to acquire knowledge and understanding of the core/essence of the subject matter, including its significance, relevance, and defining attributes.

Consequently, the candidate should have knowledge and understanding ...

- of the purpose and objective of the subject matter.
- of the underlying principles/practices/legislation/requirements (hereafter called "content").
- of how the content relates to the discipline as a whole and to other disciplines (that is, how it "fits in").
- at a broad conceptual level.

At this level, knowledge and understanding of detail, including procedural or numerical aspects specific to the subject matter, are not required.

At this level, candidates should have gained such an extent and depth of knowledge and understanding that they are able to recognise issues when encountered and to seek further depth of knowledge and understanding.

Level 2: Intermediate

At this level, the candidate has to acquire detailed knowledge and understanding of the central ideas and issues contained in the subject matter.

Consequently, the candidate should have knowledge and understanding of ...

- those aspects of the content, which are central to the subject matter, in order to achieve a sound conceptual understanding
- detail, including procedural and numerical aspects specific to the subject matter, where appropriate

Knowledge and understanding of complexities and unusual/exceptional aspects are not required, however.

At this level, candidates should have gained sound knowledge and understanding of the substance of the subject matter. In this way, they would be able to deal with issues and solve problems central to the topic. Moreover, sound conceptual knowledge will enable them to explore and understand complexities further, if necessary. This means that you must be able to apply your knowledge on given scenarios.

Level 3: Advanced

At this level the candidate is required to acquire a thorough knowledge and rigorous understanding of the subject matter. This level of knowledge and understanding extends beyond a sound understanding of central issues, to include complexities and unusual/exceptional aspects associated with the subject matter.

You will be confronted with level 3 (advanced) questions and scenarios in this module. You may be confronted with integration within the topics of this module, as well as between this module and other Auditing modules on third year level. You will not be expected to answer questions integrated with modules outside the Auditing milieu.

1.3 THE COMPANIES ACT

1.3.1 Introduction

For several years, a programme of corporate law reform has been underway. The Companies Act 61 was first promulgated in 1973. However, since that time, the economic, social and political landscape of South Africa has changed in many ways. In view of this, the need arose for updated legislation – which resulted in the new Companies Act, 2008, amended in 2011 (Jackson & Stent 2010:3/3).

As you will note, some sections are explained in detail by means of diagrams or examples. Your approach, however, should be first to study all the relevant sections directly from the source (the Companies Act 71 of 2008).



If you want your dreams to come true, don't oversleep.

(Woody Allen)

You will be examined on the Companies Act 71 of 2008, as amended by the Companies Amendment Act 3 of 2011, and on the Companies Regulations, 2011, which we will discuss in this tutorial letter.

1.3.2 Theoretical framework

Study the Companies Act, 2008, and the Companies Regulations, 2011, from the source and focus on all the important sections.



Flag all the important sections (see the table on page 6) in your copy of the Companies Act, 2008, as amended, and in the Companies Regulations, 2011. In this way, you will find the sections easily when studying.

You should bear in mind the following:

In the examination, you will have to apply your knowledge to the questions asked. You will have to identify and resolve the key issues relating to the Companies Act.

The majority of the marks will be awarded for the application of knowledge. However, to build a logical argument in any question, it is necessary to start with basic theory and definitions, whether recalled from memory or accessed from a prescribed textbook. The information in the prescribed textbook should therefore be used as building blocks to formulate an answer applied to a given scenario.

In view of the above statements, you should not only be aware of the content of the relevant legislation, but also explain where to find the applicable requirements in the Act. The full text of the relevant Act should thus form the basis of your study material.



Important!

You must be able to apply the following Companies Act sections and related Regulations on level 3 (**except for sections 49–56, 95–97, and 99–111**, and some parts/sections in topics 9 and 10, which are on level 1) and be prepared to be examined on them.

Topic	Section	Description	Knowledge level
1	–	General overview of the module	Level 3
2	1	Relevant definitions	Level 3
2	2–6	Interpretation	Level 3
2	8	Categories of companies	Level 3
2	11, 13, 15–16 and 19–22	Incorporation and legal status of companies	Level 3
3	24 and 27–30	Company records	Level 3
4	35–43, and 46–48	Capitalisation of profit companies	Level 3
4	49–56	Securities registration and transfer	Level 1
4	57–65	Governance of companies	Level 3
4	95–97, and 99–111	Public offerings of company securities	Level 1
5	66–78	Directors	Level 3
6	84–85	Application and general requirements regarding enhanced accountability and transparency	Level 3
6	86–89	Company secretary	Level 3
6	90–93	Auditors	Level 3
6	94	Audit committees	Level 3
7	44–45, 112, and 115	Transactions	Level 3

Topic	Section	Description	Knowledge level
8	79–83, 128–155, 159, 162, 163, and 168–184	Business rescue, compromise with creditors, winding up, and deregistration of companies	Level 3
9	185–204	Regulatory agencies	Level 1
9	213–216, 218, and 219	Offences, penalties and miscellaneous matters	Level 1
10	–	Schedules 2, 3 and 5 to the Companies Act and other legislation applicable to companies	Level 3

Regulations

We do not expect you to study specific form names or numbers as indicated in the various Regulations. Form names such as **Notice of Incorporation** (sec 13(2) or 14(1)) or **Notice of Amendment** (sec 16(1) and 36(4)) referred to in the Companies Act **are important**. However, specific form names and numbers, for example, for the Notice of Incorporation (Form CoR 14.1) or for the Notice of Amendment (Form CoR 15.2), referred to in the respective **Regulations** (for example, 14 and 15), are **not important for your studies**. Quite a number of the Regulations contain the same information stated in related sections of the Companies Act, but then these Regulations also refer to the specific form to be submitted. That is why our list of Regulations to be studied below does not include all these Regulations.

You will notice that in many instances, the related section number in the Companies Act is stated directly after the heading of the particular Regulation, for example, "**15. Memorandum of Incorporation**" and below that, the words "**see sec 13(1) and sec 16**". This should assist you in linking the specific Regulation to the related sections of the Act.

Table of regulations to be studied

Topic	Section number	Regulation number
2	8	26 & 27
2	13(1) & 16	15
3	27 & 28	25(3)–(6)
3	28(1)(b)	26(1)(b) & (c)
3	29(4)	27
3	30(2) & (7)	28
3	30(2) & (7)	29(1)–(10)
4	35	31(3) & (5)
4	50	32
5	66(10)	38
5	72(4)	43(1)
6	84 & 85	26, 27 & 28
6	94(5)	42



A common error that students make is that they do not identify all the related Companies Act sections that affect a specific scenario. They therefore lose many valuable marks.

A certain skill is involved in identifying the key issues from a scenario relating to the Companies Act and discussing them. You will need to practice answering questions to develop this skill. It is essential that you review the solutions only after you have attempted answering the questions blind, to ensure that you develop this skill.

1.3.3 Test of basic knowledge

The purpose of the multiple-choice questions below is to test your basic knowledge. We trust that you have the self-discipline first to attempt these on your own before comparing your answers to the solution. Answers to the multiple-choice questions can be found on page 9.

Multiple-choice questions

1. Which one of the following statements is **false** in terms of the Companies Act?
 - (a) The Act provides for the formation and incorporation of profit companies and non-profit companies.
 - (b) A "profit company" refers to a company incorporated for the purpose of financial gain for its shareholders.
 - (c) A "non-profit company" is allowed to distribute its income to its incorporators, members, directors, officers or persons related to any of them, with no requirements to be met.
 - (d) The Memorandum of Incorporation of a private company prohibits it from offering any shares to the public.
2. Which one of the following does **not** form part of the company records that a company must maintain in terms of the Companies Act?
 - (a) A copy of the Memorandum of Incorporation of the company, any amendments or alterations to it, and any rules of the company
 - (b) Copies of annual financial statements and accounting records
 - (c) Copies of all reports presented at annual general meetings
 - (d) Copies of the auditor's report
3. Which one of the following statements is **false** in terms of the Companies Act?
 - (a) The number of shares that a company is authorised to issue is set out in the Memorandum of Incorporation (MOI) of the company.
 - (b) Unless a company's MOI provides otherwise, the board of directors may increase or decrease the number of authorised shares.
 - (c) Shareholders may pass a special resolution to increase the authorised shares by an amendment to the company's MOI.
 - (d) A company may issue shares to itself.
4. Which one of the following statements is **false** in terms of the Companies Act?
 - (a) A Memorandum of Incorporation and a record of the company directors form part of the company records that every company must maintain.
 - (b) A private company does not have to be audited at all.
 - (c) The annual financial statements of a public company must be audited.
 - (d) A public company must appoint a company secretary who must be a permanent resident of the Republic of South Africa and must remain so while serving in that capacity.

5. Which one of the following statements regarding voting and shareholders' meetings is **false** in terms of the Companies Act?
 - (a) If there is only one class of shares, those shares must have voting rights in respect of all voting matters.
 - (b) Every share has associated with it one general voting right, subject to the provisions of the Act or the Memorandum of Incorporation.
 - (c) If there is more than one class of shares, the Memorandum of Incorporation must provide that all classes must have voting rights in respect of all voting matters.
 - (d) Subject to any other law, the Memorandum of Incorporation may establish any particular class of shares, that is, rights that confer special, conditional or limited voting rights.

6. Which one of the following statements regarding meeting requirements is **false** in terms of the Companies Act?
 - (a) Unless the Memorandum of Incorporation of a company provides for a lower percentage to constitute a voters' quorum, the quorum for all shareholders' meetings is the presence at the meeting of the holders of at least 25% of the shares entitled to vote.
 - (b) Irrespective of the voters' quorum, if a company has more than two shareholders, a shareholders' meeting may not begin or a matter begin to be debated, unless at least three shareholders are present at the meeting.
 - (c) A shareholder of a company may appoint any individual (including an individual who is not a shareholder of that company) as a proxy to participate in, speak and vote at a shareholders' meeting, on behalf of the shareholder.
 - (d) The Companies Act does not provide for the adoption of any resolution by means of electronic communication.

7. Which one of the following statements regarding voting and shareholders' meetings is **false** in terms of the Companies Act?
 - (a) A shareholder of a company may only appoint an individual, who is a shareholder of that company, as a proxy to participate in, speak and vote at a shareholders' meeting on behalf of the shareholder.
 - (b) Voting on any matter at a shareholders' meeting may be conducted by polling the persons present and entitled to exercise voting rights on that matter.
 - (c) On a poll, any member (including his/her proxy) must be entitled to exercise all the voting rights attached to the shares held or represented by that person.
 - (d) On a show of hands, a person will only have one vote, irrespective of the number of shares he/she holds or represents.

Suggested solutions to multiple-choice questions in section 1.3.3:

1. c – section 1: definition.
2. d – section 24.
3. d – section 35(3).
4. b – section 30(2)(b).
5. c – section 37(4)(a)
6. d – section 61(10); section 59(c).
7. a – section 58; section 63.



We find that students do not work through enough questions in Auditing. Remember, you must train yourself to be "examination fit", and therefore you need to work through enough questions during the year in order to achieve this!

1.3.4 Proposed guidance for solving problems



Please note that it is your responsibility as a student to study the Companies Act and stay up to date with important aspects contained therein. We will emphasise some of the important aspects in this tutorial letter.

Knowledge of relevant legislation may be tested in the following way:

- A certain scenario may be given in a question and you will then have to evaluate the legality of any transactions/schemes that are contemplated or have been implemented. You may also be required to suggest alternatives and/or further requirements that have to be met.

We suggest that you approach questions as follows:

Questions that require your advice on or evaluation of a given situation

- Identify all transactions/events referred to in the scenario.
- Determine which requirements of the relevant acts relate to each transaction/event.

These requirements may include:

- Powers of the entity (Memorandum; sections of the Act)
 - Specific authorisation required (for example, special resolution; ordinary resolution)
 - Special preconditions (liquidity and solvency)
- Reproduce the theory applicable to each transaction/event.
 - Apply the theory to the facts given in the question.
 - Conclude on the legality of each transaction/event.
 - Make recommendations or discuss alternatives (if required by the question).

2. TOPIC 2 - INTERPRETATION, PURPOSE, APPLICATION AND FORMATION OF A COMPANY

Topic overview

The aim of this topic is to explain and apply the requirements regarding the interpretation of certain words and concepts used in the Companies Act, as well as those applying to the incorporation and legal status of companies.

Section 1 of the Act includes the definitions relevant to the Act and is therefore very important to every person who has to read and apply the Companies Act. (*Note: Whenever you are unfamiliar with a term used in the Act, you should refer back to section 1 for its definition.*) Specific definitions are also provided in sections 2 to 5. These definitions are important for the application of the different sections of the Act.

For example, in section 4, the solvency and liquidity test is explained. Section 46, which deals with distributions, provides that a company may not make a distribution unless it reasonably

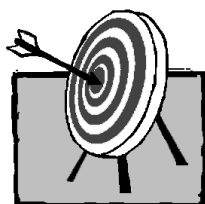
appears that the company will satisfy the solvency test. If you did not study the definition in section 4, you will not know how the test is done and what is taken into account.

Topic 2 is divided into the following study units:

Study unit	Title	Page
2.1	Interpretation (sections 1–6 and 8)	12
2.1.1	Related and interrelated persons, and control (sec 2) and subsidiary relationships (sec 3)	12
2.1.2	Solvency and liquidity test (sec 4)	15
2.1.3	Categories of companies (sec 8 & 10)	18
2.2	Incorporation and legal status of companies	20
2.2.1	Memorandum of Incorporation (MOI) (sec 15–16)	20
2.2.2	Pre-incorporation contracts (sec 21 – also, refer to Regulation 35)	22
2.2.3	Reckless trading (sec 22)	23

Textual amendments and additions

Before proceeding with the study of this topic, please refer to Tutorial Letter 104 for this module to acquaint yourself with any textual amendments and additions that may have been indicated, if any.



Learning outcomes

Study unit	On completion of this topic you should be able to	Level
2.1 Interpretation (sec 1–6, 8 & 10)	<ul style="list-style-type: none"> give advice, discuss concerns, and apply the interpretation of the Companies Act concerning related and interrelated persons, and control, subsidiary relationships, the solvency and liquidity test, anti-avoidance, and categories of companies 	3
2.2 Incorporation and legal status of companies	<ul style="list-style-type: none"> discuss and apply the definitions of related and interrelated persons, and control, subsidiary relationships, the solvency and liquidity test, anti-avoidance and categories of companies give advice, discuss concerns, apply the criteria for names, discuss the right to incorporate and register a company, and explain the Memorandum of Incorporation give advice on the legal status of companies, the validity of company actions, pre-incorporation contracts, and reckless trading that is prohibited 	3

Study unit 2.1

Interpretation, purpose, application and formation of a company



Introduction

In this study unit, the definitions of related and interrelated persons and control, subsidiary relationships, the solvency and liquidity test, and the different categories of companies will be discussed. The application of these definitions will also be explained by means of activities that you should attempt to complete.

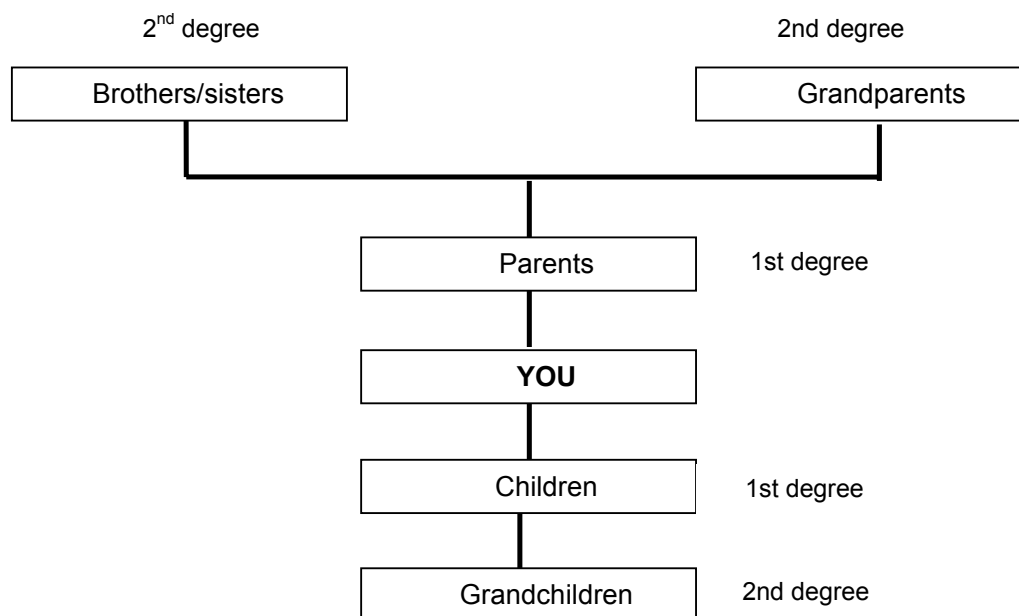
2.1.1 Related and interrelated persons, and control (sec 2) and subsidiary relationships (sec 3)

Section 2 and section 3 of the Act deal with related and interrelated persons, control and subsidiary relationships. These two sections are very important since a number of other sections in the Companies Act refer to related persons and subsidiary relationships (for example, sec 45 that regulates loans or other financial assistance to directors). Later, we will deal in greater detail with section 45, which not only provides (in subsec 45(2)) that a company may assist its directors financially, but also refers to financial assistance provided to "a related person". Understanding the concept of related persons is therefore necessary to interpret the requirements of a section such as section 45 of the Act.

The following mind map/diagram will assist you in your studies. It explains two concepts that are dealt with in section 2 of the Act. These are "consanguinity", which means "blood relationship", generally speaking, and "affinity", which is a relationship that exists due to a valid marriage. In terms of the Act, a person is related to another person if the relationship between the two persons is within the second degree of "consanguinity" or "affinity".

CONSANGUINITY AND AFFINITY

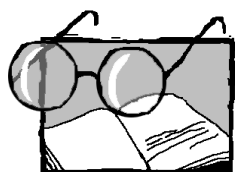
Section 2 refers to the terms "consanguinity" and affinity", within the second degree. In this regard, it is important to note:



Relationship by marriage (affinity)

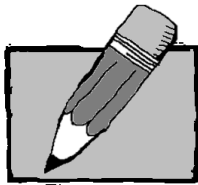
A relationship by marriage is sometimes referred to as being related by affinity. A husband and wife are related in the first degree by marriage. For other relationships by marriage, the degree of the relationship is the same as the degree of the underlying relationship by blood. For example, John and Steve are brothers and are therefore second-degree relatives by blood. John's wife, Linda, is related to Steve in the second degree by marriage.

Your brothers, sisters, grandparents and grandchildren are thus related to you in the second degree of consanguinity (second degree of blood relationship). In other words, there is at least one other generation between you and a person related to you in the second degree. The persons who are related to you in the first degree of consanguinity are your children or your parents.



Study

Study sections 2 and 3 of the Companies Act. Familiarise yourself with related-party relationships between individual persons and with subsidiary relationships (relationships between holding and subsidiary companies).



Activity 1

After you have studied section 2 and section 3, you should try to answer the following questions to test your knowledge. This will help you identify the specific relationships in a given scenario.

Please indicate whether the following persons are related to each other, by answering Yes or No. Give reasons for your answers.

- (a) **Don and Sandra:** Don and Sandra have been married for several years and they live in Cape Town. Because Don works in Johannesburg from Monday to Friday, he lives in a separate apartment in Melville during those days. Are Don and Sandra related to each other? Give a reason for your answer.
- (b) **Lynette and Master Locks (Pty) Ltd:** Lynette owned 100% of the shares in Master Locks (Pty) Ltd before she recently transferred all her shares in Master Locks (Pty) Ltd to her adopted son, Peter. Are Peter and the company, Master Locks (Pty) Ltd related to each other? Give a reason for your answer.
- (c) **Anglo Ltd and Naidoo Cash & Carry (Pty) Ltd:** Johnny and his brother Kumar both own 50% shares in a company called Naidoo Cash & Carry (Pty) Ltd. Kumar recently purchased R5 000 worth of shares in Anglo Ltd, a company listed on the JSE Limited. Kumar does not control Anglo Ltd directly or indirectly. Are the two companies, Anglo Ltd and Naidoo Cash & Carry (Pty) Ltd, related to each other? Give a reason for your answer.
- (d) **Blue Hills (Pty) Ltd and Wollongong (Pty) Ltd:** Blue Hills (Pty) Ltd appointed Mr Patrice Lumumba and Mr Eugene Wollongong as the directors of Wollongong (Pty) Ltd. Mr Lumumba and Mr Wollongong control the majority of the votes at board meetings. Are the two companies, Blue Hills (Pty) Ltd and Wollongong (Pty) Ltd, related to each other?
- (e) **Sonny and Cher:** Sonny and Cher are not married, but they have been living together for several years with their two children. Are Sonny and Cher related to each other?



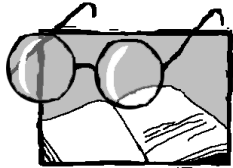
Feedback on activity 1

Reference: Section 2 of the Companies Act

- (a) Yes – They are married. It is irrelevant that they are not permanently living together [**sec 2(1)(a)**].
- (b) Yes – Peter directly controls Master Locks (Pty) Ltd and Peter is related to Lynette in the second degree of consanguinity [**sec 2((1)(a–b))**]. Thus, Peter is related to Master Locks (Pty) Ltd. (Note: It does not matter that Peter is adopted; in terms of the law, his relationship with his mother is exactly the same, whether he was adopted or not).

- (c) No – Although Kumar is a shareholder of both entities, he does not have control over Anglo Ltd **[sec 2(1)(c)]**. Therefore, Anglo Ltd and Naidoo Cash & Carry (Pty) Ltd are not related persons in terms of being controlled by the same person.
- (d) Yes – Blue Hills (Pty) Ltd has **indirect** control over Wollongong (Pty) Ltd **[sec 2(1)(c)]**.
- (e) Yes – Sonny and Cher are living together in a relationship similar to marriage **[sec 2(1)(a)]**. (This is a more difficult concept to remember!)

2.1.2 Solvency and liquidity test (sec 4)

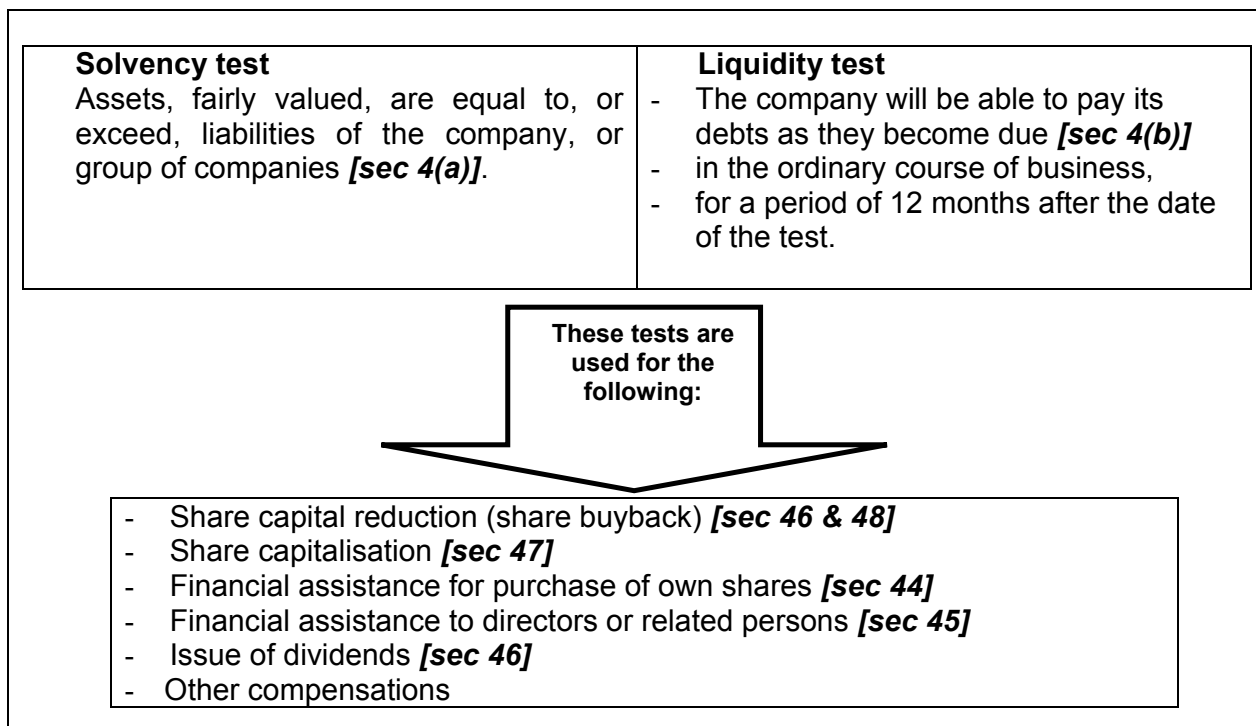


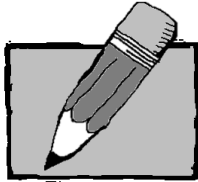
Study

Study section 4 of the Companies Act.

You will see from the diagram below that, in terms of various sections of the Companies Act, the solvency and liquidity test must be applied to particular transactions. Conducting the solvency and liquidity test forms part of the requirements for that transaction to be valid, and it must be proved before resolutions can be passed.

The following diagram will assist you in your studies:





Activity 2

Distillique Limited, a leading producer and distributor of fine wines, spirits and ciders, has a significant equity interest of 85% in Aqua Vitae (Proprietary) Limited.

The following extract has been taken from Distillique Limited's annual financial statements as at 30 June 2012:

	2012 R
ASSETS	
Total non-current assets	4 000 000
Total current assets	<u>2 000 000</u>
	<u>6 000 000</u>
LIABILITIES	
Total non-current liabilities	6 000 000
Total current liabilities	<u>5 000 000</u>
	<u>11 000 000</u>

Mr Barcardi, the chief executive director, approached you for advice regarding the following transactions:

Distillique Limited is experiencing severe cash flow problems. The company decided on a strategy that will attract investors, increase the satisfaction of current shareholders, and discourage any disinvesting. Mr Barcardi proposed to declare a dividend at the end of the financial year in order to accomplish the company's goals successfully.

The board of directors approved the decision, with no director opposing the decision.

REQUIRED

Marks

Evaluate the legality of the above transaction in terms of the Companies Act 71 of 2008 with regard to the dividends declared. (Although sec 46 has not yet been studied, it relates to dividends and in terms of sec 46, the solvency and liquidity test must be applied.)

(9)



Feedback on activity 2

Declaring of a dividend

Theory

In terms of section 46, a company must not make any proposed distribution unless

- (a) the distribution
 - (i) is pursuant to an existing legal obligation of the company, (1)
or a court order (1)
 - (ii) the board of the company, by resolution, has authorised the distribution (1)
- (b) it reasonably appears that the company will satisfy the solvency and liquidity test (1)
immediately after completing the proposed distribution (1)
- (c) the board of the company, by resolution, has acknowledged that it has applied the solvency and liquidity test, and reasonably concluded that the company will satisfy the solvency and liquidity test immediately after completing the proposed distribution (1)

Application

Distillique Limited does not satisfy the solvency requirements after having made the dividend distribution, because considering all reasonable foreseeable financial circumstances of the company, (1½)

the liabilities (R11 000 000) of the company fairly valued, exceed the assets (R6 000 000) of the company fairly valued. (1½)

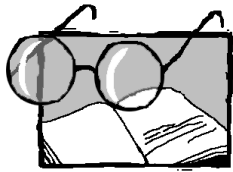
Distillique Limited is not liquid, since its current liabilities (R5 000 000) exceed its current assets (R2 000 000). (1½)

Based on the information provided, the dividend distribution will be illegal, since it does not satisfy the solvency and liquidity requirement. This constitutes a breach of section 46 of the Companies Act, 2008, as amended. (1½)

Any director of Distillique Limited is liable to the extent set out in section 77(3)(e)(vi) if that director was present at the meeting when the board approved a dividend distribution and failed to vote against the distribution, despite knowing that the distribution was contrary to section 46 – which is the case here. In such a case, the directors did not perform their duties regarding the application of the solvency and liquidity test properly, otherwise they would never have approved the distribution (1½)

Maximum marks (9)

2.1.3 Categories of companies (sec 8)

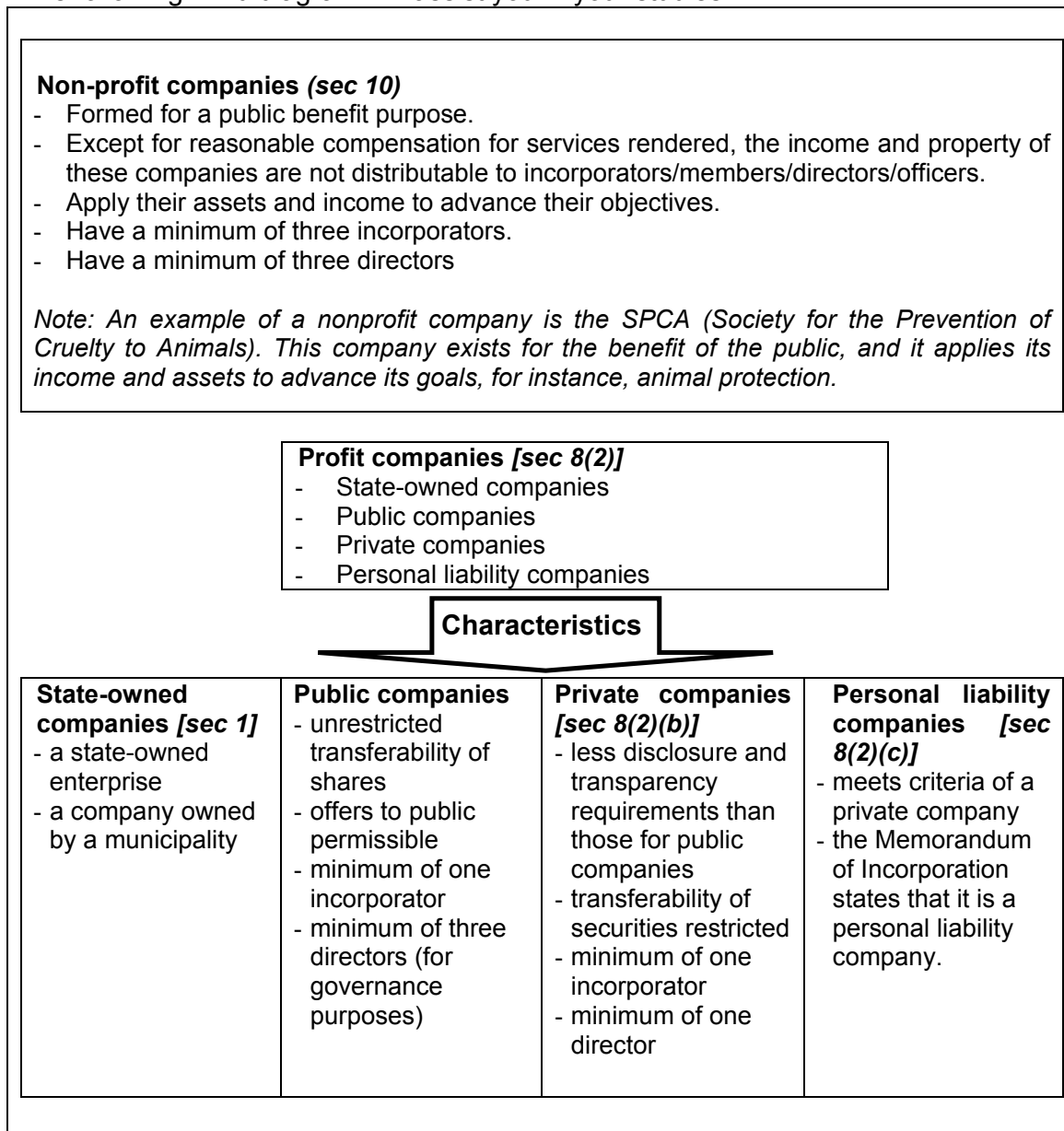


Study

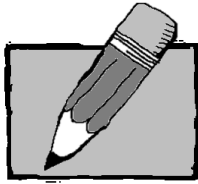
Study sections 8 and 10 of the Companies Act.

The Act provides for two categories of companies, namely non-profit and profit companies. You must know the different type of companies, as each of them has different characteristics, and different requirements may apply to each of them in terms of the Act.

The following mind diagram will assist you in your studies:



In order to understand the diagrams above fully, look up the definitions of the following terms in section 1 of the Companies Act: "incorporator"; "Memorandum of Incorporation"; and "securities".



Activity 3

Answer the following question on the characteristics of a private and public company:

Distinguish between a public and a private company in respect of the following:

- 3.1 name. (2)
- 3.2 number of directors. (2)
- 3.3 offer of shares to the public. (2)
- 3.4 company secretary. (2)
- 3.5 audit committees. (2)



Feedback on activity 3

- 3.1 A private company must include the words "proprietary" and "limited" or the abbreviation of the words in its name, that is, (Pty) Ltd.
A public company must not include the word "proprietary" or its abbreviation, but must include "limited" or its abbreviation in its name. (2)
- 3.2 A private company must have a minimum of one director. No maximum is stipulated in the Act.
A public company must have a minimum of three directors. No maximum is stipulated. However, the company's MOI may stipulate a higher number for the minimum.
Maximum marks (2)
- 3.3 A private company may not offer its shares for sale to the public under any circumstances and the transferability of its shares is restricted.
A public company may offer its shares to the public under the conditions stipulated in the Act and in terms of its MOI. (2)
- 3.4 A private company is not required to have a company secretary but may appoint one.
A public company must appoint a company secretary. (2)
- 3.5 A private company is not required to appoint an audit committee unless its MOI indicates that the company elects to comply voluntarily with the provisions of Chapter 3 of the Companies Act, 2008, which deals, inter alia with, the appointment of an audit committee.
A public company must appoint an audit committee annually. (2)

Summary

In this study unit, we explained and applied the interpretation of the Act, including definitions, related and interrelated persons and control, subsidiary relationships, the solvency and liquidity test, anti-avoidance, and categories of companies.



Self-assessment

After having worked through the study unit and the references to the prescribed study material, you should be able to do the following:

Give advice, discuss concerns, and apply the interpretation of the Act, including definitions, related and interrelated persons and control, subsidiary relationships, the solvency and liquidity test, anti-avoidance, and the categories of companies.

Study unit 2.2

Incorporation and legal status of companies



2.2.1 Memorandum of Incorporation (MOI) (sec 15–16)

The founding document of a company under the Act will be the MOI. It is important to know that sections 15 and 16 do not only deal with the MOI, but that they include rules of a company and shareholder agreements.

The Companies Act, 2008, provides that a company's MOI is subject to the Act and must be consistent with the provisions of the Act. To the extent that a provision of the MOI contravenes or is inconsistent with the Act, it is void (sec 15(1)).

However, the Companies Act recognises that not all its provisions are suitable for all companies and therefore, section 15(2) permits a company's MOI to ...

- include matters that are not dealt with in the Act;
- alter the effect of any "alterable" provision (these are provisions that are allowed to be altered);

- impose on the company a higher standard, greater restriction, longer period, or any similarly more onerous requirement, than would otherwise apply to the company in terms of an unalterable provision of the Act;
- contain any restrictive conditions applicable to the company or changes to any such conditions, in addition to the requirements for amendments of MOIs set out in section 16;
- prohibit the amendment of any particular provision of the MOI, provided that the MOI does 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 to the extent contemplated in the third bullet point above.

An "alterable" provision is a provision of the Act "in which it is expressly contemplated that its effect on a particular company may be negated, restricted, limited, qualified, extended or otherwise altered in substance or effect by that company's MOI" (sec 1).

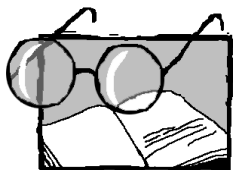
Some examples of alterable provisions are as follows:

- Annual financial statements – *"The annual financial statements must ... be ... audited voluntarily if the company's Memorandum of Incorporation, or a shareholders' resolution, so requires or if the Company's board has so determined ..."* (sec 30(2)(b)(ii)(aa)).
- Notice of shareholder meetings – *"A company's Memorandum of Incorporation may provide for longer or shorter minimum notice periods than required by subsection (1)"* (sec 62(2)).
- Special resolutions – *"A company's Memorandum of Incorporation may permit:*
 (a) *a lower percentage of voting rights to approve any special resolution; or*
 (b) *one or more lower percentages of voting rights to approve special resolutions concerning one or more particular matters, respectively, provided that 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"* (sec 65(10)).

(Adapted from Webber & Wentzel 2011 – a list of alterable provisions as published on SAICA's website.)

Section 15(3) provides that, unless the MOI states otherwise, the board of the company may make, amend or repeal any necessary or incidental rules relating to the governance of the company in respect of matters that are not addressed in the Act or in the MOI. The steps, which the board must follow in this regard, are set out. An example would be a company that does not need to be audited in terms of the Act, but which the board voluntarily decides must be audited.

The steps that must be followed in amending a MOI are included in section 16. Regulation 15 provides for the various forms (including a long and short form) to be completed when registering or amending the MOI.

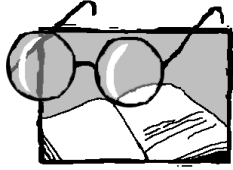


Study

Study sections 15 and 16 of the Companies Act, which deal with the Memorandum of Incorporation (MOI) of a company.

2.2.2 Pre-incorporation contracts (sec 21 – also, refer to Regulation 35)

Pre-incorporation contracts are exactly what they say they are: a contract entered into with, or by a company that is not yet incorporated. Naturally, parties would be hesitant to conclude a contract with a party not yet incorporated, but this section of the Companies Act makes it possible.



Study

Study section 21 of the Companies Act as well as Regulation 35. Familiarise yourself with the requirements of the Act in order to enter into a pre-incorporation contract legally.



Activity 1

You are an accountant and must advise Lionel Lester and Wendell Webb who have made an appointment to see you about a private company they want to form.

The company will operate from a factory, which they believe will be suitable for lease. The owner of the factory wants to tie up the lease as soon as possible.

Lester and Webb asked you the following question:

Is it possible for the proposed company to enter into the lease contract before the company is incorporated?

(Adapted – Gowar & Jackson 2010)



Feedback on activity 1

Suggested solution

1. The lessor will be contracting with an entity that does not yet exist, and the lessor may have a problem with this. (1)
2. However, in terms of the Companies Act (sec 21), Lester or Webb may enter into an agreement in the name of, or on behalf of, the proposed company. (1)
 - 2.1 Within three months after the date on which the company is incorporated, Lester and Webb, as the board of the company, must ratify (confirm) the contract. (1)
 - 2.2 If they do not actively ratify or reject the contract, the contract will be deemed to have been ratified. (1)

3. If, for some reason, the company is not incorporated, then Lester and Webb will be jointly and severally liable for all liabilities, for example, the lease payments arising from the agreement. (1)
4. If the agreement is ratified, it is enforceable against the company and Lester and Webb's liabilities as individuals are discharged, that is, the contract and performance in respect thereof will be between the lessor and the company. (1)
5. The pre-incorporation contract must be in writing. (1)
7

2.2.3 Reckless trading (sec 22)

This section also links to other sections in the Act and it is rather important.

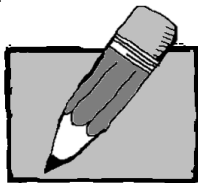
In terms of **section 22**, "*a company must not carry on its business recklessly, with gross negligence, with intent to defraud any person or for any fraudulent purpose; or trade under insolvent circumstances*". Obviously, a fair amount of subjectivity is involved in determining whether the directors have been reckless, but the key will be to establish whether the directors have acted as reasonable persons.

A director may be liable to the company for any loss suffered by the company while trading under insolvent circumstances **[sec 77(3)]**, and a director may also be liable to third parties who have had dealings with the company and suffered a loss.

The question here is whether a reasonable person would have acted in the same manner in a situation of factual insolvency. An example may illustrate this better:

- (a) If you assume that the company is factually insolvent, would it be reasonable for it to enter into a lease agreement for a very expensive fleet of company vehicles for its directors?
- (b) Alternatively, would it be reasonable for three or four directors to embark on an extensive overseas trip to visit trade fairs when one director could have taken the trip?
- (c) Would it be reasonable for the directors to vote in favour of large bonuses for themselves or substantial salary increases when the company is experiencing severe financial difficulty?
- (d) Would it be reasonable for the directors to continue incurring debt when there is, to the knowledge of the directors, no reasonable prospect of the creditors ever receiving payment for those debts?

All of the above will constitute reckless trading – thus, a breach of **section 22** would have taken place.



Activity 2

The following is an extract from Distillique Limited's annual financial statements as at 30 June 2012:

	2012
	R
ASSETS	
Total non-current assets	4 000 000
Total current assets	<u>2 000 000</u>
	<u>6 000 000</u>
LIABILITIES	
Total non-current liabilities	6 000 000
Total current liabilities	<u>5 000 000</u>
	<u>11 000 000</u>

REQUIRED

Marks

With reference to the extract from Distillique Limited's annual financial statements as at 30 June 2012, evaluate if Distillique Limited is trading recklessly in terms of the requirements of the Companies Act.

(6)



Feedback on activity 3

Theory

According to section 22, a company may not carry on its business recklessly, with gross negligence, with intent to defraud any person or for any fraudulent purpose. (1)

If the Commission has reasonable grounds to believe that a company is engaging in prohibited conduct as stated in the above paragraph, or is unable to pay its debts as they become due and payable in the normal course of business, the Commission may issue a notice to the company. The company will then have to give reasons why it should be permitted to continue with its business or with its trade, as the case may be. (1)

Should the company fail to satisfy the Commission within 20 business days that it is not engaging in conduct prohibited by the first paragraph above or that it is able to pay its debts as they become due and payable in the normal course of business, the Commission may issue a compliance notice to the company requiring it to cease carrying on its business or trading, as the case may be. (1)

Application

In this instance, Distillique Limited will not be able to satisfy the Commission if it receives the notice indicated above, because of the following:

- Distillique Limited does not satisfy the solvency test, since after considering all reasonable foreseeable financial circumstances of the company, the assets (R6 000 000) of the company fairly valued, do not exceed the liabilities (R11 000 000) of the company fairly valued. (1½)
- Distillique Limited is not liquid, since the current liabilities (R5 000 000) exceed the current assets (R2 000 000). (1½)

- Distillique Limited is trading recklessly; it is therefore in contravention of the Companies Act. (1½)
- Maximum marks (6)**

Summary

In this study unit, we explained and applied the criteria for names, the right to incorporate and register a company, and the Memorandum of Incorporation. We also gave advice on the legal status of companies, the validity of company actions, pre-incorporation contracts, and reckless trading prohibited.



Self-assessment

After having worked through the study unit and the references to the prescribed study material, you should be able to do the following:

Give advice, discuss concerns, and apply the criteria for names, the right to incorporate and register a company, and the Memorandum of Incorporation. Give advice on the legal status of companies, the validity of company actions, pre-incorporation contracts, and reckless trading prohibited.

CONCLUSION

In this topic about the **interpretation, purpose, application and formation of a company**, we explained and applied the requirements in terms of the Companies Act and certain Regulations regarding the interpretation of the Act as well as the incorporation and legal status of companies.

3. TOPIC 3 - COMPANY RECORDS

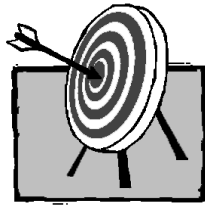
Topic overview

This topic is dealt with in one study unit:

Study unit	Title	Page
3.1	Company records	26
3.1.1	Form and standards of company records (sec 24) and accounting records (sec 28)	26
3.1.2	Record keeping and financial statements (sec 29–30)	27

Textual amendments and additions

Before proceeding with the study of this topic, please refer to Tutorial Letter 104 for this module to acquaint yourself with any textual amendments and additions that may have been indicated.



Learning outcomes

Study unit	In this topic, we will focus on the following learning outcomes:	Level
3.1 Company records (sec 24, and 28–30)	Give advice, discuss concerns, and apply the requirements of the Act regarding <ul style="list-style-type: none"> the form and standards of company records record keeping and financial statements 	3 3

Study unit 3.1

Company records



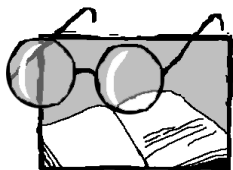
Introduction

Company records refer to any documentation, accounting records or any other books or written documents that a company should keep. These include, for example, the Memorandum of Incorporation of a company. Company records are a very important source to the auditor/accountant, as they form the basis for the financial statements of a company.

3.1.1 Form and standards for company records (sec 24) and accounting records (sec 28)

All companies must keep accurate and complete accounting records, as well as all documents set out in **section 24** of the Act. These documents should be kept in written form for a minimum period of seven years.

Profit companies must also maintain a securities register and a register of its company secretary and auditors (if any).



Study

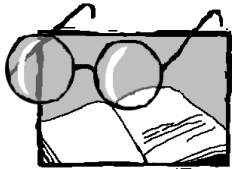
Study sections 24 and 28 of the Companies Act. See if you can make a list of all the records that a company should keep.

3.1.2 Record keeping and financial statements (sec 29–30)

Each year, a company must prepare annual financial statements within six months after year end **[sec 30(1) to (7)]**.

Financial statements provided to any person must (sec 29 and Regulation 27):

- Satisfy financial reporting standards;
- Represent the state of business and affairs of the company fairly;
- Explain the transactions and financial position of the company;
- Indicate whether or not the statements have been audited or independently reviewed;
- State the name and designation of the preparer of the statements; and
- Not be incomplete, false or misleading.



Study

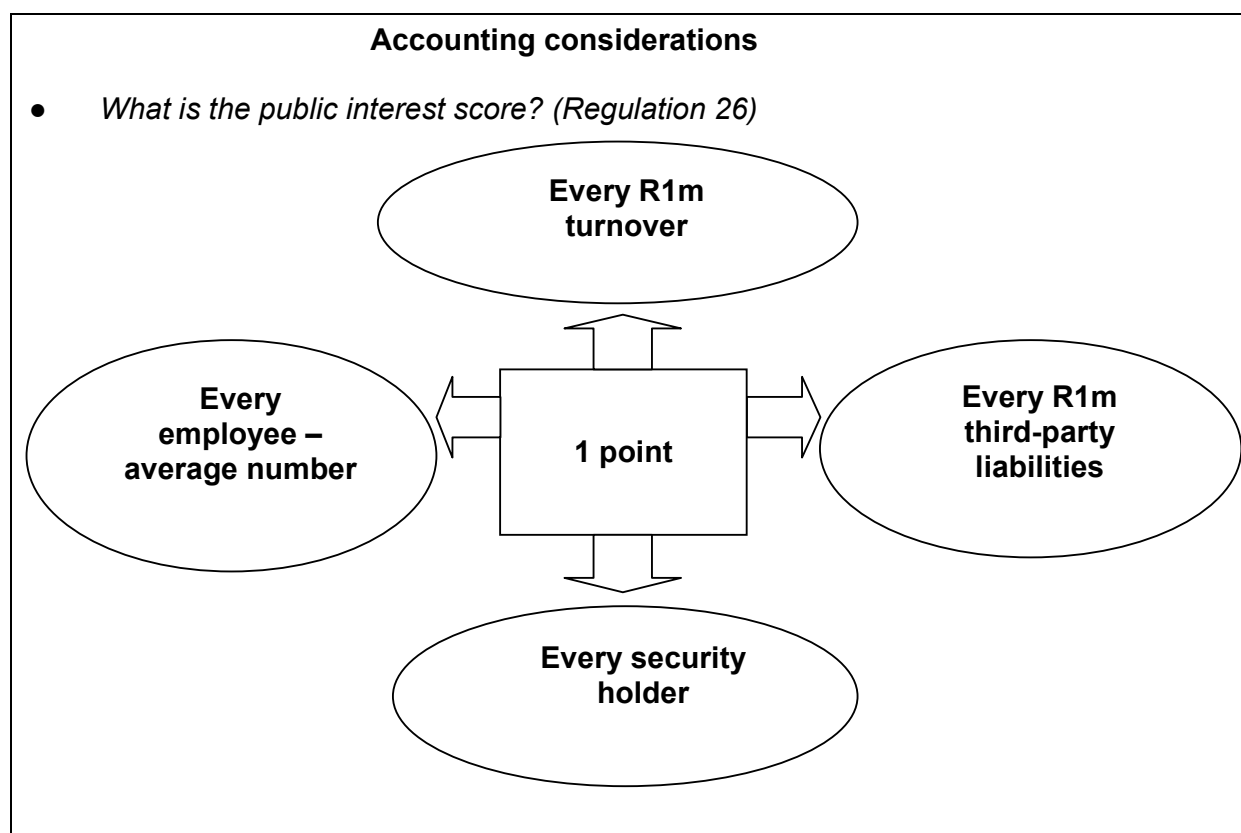
Study sections 29 and 30 of the Companies Act.

To determine whether a company should be audited or independently reviewed, please refer to the table below.

	Category of company	Audit/Review
1.	Public companies and state-owned companies	Audit (by a Registered auditor)
2	Non-profit companies (incorporated by state)	Audit (by a Registered auditor)
3	Profit companies, non-profit companies and close corporations holding assets in a fiduciary capacity, which exceed R5 million at any time in the financial year	Audit (by a Registered auditor)
4	Other companies or close corporations with public interest scores of <ul style="list-style-type: none"> • 350 or more; or • At least 100 but less than 350 and with financial statements that are internally compiled 	Audit (by a Registered auditor)
5	Other companies with a public interest score of at least 100 but less than 350 and with financial statements not internally compiled (that is, compiled independently)	Review (by a Registered auditor or Chartered accountant (SA))
6	Other companies with a public interest score of less than 100	Review (by a Registered auditor or Chartered accountant (SA) or/Accounting officer)

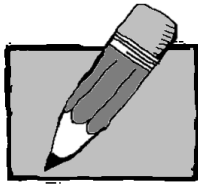
	Category of company	Audit/Review
7	Other companies where the directors of the company hold or have all of the beneficial interests in the securities issued by the company and close corporations, if not subject to a "public interest audit" as per categories 3 and 4 above [sec 30(23A)] .	No audit or review
8	Other companies that fall within categories 5, 6 and 7 above can elect to have a voluntary audit as per a: <ul style="list-style-type: none"> • MOI requirement; • shareholders' resolution; or • board resolution. 	Audit (by a Registered auditor)

The public interest score (Regulation 26) is important for accounting considerations. Refer to the diagram below to understand what comprises the public interest score.



In terms of the diagram above, a company is awarded one point for every R1 million of turnover (or part thereof); one point for every one employee employed (based on the average number of employees employed during the year); one point for every security holder of the company; and one point for every R1 million (or part thereof) owed to a third party (such as finance providers, banks, and creditors).

All these points added together will give the total public interest score of the company.



Activity 1

You are an accountant. Mr Joe Soap and Mr John Doe have made an appointment to see you about a private company they want to form.

The two of them will be the only shareholders and directors of the company, but it is expected that over time, a few new shareholders will be found as well as one or two additional directors appointed.

They want to know the following:

1. As the company does not require an auditor, is it necessary to produce annual financial statements? (1)
2. What company records must they keep and for how long do they have to keep these records? (8)

(Adapted – Gowar & Jackson 2010)



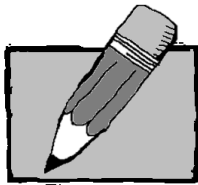
Feedback on activity 1

Reference: Sections 24, 28 and 30 of the Companies Act

1. Yes. The company must prepare annual financial statements (usually) within six months after the end of its financial year (**sec 30**). (1)
This is a specific requirement of the Companies Act, which has nothing to do with whether or not the annual financial statements are audited. (1)
2. With regard to company records, **sections 24 and 28** of the Companies Act state that the company must keep or maintain:
 - 2.1 Accurate and complete accounting records in one of the official languages of the Republic; (1)
 - 2.2 A copy of the Memorandum of Incorporation (and any amendments, etc, thereto); (1)
 - 2.3 A record of its directors' details; (1)
 - 2.4 Copies of all ...
 - reports presented at an annual general meeting (for seven years);
 - annual financial statements (for seven years);
 - accounting records (for the current year and the seven years prior to the current year);
 - notices and minutes of all shareholders' meetings (for seven years);
 - copies of all communications to shareholders (for seven years);
 - minutes of all meetings and resolutions of directors' meetings (for seven years);and
 - 2.5 A register of shareholders (security register) of the company. (1)

Max (3)

Maximum of 8



Activity 2

Answer the following questions:

1. What is a public interest score? (3)
2. State three matters that will be affected by a company's public interest score. (3)
3. Which of the following do **not** affect a company's public interest score?
 - 3.1 Location of the company
 - 3.2 Number of non-executive directors
 - 3.3 Number of directors
 - 3.4 Turnover
 - 3.5 Assets held in trust by the company
 - 3.6 Number of years in operation (3)
4. Public companies, both listed and unlisted, must calculate their public interest score. True or false? (1)
5. The Memorandum of Incorporation can stipulate other criteria for calculating the public interest score. True or false? (1)
6. Calculate the public interest scores for Tech (Pty) Ltd and Master (Pty) Ltd:

	Tech (Pty) Ltd	Master (Pty) Ltd	
6.1 Turnover	R7.25m	R135.75m	
6.2 Directors	4	11	
6.3 Average employees for the year	62	201	
6.4 Amounts owed to third parties	R1.6m	R19.2m	
6.5 Individuals with direct or indirect interest in each company's shares	9	22	(3)
7. What are the various thresholds (categories) set by the Regulations for public interest scores?



Feedback on activity 2

Solution to questions 1 to 7:

1. 1.1 A public interest score is the sum of the points allocated to certain attributes applicable to all companies, for example, one point is allocated to every one million rand, or part thereof, of turnover.
- 1.2 The public interest score is used as a gauge of the interest the public at large (society) has in the company.

- 1.3 The company will be required to satisfy various conditions, dependent upon its public interest score, for example, a company with a score of at least 350 points will have to be audited externally.
2.
 - 2.1 Whether the company is audited or reviewed and who must carry out the independent review.
 - 2.2 Which financial reporting standard the company must use to prepare its annual financial statements.
 - 2.3 The level of the financial rescue practitioner who would be engaged if the company needed financial rescue.
3. Location of the company, the number of directors (executive and non-executive), and the number of years in operation do not affect the public interest score.
4. True. **All** companies must calculate their public interest score, regardless of whether they are public, private, listed, or unlisted companies.
5. False. Public interest score criteria are set in Regulation 26 of the Companies Act.

6.

	Tech (Pty) Ltd	Master (Pty) Ltd
6.1	8	136
6.2	N/A	N/A
6.3	62	201
6.4	2	20
6.5	<u>9</u>	<u>22</u>
Total	81 points	379 points

7. Equal to or above 350 points
Equal to 100 or above, but less than 350 points
Below 100 points

Summary

In this study unit, we explained and applied the requirements regarding the form and standards of company records, record keeping, and financial statements in terms of the Companies Act.



Self-assessment

After having worked through the study unit and the references to the prescribed study material, you should be able to do the following:

Give advice, discuss concerns, and apply the requirements regarding company records including the:

- financial year of the company
- accounting records
- financial statements

CONCLUSION

In this topic about **company records**, we explained and applied the requirements regarding company records (including the financial year of the company, accounting records and financial statements) in terms of the Companies Act and certain Regulations.

4. TOPIC 4 - SHAREHOLDERS AND SHARES

Topic overview

Companies cannot exist without shareholders or share capital. It is therefore important to take note of the requirements in the Act relating to shareholders and shares. This topic does not only deal with shareholders, but also includes the requirements for capitalisation of profit companies.

This topic will deal with the authorisation of issue shares, preferences, rights, limitations, and other share terms, as well as the issuing of shares, shareholder approval for issuing shares (in certain instances), financial assistance for subscription of securities, loans or other financial assistance and distributions, to name only a few. You will also cover securities registration and transfer, governance of companies and public offering of company securities. This topic is therefore justly one of the most important topics for your studies.

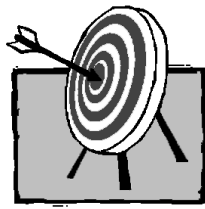
The terms mentioned above might seem very new and unfamiliar to you, but as you work through the topic, your perception will change. Remember to refer to section 1 of the Act for definitions of terms with which you are unfamiliar.

Topic 4 is divided into the following study units:

Study unit	Title	Page
4.1	Capitalisation of profit companies (sections 35, 36, 37, 38, 39, 40, 41, 42, 43, 46, 47 and 48)	33
4.1.1	Legal nature of company shares and requirement to have shareholders (<i>sec 35</i>)	34
4.1.2	Authorisation for shares (<i>sec 36</i>)	34
4.1.3	Preferences, rights, limitations and other share terms (<i>sec 37</i>)	35
4.1.4	Issuing shares (<i>sec 38</i>)	36
4.1.5	Subscription of shares (<i>sec 39</i>)	37
4.1.6	Distributions must be authorised by board (<i>sec 46</i>)	38
4.1.7	Company or subsidiary acquiring company shares (<i>sec 48</i>)	40
4.2	Securities registration and transfer (sec 49–56)	41
4.3	Governance of companies (sec 57–65)	43
4.4	Public offerings of company securities (sec 96, 97, 99 and 100–111)	47

Textual amendments and additions

Before proceeding with the study of this topic, please refer to Tutorial Letter 104 for this module to acquaint yourself with any textual amendments and additions that may have been indicated.



Learning outcomes

Study unit	Title	Level
4.1 Capitalisation of profit companies (sec 35, 36, 37, 38, 39, 40, 41, 42, 43, 46, 47 and 48)	<ul style="list-style-type: none"> • Give advice, discuss concerns, and apply the requirements of the Act regarding the following: <ul style="list-style-type: none"> - capitalisation of profit companies, including the legal nature of company shares and the requirement to have shareholders - authorisation of shares - distributions - capitalisation shares - the company or subsidiary acquiring company shares in scenarios 	3
4.2 Securities registration and transfer (sec 49–56)	<ul style="list-style-type: none"> • Give advice, discuss concerns and apply the requirements of the Act regarding securities registration and transfer in scenarios. 	3
4.3 Governance of companies (sec 57–65)	<ul style="list-style-type: none"> • Give advice, discuss concerns and apply the requirements of the Act regarding governance of companies, including shareholder meeting requirements, such as notices, quorums and voting, in scenarios. 	3
4.4 Public offerings of company securities (sec 96, 97, 99, and 100–111)	<ul style="list-style-type: none"> • Acquire basic knowledge and understanding of the requirements for public offerings of company securities in scenarios in terms of the Act. 	3

Study unit 4.1

Capitalisation of profit companies



Introduction

In terms of the Companies Act, a security is a share, debenture or other instrument, that is issued by a profit company. In this topic, we will specifically refer to shares. The study unit deals

with different aspects of shares, such as their legal nature, how they are issued, and the rights and limitations attached to them. (Note: Refer to section 1 of the Act for definitions of unfamiliar terms used in this study unit.)

4.1.1 Legal nature of company shares and requirement to have shareholders (sec 35)

What is a share? Shares are units into which company divides its profit. Each "owner" (shareholder) of the company holds a certain amount of shares, which might entitle him/her to a share of the profit of the company in the form of a dividend. (Note: Study unit 4.1.6 covers dividends.) Holders of shares are referred to as shareholders.

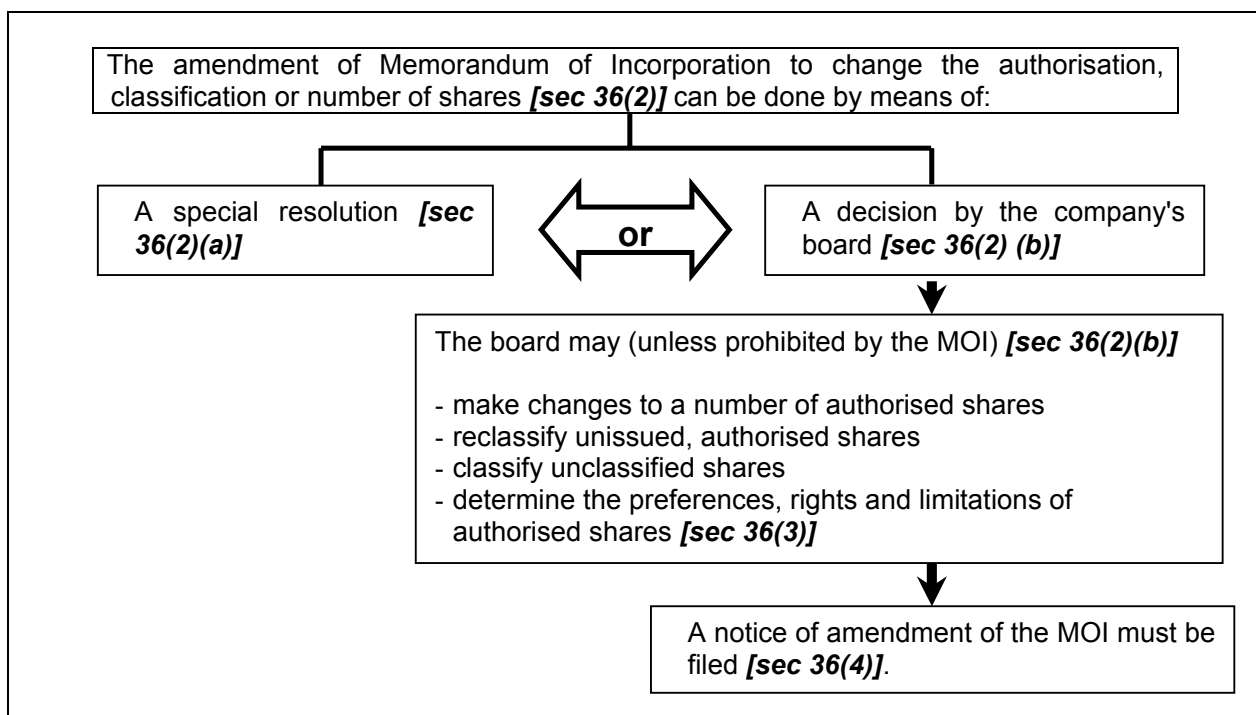
Under the previous Companies Act, shares could have a so-called par value. The term "**par value**" referred to a nominal value that was assigned to a share. It is important to note that under the new Companies Act, companies no longer have par value shares. Refer to Regulations 31(3) and (5), which set out how to deal with authorised shares of par or nominal value and where it is indicated what should be done where no shares have yet been issued before the effective date (1 May 2011). This Regulation also deals with cases where there are authorised shares of par or nominal value and only some of the authorised shares have already been issued before the effective date.

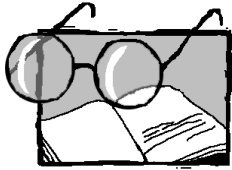
4.1.2 Authorisation for shares (sec 36)

In its MOI, a company must set out the different classes and number of shares that the company is authorised to issue. This is referred to as the authorised shares of a company. The MOI should describe the name of each different class of share in order to distinguish it from other classes of shares, as well as to indicate the preferences, rights (such as voting rights) and limitations of these shares.

It is important to note that an authorised share has no rights associated with it until the share has been issued. The person to whom the share is issued, becomes the holder of the share, and is called the **shareholder**. A company is not allowed to issue shares to itself.

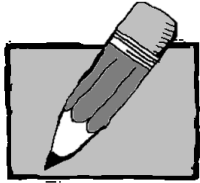
Should a company want to change the classification, authorisation or number of shares, the MOI may be amended in terms of section 36. Refer to the diagram below in this regard.





Study

Study sections 35 and 36 of the Companies Act.



Activity 2

Example: ABC (Pty) Ltd currently has 1 000 authorised ordinary shares. The director of ABC (Pty) Ltd, Mr Joe Soap, wants to convert 100 of these ordinary shares to preference shares. Explain to Mr Soap how the requirements of the Companies Act relate to this matter.



Feedback on activity 2

Reference: Section 36 of the Companies Act

Answer: In terms of **section 36** of the Act, the Memorandum of Incorporation of ABC (Pty) Ltd may be amended to change the classification of these shares by means of a **special resolution**. (Note: A "resolution" is a decision. Study unit 4.3 deals with resolutions.)

OR

In terms of **section 36** of the Act, the **board of the company** may decide to change the classification of these shares (unless stated otherwise in the Memorandum of Incorporation). The board must then file a notice of amendment of the Memorandum of Incorporation.

4.1.3 Preferences, rights, limitations and other share terms (sec 37)

In terms of section 37(2), every share, irrespective of its class, has associated with it one voting right, subject to the provisions of the Act and the MOI. The MOI may determine the preferences, rights and limitations. This means that a voting right can be limited, but not excluded.

The "provisions of the Act" mentioned above are as follows:

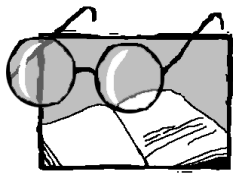
- If there is only one class of shares, those shares must have voting rights in respect of all voting matters and must be entitled to the surplus at liquidation (sec 37(3)(b)).
- If there is more than one class of share, the MOI must provide that at least one class of share must have voting rights in respect of all matters on which can be voted. Further, a class of share (not necessarily the voting class) must be entitled to the surplus at liquidation (the monetary value that is available if the company should be liquidated) (sec 37(4)).
- Shares with limited voting rights will, irrespective of the provisions of the MOI, nevertheless have voting rights on any proposal to amend the rights associated with that share (sec 37(3)(a)).

- All the shares of a particular class must have the same preferences, rights, limitations and other terms (sec 37(1)).

What do rights mean?

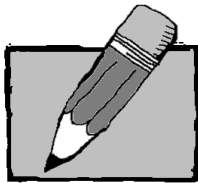
"Rights" refers to ...

- control rights – which relate to voting rights at meetings
- financial rights – which relate to the right to dividends and the right to any excess upon liquidation



Study

Study section 37 of the Companies Act.



Activity 3

Example: ABC (Pty) Ltd is in the process of being liquidated. Mr Joe Soap, a shareholder of ABC (Pty) Ltd, wants to know if he will be equally entitled to the surplus net assets of the company upon its liquidation, distributed to all the other shareholders. ABC (Pty) Ltd has only one class of shares.



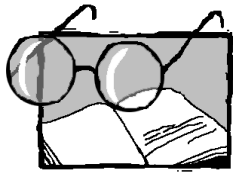
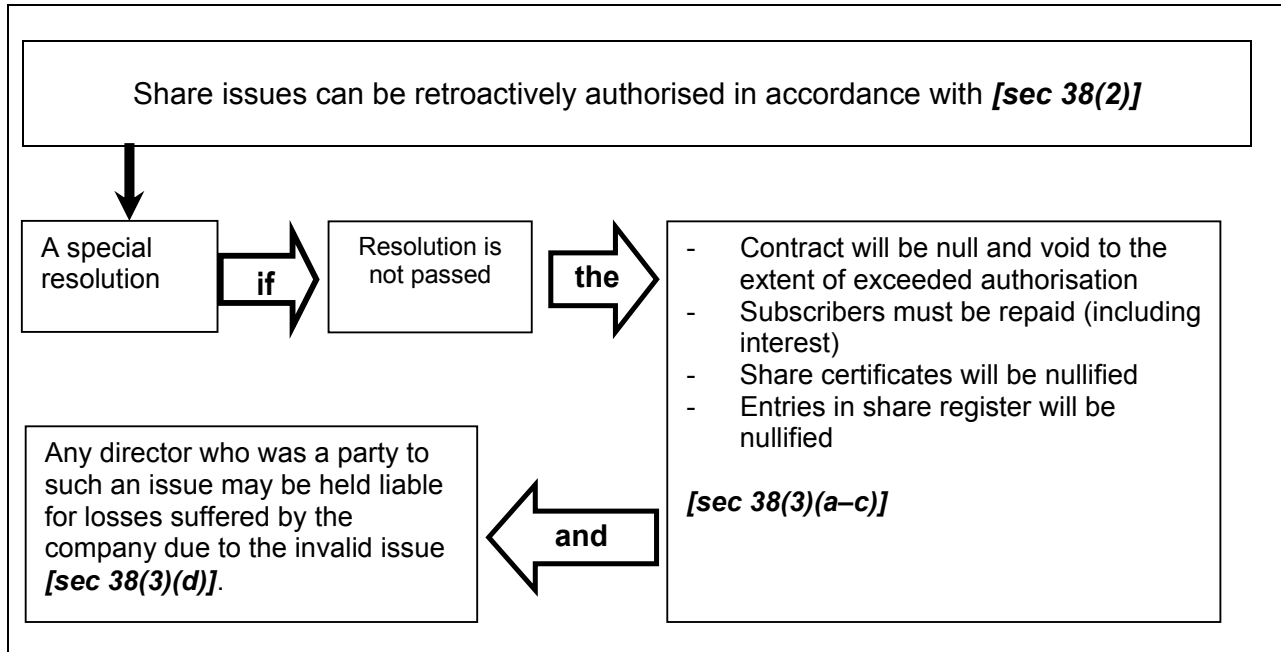
Feedback on activity 3

Answer: In terms of **section 37** of the Act, if a company has only one class of shares, all these shares will have equal preferences, rights and limitations, unless stated otherwise in the Memorandum of Incorporation.

4.1.4 Issuing shares (sec 38)

The board of directors has the power to issue shares in terms of section 38(1). However, such a share issue must be approved by a special resolution if the issue is to a director or prescribed officer (or a person related to or interrelated to the director, prescribed officer or the company), or to a future director or prescribed officer. (The requirements in sec 38 and 40 do not apply in a business rescue scheme where the practitioner can issue shares and determine the consideration.)

The following actions can be taken if the board issues shares that either are not authorised (as per section 36), or exceed the number of authorised shares according to the Memorandum of Incorporation:



Study

Study section 38 of the Companies Act.

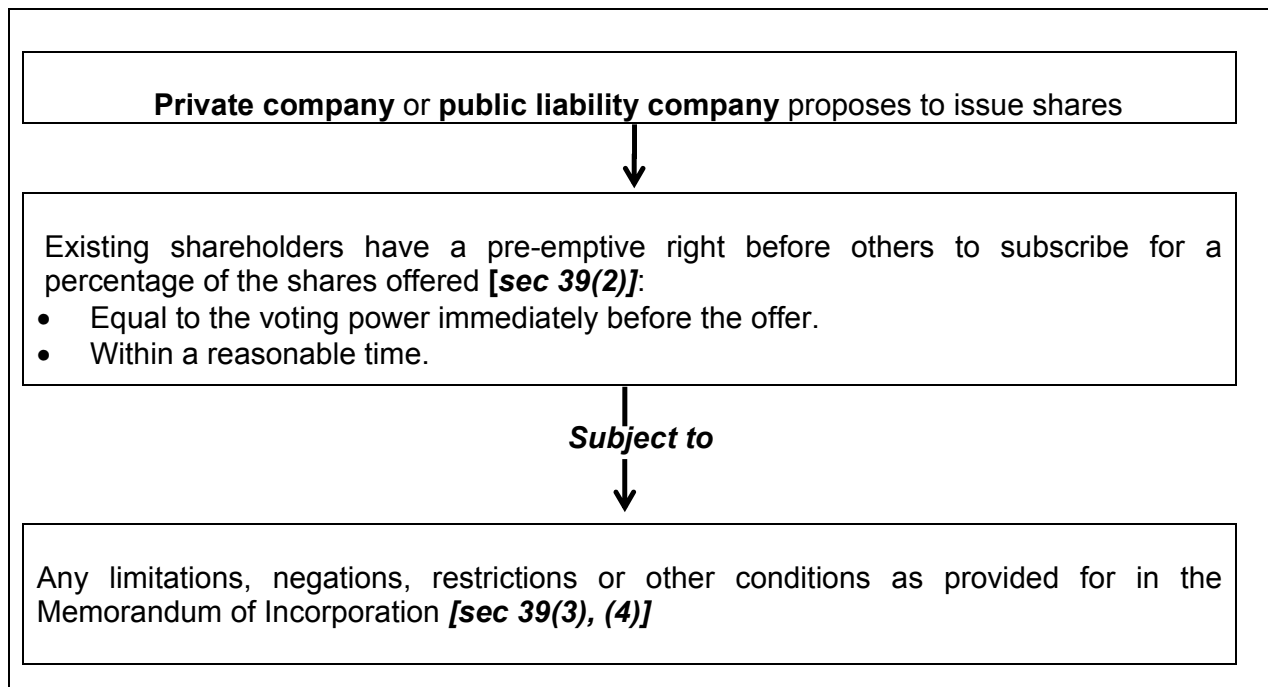
4.1.5 Subscription of shares (sec 39)

This section does not apply to public or state-owned companies (except if provided otherwise in the Memorandum of Incorporation) **[sec 39(1) (a)]**.

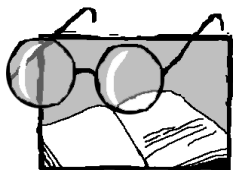
Except to the extent that the MOI of a private or personal liability company provides otherwise

- a shareholder may, in exercising the pre-emptive right, subscribe for fewer shares than he/she would be entitled to subscribe for
- shares not subscribed for by a shareholder within a reasonable time may be offered to other persons to the extent permitted by the MOI

Section 39 is explained in the diagram below.



Example: Macbeth has general voting rights relating to 35% of the shares in Hamlet (Pty) Ltd. Hamlet (Pty) Ltd plans to issue 1 000 shares. This would mean that Macbeth has a pre-emptive right to 35% of these shares, which amounts to 350 shares.



Study

Study section 39 of the Companies Act.

4.1.6 Distributions to be authorised by the board (sec 46)

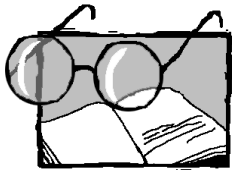
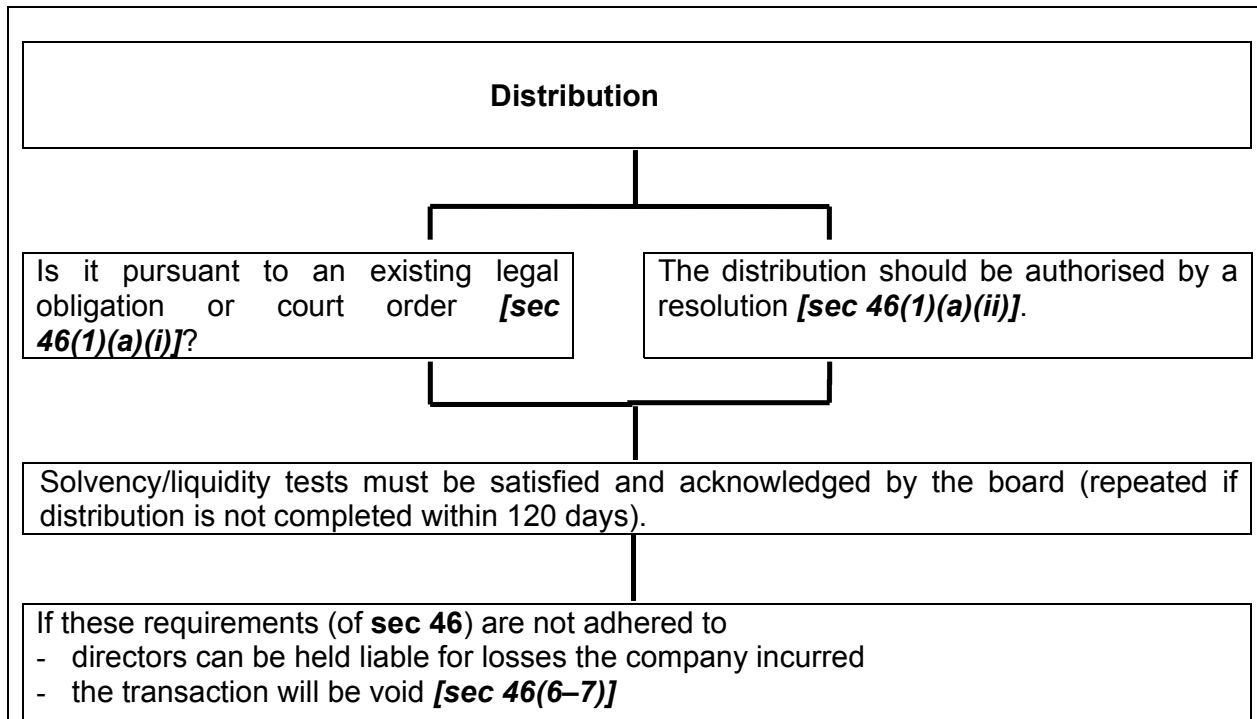
Study the definition of a distribution as described in sections 1 and 46 of the Act. It is important to note that distributions include payments for share repurchases (where a company buys back its own shares) and the payment of dividends. A dividend is a portion of a company's earnings, which is distributed to its shareholders.

In terms of section 46(1)(a)(ii), all distributions must be authorised by a resolution of the board of directors. Shareholder approval is not required unless it is prescribed by the company's MOI.

In addition, it must reasonably appear that the company will satisfy the solvency and liquidity test immediately after the distribution. The board must acknowledge by resolution that it has applied the test and has reasonably concluded that the company will satisfy the test immediately after completing the distribution.

The directors responsible for an invalid distribution, in other words, those directors who, despite knowing that the requirements for a valid distribution were not satisfied, had nevertheless either voted for or had assented to the authorisation of the distribution, would be personally liable, jointly and severally, to restore the company with the amount of the unlawful distribution less the

amount, if any, that is recovered by the company from the persons to whom the distribution was made. Creditors are not given a right to institute legal action against the directors for an unlawful distribution. The errant directors are liable to the company – not its creditors.



Study

Study section 46 of the Companies Act.



Activity 4

During the financial year, Smugglers (Pty) Ltd had to revalue a certain part of the company's property portfolio upward by R3 million. Shortly thereafter, its board of directors distributed the R3 million as a dividend.

REQUIRED

Marks

Discuss the legality of the dividend distributed by Smugglers (Pty) Ltd in respect of the fixed asset revaluation.

(10)

(Adapted – Gowar & Jackson 2012)



Feedback on activity 4

In terms of the legal concept of divisible profits, the revaluation of the fixed assets may be distributed, provided competent valuers made the valuation in good faith. In this case, it appears that the revaluation was not carried out in the required manner. The increase is of a permanent nature and the company's MOI does not prohibit the distribution.

In terms of section 46, a company must not make any proposed distribution unless ...

- it was pursuant to an existing legal obligation or court order (in this case it was not).
- the board has authorised the distribution.
- it appears that the company will satisfy the solvency and liquidity test immediately after making the distribution.

The board must state in the resolution that they have considered the solvency and liquidity test and reasonably concluded that the company would satisfy the requirements after the distribution.

The distribution must have taken place in full within 120 business days of the resolution, or the directors must reperform and acknowledge the performance of the solvency and liquidity test.

As it appears as though the holding company may be putting pressure on its subsidiary (Smugglers [Pty] Ltd), the directors of the subsidiary should act with caution. They need to be absolutely certain that they are acting in the best interests of the subsidiary and in good faith, and that they are complying with the requirements of section 46, particularly in performing the solvency and liquidity test.

A director who was present at the meeting, or took part in the decision-making, will be liable for losses suffered by the company if that director failed to vote against the resolution knowing that the distribution was contrary to section 46.

4.1.7 Company or subsidiary acquiring company shares (sec 48)

May a company buy back its own shares? (Note: This is not the same action as a company issuing shares to itself, which is prohibited.)

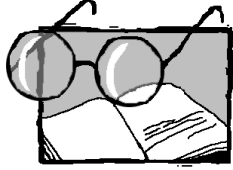
Yes, provided that the requirements of **section 46** (distributions) and those of **section 48 [sec 48(2) (a)]** are met.

The board may determine that the company should acquire a number of its own shares. However, the board decision must be approved by a special resolution of the shareholders of the company if the company is to acquire any shares from a director or prescribed officer of the company, or a person related to a director or prescribed officer of the company.

May a subsidiary of a company buy the shares of that company?

Yes, provided that:

- No more than 10%, in aggregate, of any class of shares is held by all the subsidiaries taken together.
- Voting rights attached to those shares may not be exercised **[sec 48(2) (b)]**



Study

Study section 48 of the Companies Act.

Summary

In this study unit, we explained and applied the requirements for the capitalisation of profit companies in terms of the Companies Act.



Self-assessment

After having worked through the study unit and the references to the prescribed study material, you should be able to do the following:

Give advice, discuss concerns, and apply the requirements for the capitalisation of profit companies, including the legal nature of company shares and the requirement to have shareholders, authorisation for shares, and the sections related to shares, distributions, capitalisation shares, and the company or subsidiary acquiring company shares in scenarios.

Study unit 4.2

Securities registration and transfer

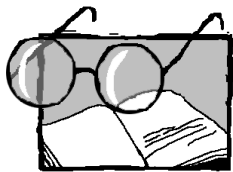


Introduction

This study unit will give you an overview of the registration and transfer of securities.

4.2.1 Securities registration and transfer (sec 49–56)

Section 49 provides that securities must be evidenced by certificates, but they may also be without any certificates. Certificated means evidenced by a certificate, while uncertified means that no certificates have been issued. **Section 50** provides that every company must establish a register of its issued securities in the prescribed form and maintain such register according to prescribed standards (refer to **Regulation 32** for the form and standards). **Section 51** stipulates the information that must be included in a certified security certificate and the information that must be entered in the security register when a transfer takes place. **Section 56** provides for a company's issued securities to be held and registered in the name of one person for the beneficial interest of another person.



Study

Study sections 49 to 56 of the Companies Act.

Summary

In this study unit, we explained and applied the requirements for the registration and transfer of securities in terms of the Companies Act.



Self-assessment

After having worked through the study unit and the references to the prescribed study material, you should be able to do the following:

Give advice, discuss concerns, and apply the requirements for securities registration and transfer in scenarios.

Study unit 4.3

Governance of companies



Introduction

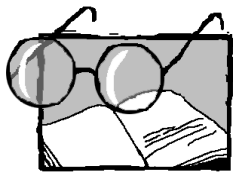
This study unit discusses the way in which a company is governed. It includes matters such as shareholders and their voting rights, the conducting of meetings and shareholders' resolutions.

4.3.1 Shareholders and voting rights (sec 57)

Take note that a shareholder is entitled to exercise any voting rights in relation to a company, irrespective of the form, title or nature of the securities (shares) to which those voting rights are attached.

Section 57 furthermore provides for the way in which voting rights will be exercised in instances where, in a profit company (other than a state-owned company), there is only one shareholder or only one director, and another instance where every shareholder is also a director of the company.

It also provides that the governance requirements in sections 59 to 65 do not apply where a profit company (other than a state-owned company) has only one shareholder. For example, the requirements for notice, quorum and conduct at meetings will not apply.



Study

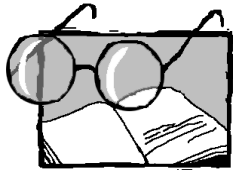
Study section 57 of the Companies Act.

4.3.2 Proxies, quorums, notice of meetings and conducting of meetings (sec 58, 62 and 63)

The requirements for the above should be studied, as they form part of the steps in passing ordinary or special resolutions.

What is an ordinary resolution?
What is a special resolution?

Study the definitions of these terms found in section 1 of the Act; note how these two types of resolutions differ from each other. You need to remember that a special resolution requires a higher percentage of voting rights than an ordinary resolution would. This will be discussed in more detail in study unit 4, section 4.3.3.



Study

Study sections 58, 62 and 63 of the Companies Act.



Activity 5

TechNet (Pty) Ltd is a large computer services firm that specialises in the implementation of computer networks. As would be expected, TechNet (Pty) Ltd uses leading-edge technology and its own financial and related systems are fully integrated. The company has fifteen ordinary shareholders.

Daniel Buys has informed Nancy Loopis of his intention to raise additional finance amounting to R5 000 000 for the company by issuing further ordinary shares. The company's only authorised share capital comprises 100 000 ordinary shares that have no par value. However, these shares have already been issued in full. Daniel Buys has therefore asked Jolly & Hills for advice in this regard, particularly about the requirements relating to the issue contained in the Companies Act. It is *intended that the directors of TechNet (Pty) Ltd be offered shares*. None of the directors currently holds shares. The company's MOI prohibits shareholders' meetings from being held via electronic means.

REQUIRED

Marks

Discuss the sections of the Companies Act, 2008, with which TechNet (Pty) Ltd will need to comply in respect of the proposed issue, but *only in terms of the requirements applicable to the shareholders' meeting to be held*. You must deal with all matters pertaining to the meeting, for example, the quorum, resolution, notice, etc. You will also have to apply section 65 that relates to section 4.3.3 of the tutorial letter.

(21)

(Adapted – Gowar & Jackson 2012)



Feedback on activity 4

As there is a need to hold a shareholders' meeting, the board will have to provide all shareholders with written notice ...

- of the date, time and place of the meeting.
- of the specific purpose of the meeting (to issue shares) (A copy of the resolution must be provided.).
- of the percentage of voting rights required for the resolution (special resolution).
- that a shareholder, who is entitled to vote, may appoint a proxy (this must be reasonably prominently displayed on the notice).
- that satisfactory identification will be required from shareholders to attend.

This notice must be given at least 10 business days before the meeting will be held. (The MOI may stipulate a longer or shorter notice period.)

The meeting to pass this resolution may only begin if 25% of the voting rights entitled to be voted in respect of at least one matter to be decided at the meeting (there may be other matters to be covered at the meeting) are present.

For the debate to commence on the share issue resolution, holders of at least 25% of the shares entitled to vote in respect of the share issue must be present when the matter is called on the agenda. For TechNet (Pty) Ltd, it means that holders of at least 25% of the (existing) ordinary shares need to be present. (Note: The MOI may stipulate lower percentages.)

The previous paragraph deals with a voters' quorum. In addition, as TechNet (Pty) Ltd has more than two shareholders, the meeting may not begin or a matter be debated, unless at least three shareholders are present at the meeting.

At the commencement of the meeting, shareholders' identities as well as their right to attend or participate must be verified. The person presiding over the meeting must be satisfied with the validity of the shareholders' identities.

The proposed resolution must be sufficiently clear and specific. It must also be accompanied by sufficient information to enable a shareholder to decide whether to participate in the meeting and "influence the outcome" of the vote on the resolution or not.

For the (special) resolution on the share issue to be passed, at least 75% of the voting rights exercised on the resolution must support it. (Note: The MOI may stipulate a lower [or higher] percentage, but the difference between the percentage for an ordinary and a special resolution must be at least 10%.)

Voting should be by poll (not by a show of hands). Voting by poll enables those shareholders with larger shareholdings to exercise greater influence on the vote.

4.3.3 Shareholders' resolutions (sec 65)

Shareholders' resolutions can be one of the following:

✓ **Ordinary resolutions**

In terms of the definitions given in section 1, an ordinary resolution 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 section 65(8).

Or

✓ **Special resolutions**

In terms of the definitions given in section 1, a special resolution means 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).

A company's Memorandum of Incorporation may permit:

- (a) A different percentage of voting rights to approve any special resolution; or
- (b) One or more different percentages of voting rights to approve special resolutions concerning one or more particular matters, respectively, provided that a margin of at least 10 percentage points must be maintained at all times 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.

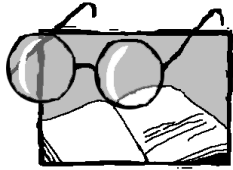
When is a special resolution needed?

A special resolution is required to ...

- (a) amend the company's Memorandum of Incorporation to the extent required by section 16(1)(c) and section 36(2)(a)
- (b) ratify a consolidated revision of a company's Memorandum of Incorporation, as contemplated in section 18(1)(b)
- (c) ratify actions by the company or directors in excess of their authority, as contemplated in section 20(2)
- (d) approve an issue of shares or grant of rights in the circumstances contemplated in section 41(1)
- (e) approve an issue of shares or securities as contemplated in section 41(3)
- (f) authorise the board to grant financial assistance in the circumstances contemplated in section 44(3)(a)(ii) or 45(3)(a)(ii)
- (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 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
- (m) revoke a resolution contemplated in section 164(9)(c)

The section numbers referred to in the above paragraph are the sources for the particular special resolution requirements. Since some sections referred to are not listed on pages 6 and 7 of this tutorial letter, it will not be necessary for you to discuss, for example, the requirement for a special resolution in instances such as in (b), (i), (j), (k) and (m) in the examination.

Take note that in terms of the Act, sections 57, 59 and 61 to 65, which relate to this topic, are alterable.



Study

Study section 65 of the Companies Act.

Summary

In this study unit, we explained and applied the requirements regarding governance of companies, including the meeting requirements regarding notices, quorums and voting relating to special resolutions in terms of the Companies Act.



Self-assessment

After having worked through the study unit and the references to the prescribed study material, you should be able to do the following:

Give advice, discuss concerns, and apply the requirements for the governance of companies, including the meeting requirements in respect to notices, quorums and voting relating to special resolutions, in scenarios.

Study unit 4.4

Public offerings of company securities



Introduction

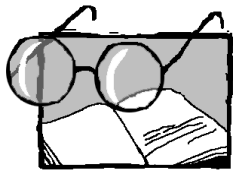
The sections that are dealt with in this study unit are to be studied at level 1. This means that you will not be required to give advice, discuss concerns and apply the requirements for the matters included in this study unit, as set out in the Companies Act.

4.4.1 Public offerings of company securities (sec 96, 97, 99 and 100–111)

Since share offers to the public are restricted (section 99), section 96 lists the instances where an offer is not an offer to the public and where restrictions will not apply. Section 97 provides for standards for qualifying employee share schemes; exemptions, for which an employee share scheme qualifies, are contemplated in sections 42(2)(d), 44(3)(a)(i) or 45(3)(a)(i). The first section refers to shareholder approval (special resolution) that is not required if the issue is pursuant to an employee share scheme, while the second and last sections refer to the board's authorisation of financial assistance if it is pursuant to an employee share scheme.

Section 100 lists the requirements for a prospectus and further provides that every prospectus is subject to the requirements of sections 102 to 111. In order to understand some of the phrases used in the sections listed above, you will have to study the definitions in section 95. For example, section 100(1) provides that the requirements for a prospectus do not apply to listed securities, except listed securities that are the subject of an initial public offering. The definition of the latter is included in section 95(1)(e).

Section 104 provides for liability for untrue statements in the prospectus. It refers to four parties that may be liable to compensate any person, who acquired securities on the faith of the prospectus, for any loss or damage the person may have sustained as a result of any untrue statement in the prospectus. Section 105 provides for liability of experts and others. According to the definition of an expert in terms of section 95, it includes, for example, an accountant or an auditor.



Study

Study sections 96, 97, 99, and 100 to 111 of the Companies Act on level 1.

Summary

In this study unit, we explained and applied the requirements for public offerings of company securities in terms of the Companies Act.



Self-assessment

After having worked through the study unit and the references to the prescribed study material, you should be able to

have basic knowledge and understanding of the requirements for public offerings of company securities in terms of the Act, in scenarios.

CONCLUSION

In this topic about **shareholders and shares**, we explained and applied the requirements regarding capitalisation of profit companies, securities registration and transfer, governance of companies, and public offerings of company securities in terms of the Companies Act .

5. TOPIC 5 - DIRECTORS

Topic overview

The Companies Act provides that a company's board of directors must manage the business and affairs of that company. A **director** is a member of the body of people that manages a company. All the directors of a company together, are referred to as the **board of directors**. The board of directors of a company has the authority to exercise all of the powers and perform any of the functions of the company (except to the extent that the Act or the company's MOI provides otherwise). The Act and Memorandum of Incorporation (MOI) can restrict the powers of the board of directors and, for instance, ensure that:

- For certain transactions, the directors cannot act alone.
- Certain matters be referred to the shareholders of a company for consideration and approval.

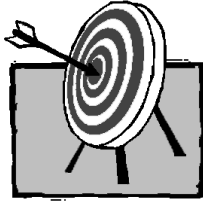
The topic deals with the board, directors and prescribed officers, their appointment and removal, board meetings, directors having a financial interest in a matter, standards of directors' conduct, directors' liability, indemnification and insurance. This is a very important topic.

Topic 5 is divided into the following study units:

Study unit	Title	Page
5.1	The board, directors and prescribed officers, election, ineligibility and disqualification, and vacancies (sec 66–71)	50
5.1.1	The board, directors and prescribed officers (sec 66)	51
5.1.2	Election and removal of directors (sec 67–71)	51
5.2	Board committees, meetings and directors acting other than at meetings (sec 72–74)	54
5.2.1	Board committees (sec 72)	55
5.2.2	Board meetings/directors' meetings (sec 73)	55
5.2.3	Directors acting other than at board meetings (sec 74)	57
5.3	Directors' personal financial interests (sec 75)	58
5.3.1	Directors' personal financial interests (sec 75)	58
5.4	Standards of directors' conduct, liability of directors and prescribed officers, indemnification and directors' insurance (sec 76–78)	60
5.4.1	Standards of directors' conduct (sec 76)	61
5.4.2	Liability of directors and prescribed officers (sec 77)	64
5.4.3	Indemnification and directors' insurance (sec 78)	65

Textual amendments and additions

Before you proceed with the study of this topic, please refer to Tutorial Letter 104 for this module to acquaint yourself with any textual amendments and additions that may have been indicated.



Learning outcomes

Study unit	In this topic, we will focus on the following learning outcomes:	Level
5.1 The board, directors and prescribed officers, election, ineligibility and disqualification, and vacancies.	Give advice, discuss concerns and apply the requirements for directors' appointment and removal, and vacancies in scenarios.	3
5.2 Board committees, meetings and directors acting other than at meetings.	Give advice, discuss concerns and apply the requirements for board committees and their meetings in scenarios.	3
5.3 Directors' personal financial interests	Give advice, discuss concerns and apply the requirements for directors' personal financial interests in scenarios.	3
5.4 Standards of directors' conduct, liability of directors and prescribed officers, indemnification and directors' insurance	Give advice, discuss concerns and apply the requirements for: standards of directors' conduct; the liability of directors and prescribed officers; and indemnification and directors' insurance in scenarios.	3

Study unit 5.1

The board, directors and prescribed officers, election, ineligibility and disqualification, and vacancies



Introduction

A **director** is a member of the board of people that manages a company. Together, the directors of a company are called the **board of directors**.

In this study unit, we will look at the number of directors that the different types of companies are required to appoint, as well as those persons ineligible or disqualified from being appointed as directors. This study unit also deals with the process for electing directors to and removing them from the board.

5.1.1 The board, directors and prescribed officers (sec 66)

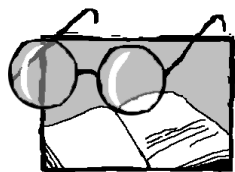
This section deals with the board, directors and prescribed officers. In terms of the definition in section 1, a director is a member of the board of a company or an alternate director (person appointed to act on behalf of a director).

The minimum number of directors required for different types of companies is indicated in the table below.

Type of company (as explained in topic 7.3 of this tutorial letter)	Minimum number of directors
Private company [(Pty) Ltd]	1
Incorporated company (Inc)	1
Public company (Ltd)	3
State-owned company (SOC Ltd)	3 (refer to sec 9(1))
Not-for-profit company (NPC)	3

The MOI may specify a higher number of directors. The MOI of a profit company (other than a state-owned company) requires that the shareholders should elect at least 50% of the directors to be appointed (including alternates). Any other person stipulated in the MOI may appoint the remaining directors.

A director's remuneration for services as a director must be approved by a special resolution adopted within the previous two years.



Study

Study section 66 of the Companies Act.

5.1.2 Election and removal of directors (sec 67–71)

The diagram below illustrates the election and removal of directors. Persons who are ineligible or disqualified from being directors may not be appointed. Take note that shareholders may remove a director (sec 71(1)) and that certain steps must then be followed (sec 72(a) & (b)). In some circumstances, the board of directors may remove a director (sec 71(3)–(5)).

Incorporators = First directors **[sec 67(1)]**

Will serve until sufficient other directors have been appointed **[sec 67(1)]**

Appointment of directors

- Elected by shareholders
- Voted on separately
- Serve for indefinite term (or as set out by Memorandum of Incorporation) **(sec 68)**

Note: The Memorandum of Incorporation may set out additional grounds for ineligibility or disqualification.

Ineligible **[sec 69(7)]**

- A juristic person
- An unemployed minor (or under a similar legal disability)
- A person not meeting the requirements of the Memorandum of Incorporation, if any

Disqualified **[sec 68(8)]**

Prohibited by a court
Declared delinquent by a court
Unrehabilitated insolvent
Prohibited in terms of public regulation
Removed from office due to misconduct that involved dishonesty
Convicted and imprisoned without option of a fine for theft, fraud, forgery, perjury or other offences **(sec 69)**.

Removal of directors **(sec 71)**

Where a shareholder or director alleges that a fellow director **[sec 71(3)(a), (b)]**:

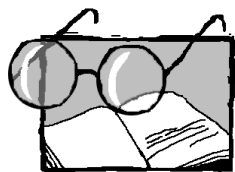
- has become ineligible or disqualified
- is incapacitated to perform as a director
- neglected his/her duty or have been derelict as director

then

- The board must consider this allegation **[sec 71(4)]**.
- The board may vote on the removal of the director.
- The director may not vote on his/her removal **[sec 71(3)]**.
- The director must still be given notice and an opportunity for representation **[sec 71(4) (a), (b)]**.
- The director may apply (within 20 days) to a court for a review **[sec 71(5)]**.

- May be removed by ordinary resolution, unless stated otherwise in the Memorandum of Incorporation **[sec 71(1)]**
- Must be given notice of the meeting and resolution to remove him **[sec 71(2) (a)]**
- Must be afforded the opportunity to make a presentation to the meeting before voting takes place **[sec 71(2) (b)]**

Note: This cannot apply to companies with fewer than three directors.



Study

Study sections 67 to 71 of the Companies Act.



Activity 1

Canyon (Pty) Ltd is a private company in the paint wholesaling business. John Wayne, the newly appointed chief executive officer, is keen to improve the company's corporate governance. He has approached you for some advice on various aspects of the Companies Act, 2008, which directly affect governance.

John Wayne informs you that since he has joined the company, he has been somewhat concerned about the attitude and performance of one of the directors, Doc Hudson. He wants to know whether Doc Hudson can be removed from his position as a director and if so, what procedures will have to be followed. John Wayne is aware that Doc Hudson will not resign his directorship. The company has six directors in total.

Canyon (Pty) Ltd's Memorandum of Incorporation is consistent with the Companies Act, 2008, and contains no variations regarding quorums, notice periods, approval of resolutions, appointments of directors, etc. The company has twenty shareholders.

REQUIRED

Marks

Advise John Wayne on whether Doc Hudson can be removed from his position as a director of Canyon (Pty) Ltd. Do not include meeting requirements in your answer.

(8)



Feedback on activity 1

If the MOI contained a clause that designated an individual such as John Wayne, in his capacity as CEO, the power to remove a director (like Doc Hudson) from the board of the company, that power could be exercised.

Doc Hudson can also be removed by an ordinary resolution of the shareholders at any general meeting.

Doc Hudson may also be removed if a shareholder or fellow director (for example, John Wayne) alleges, inter alia, that he has been negligent or derelict in his duties as a director. The board must consider the allegation and vote on his removal.

Irrespective of the "method" used to remove Doc Hudson, he must be afforded the chance to defend himself, and ...

- he must be given notice of the meeting (10 business days) and a copy of the resolution to remove him.
- he must be afforded a reasonable opportunity to make a presentation (in person or through a representative) before voting takes place.

If the board has to remove Doc Hudson, he may not vote on his removal. For the removal resolution to be accepted, the majority of directors voting would need to vote in favour.

If Doc Hudson is removed by the board, he has 20 business days to go to court for a review.

If he is **not** removed, any director or shareholder who voted to have him removed, may go to court for a review (20 business days).

Summary

In this study unit, we explained and applied the requirements regarding the board, directors and prescribed officers, election, ineligibility and disqualification, and vacancies in terms of the Companies Act.



Self-assessment

After having worked through the study unit and the references to the prescribed study material, you should be able to do the following:

Give advice, discuss concerns, and apply the requirements regarding the board, directors and prescribed officers, election, ineligibility and disqualification, and vacancies in scenarios.

Study unit 5.2

Board committees, meetings and directors acting other than at meetings



Introduction

A board committee is a committee formed to perform specific functions of the board. This study unit deals with board committees and board/directors' meetings.

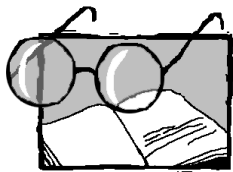
5.2.1 Board committees (sec 72)

Section 72 of the Companies Act provides that, except when the MOI provides otherwise, the board of directors may appoint any number of committees and may delegate any of the authority of the board to a committee. The board is responsible for performing its duties properly, and a director or the board cannot use the appointment of a committee as a shield against their own responsibility (sec 72(3)).

The audit committee is one of the possible committees that can be formed, and it has an important function to fulfill. In terms of section 94 of the Companies Act, it is compulsory for a public company and a state-owned company to have an audit committee. The King III report (a report on corporate governance that is prescribed in South Africa) recommends that all other companies also appoint an audit committee and define its composition, purpose and duties in the MOI.

You are not required to study the material on the appointment of a social and ethics committee set out in sections 72(4) to (10).

Section 94(7) of the Companies Act 2008 stipulates the duties of the audit committee of a public/state-owned company. King III confirms and expands on these duties. You are not required to study King III, however. Audit committees as such are discussed in topic 6; they are merely mentioned here as one of the possible committees that a company may appoint.



Study

Study section 72 of the Companies Act.

5.2.2 Board meetings/directors' meetings (sec 73)

Section 73 provides that a director, authorised by the board (unless a company's MOI provides otherwise).

- May call a meeting of the board at any time; and
- Must call such meeting if required to do so by at least ...
 - 25% of the directors (where the board consists of at least 12 members); or
 - two directors, in any other case.

Section 73 also provides that, unless the Companies Act or a company's MOI provides otherwise ...

- a meeting of the board may be conducted by electronic communication; and
- one or more directors may participate in a meeting by means of electronic communication, as long as all persons participating in that meeting are able to communicate effectively and concurrently with each other without an intermediary.

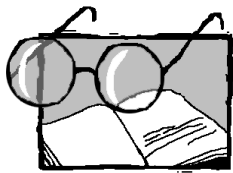
A meeting of the board must be convened by means of a notice to all directors. (An exception to this requirement is included in sec 73(5)(a).)

The company's board may determine the form of and time for giving notice (of a meeting) as long as these comply with any requirements included in the company's MOI or rules.

Except to the extent that the company's MOI provides otherwise, section 73(5)(a–d) provides certain requirements that have to be met at board meetings, including the voting rights of each director.

Section 73 also provides for the keeping of the minutes of meetings.

Directors should keep a written record of how and why they voted for matters at board meetings. This requirement flows from their duties and possible liabilities in terms of sections 76 and 77, respectively.



Study

Study section 73 of the Companies Act.



Activity 2

Answer the following questions:

- 1 Is the following statement true or false? A resolution at a directors' meeting will be approved if 50% of the directors vote in favour of the resolution. (1½)
2. What is the quorum for a directors' meeting where the company has ...
 - 2.1 two directors?
 - 2.2 three directors?
 - 2.3 nine directors?
 - 2.4 twelve directors? (2)
3. When the directors of a public company have a meeting, the following individuals cannot be included in determining the quorum for that meeting. Indicate "true" or "false", and give a reason for your choice.
 - 3.1 Company secretary.
 - 3.2 Independent non-executive chairperson.
 - 3.3 Other non-executive directors.
 - 3.4 The chief audit executive (head of internal audit). (4)



Feedback on activity 2

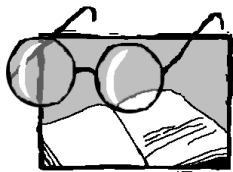
- 1 False: For a resolution to be approved at a directors' meeting, a majority of the votes cast must be in favour. If 50% of the directors vote in favour and 50% vote against, the vote is tied. If this occurs, the chairperson will have a casting vote

but only if he or she (the chairperson) initially did not have a vote or did not cast a vote. (The chairperson does not get 2 votes.)

2. 2.1 Two directors.
 2.2 Two directors.
 2.3 Five directors.
 2.4 Seven directors.
3. 3.1 True: Not a director.
 3.2 False: The chairman is a director (non-executive directors have the same status as executive directors).
 3.3 False: All (properly appointed) directors, executive or otherwise, can form part of the quorum.
 3.4 True: The chief audit executive is not a director.

5.2.3 Directors acting other than at board meetings (sec 74)

Except where the MOI of a company provides otherwise, section 74 provides that a decision, which could be voted on at a board meeting, may instead be adopted by the written consent of a majority of the directors, given in person, or by electronic communication, provided that each director received notice of the matter to be decided. A decision taken in such way has the same effect as if it had been approved by voting at a meeting.



Study

Study section 74 of the Companies Act.

Summary

In this study unit, we explained and applied the requirements regarding board committees, meetings, and directors acting other than at meetings in terms of the Companies Act.



Self-assessment

After having worked through the study unit and the references to the prescribed study material, you should be able to do the following:

Give advice, discuss concerns, and apply the requirements regarding board committees, meetings, and directors acting other than at meetings, in scenarios.

Study unit 5.3

Directors' personal financial interests



Introduction

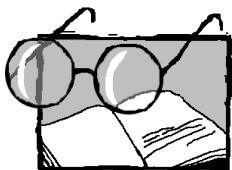
In section 75 of the Companies Act a director's personal financial interests are specifically dealt with. This section provides that if a director's personal interests are in conflict with those of the company, the director should disclose the conflict of interest in the manner described in section 75.

5.3.1 Directors' personal financial interests (sec 75)

The Act sets out procedures that a director should follow in order to disclose his or her personal financial interest or that of a person related to him or her, in respect of any matter the board must consider. Study the definition of the term "personal financial interest" in **section 1**.

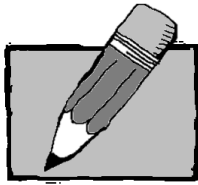
If a director of a company has a personal financial interest in a matter to be considered at a board meeting, or knows that a person related to him or her has a personal financial interest in the matter, the director must make certain specified disclosures. Immediately after disclosing this information, the director must leave the meeting and may not take part in any consideration of the matter.

A decision of the board or a transaction or agreement that the board has approved is valid despite any personal financial interest of a director or person related to the director. However, it is valid only if it was approved following disclosure; or despite having being approved without disclosure if it has subsequently been ratified by an ordinary resolution of the shareholders following disclosure of that interest or after having been declared valid by a court.



Study

Study section 75 of the Companies Act.



Activity 3

You are the auditor of Craft (Pty) Ltd, a manufacturing company in the marine engineering sector. The Memorandum of Incorporation contains, inter alia, the following clause:

Any director or prescribed officer of the company who has a personal financial interest in a contract into which this company has entered or will enter, either directly or indirectly, shall comply with the Companies Act, 2008. The contract will be binding, provided that the authority of the company in general meetings is obtained by poll for the contract, prior to the contract being entered into.

Your scrutiny of the minutes of directors' meetings reveals that the company entered into a contract with Marine (Pty) Ltd for the purchase of 10 highly sophisticated and expensive radar systems valued at approximately R1 million each. Tony Teak is a director of Craft (Pty) Ltd and his brother Terry is the majority shareholder of Marine (Pty) Ltd.

REQUIRED

Marks

Discuss the requirements of the Companies Act, 2008, relating to the contract that Craft (Pty) Ltd entered into with Marine (Pty) Ltd, particularly in view of the relationship between Tony and Terry Teak.

(12)



Feedback on activity 3

In terms of the Companies Act (sec 76), the following holds true:

- Tony Teak, as a director of Marine (Pty) Ltd, should not have used his position of director, or any information obtained while acting as a director, to gain advantage for himself or for another party (his brother Terry). He must act **for the company**, for example, he should not pass confidential information on to Terry about the price that Marine (Pty) Ltd is prepared to pay for the radar systems.
- Tony Teak should have communicated to the board of Craft (Pty) Ltd at the earliest practicable opportunity, any information that was material to Marine (Pty) Ltd. (For example, it would be important for the board to know that Tony and Terry are related, as a R10 million deal could be influenced by their relationship.)
- Tony Teak must perform his function and exercise his powers as a director at all times ...
 - in good faith; and
 - in the best interests of the company

In effect, Tony Teak has a conflict of interest (the company or his brother?).

In terms of the Companies Act (sec 75), if Tony Teak had a personal financial interest in the matter to be considered at a meeting of the board (purchase of the radar systems), or had known that a **related** person had a personal financial interest, he should have ...

- disclosed the interest and its general nature before the matter was considered at the meeting.
- disclosed to the meeting any material information relating to the purchase, which was known to him.
- disclosed any observations of or pertinent insights into the matter if he had been requested to do so by the other directors.
- left the meeting (if he was present) immediately after having made the disclosures to the meeting.
- taken no further part in the meeting.
- had no right to vote on the decision.

As Tony and Terry Teak are brothers and they are within two degrees of consanguinity, they are regarded as related for the purposes of the Companies Act.

The information need only be disclosed if it is material (sec 76(2)(b)). A R10 million contract would be regarded as material.

Summary

In this study unit, we explained and applied the requirements regarding directors' personal financial interests in terms of the Companies Act.



Self-assessment

After having worked through the study unit and the references to the prescribed study material, you should be able to do the following:

Give advice, discuss concerns, and apply the requirements regarding directors' personal financial interests, in scenarios.

Study unit 5.4

Standards of directors' conduct, liability of directors and prescribed officers, indemnification and directors' insurance



Introduction

The Act lays down certain common-law duties and additional statutory duties of directors. This study unit deals with these duties as well as instances in which a director and prescribed officer may be held liable for losses suffered by the company.

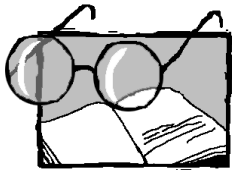
5.4.1 Standards of directors' conduct (sec 76)

A director of a company must exercise the powers and the functions of a director in good faith and in the best interest of the company, and must act with a certain degree of care, diligence and skill. The section also extends the duty to apply to a subsidiary.

Directors, for the purpose of this section, include prescribed officers and members of board committees.

The most important statutory duties that directors owe to their company, are to ...

- act in good faith and for a proper purpose.
- act in the best interests of the company.
- avoid using their position as director or using corporate information to their own advantage or knowingly cause harm to the company or its subsidiary.
- convey the company information that may be of importance to the company.
- exercise reasonable care, skill and diligence in the performance of their duties.
- declare any personal financial interest in a matter in which the company is interested (refer to sec 75).



Study

Study section 76 of the Companies Act.



Activity 4

The shareholders of Tracshion Ltd, a large electronics company specialising in tracking systems in vehicles, have recently appointed a friend of yours named Carmen de Villiers. The company is not listed. Carmen de Villiers is technically well qualified and is considered an important individual with regard to the future of the company, particularly its research and development programmes.

However, Carmen de Villiers has not filled the role of a company director before, and although she is excited about her promotion, she is concerned about her responsibilities as a director, particularly in terms of the Companies Act, 2008. She has heard that the Act contains sections dealing with standards of directors' conduct and is afraid that if she does not perform, she will be removed from the board and dismissed from the company. She has also heard that the

chairperson of the board can put her on probation as a director or that she can be declared delinquent. She has put the following questions to you:

1. Can I be removed from the board and dismissed from the company if I do not perform as a director? (6)
2. If I think things are not going well, may I resign as a director without leaving the company? (2)
3. What are the standards of conduct with which I must comply as a director? (13)
4. Can the chairperson put me on probation? (3)
5. Is there anyone in the company that I can officially approach to help me understand my duties and responsibilities? (3)

REQUIRED

Marks

Respond to Carmen de Villiers' questions.

(27)



Feedback on activity 4

You should have responded as follows:

1.
 - 1.1 Yes, you can be removed from the board.
 - 1.2 However, this does not mean that you will be dismissed from the company – being on the board is a role to which you are elected over and above your employment by the company for your skills in the electronics field. As Tracshion Ltd regards your research and development skills as important, it is highly unlikely that the company will dismiss you.
 - 1.3 Certain Companies Act requirements must also first be satisfied before the board may remove you as a director.
 - 1.3.1 If the shareholders wish to remove you, they must pass an ordinary resolution to do so. This means that a majority of the voting rights held by the shareholders, who had the right to vote on your appointment, must support your removal.
 - 1.3.2 However, if the shareholders intend to remove you, they must give at least 10 business days' notice of the meeting and that they are intending to remove you.
 - 1.3.3 Before the meeting votes on your removal, the shareholders should give you or your representative a reasonable opportunity to make a presentation on your removal. (Note: The MOI may stipulate a longer or shorter notice period.)
 - 1.4 The shareholders will not take a decision lightly to remove you. Remember, they have appointed you.
 - 1.5 You should perhaps also bear in mind that if you are negligent or derelict in your duties, the board might resolve to remove you. Negligence or dereliction of your duties is a serious matter, but if you comply with the standards of director conduct (which is not difficult to do), there is no chance of this happening. Even in this situation, you would still be allowed to make representations, and a majority of the directors would have to support your removal.
2.
 - 2.1 Yes. Your appointment as a director is an action separate from your employment contract.

- 2.2 You may resign at any time by giving written notice to the board.
 - 2.3 Your company's Memorandum of Incorporation may have other requirements for resignation of a director, but these are unlikely to be very onerous, for example, minimum notice periods.
 - 2.4 Within 10 business days of your resignation, the company (not you) will need to notify the Commission (CIPC) of your resignation.
3. The standards are laid out in section 76 and are quite clear:
- 3.1 Firstly, you may not use the position of director, or any information obtained while acting in the capacity of director, to
 - gain an advantage for yourself or any other person; or
 - knowingly cause harm to the company (For example, when hearing at a board meeting that the company is going to call for tenders for a large contract, you may not pass any confidential information about the tender to a friend who is tendering for that contract.)
 - 3.2 Secondly, you must communicate to the board at the earliest practical opportunity, any information that comes to your attention (about the company), unless you
 - believe the information is immaterial to the company
 - believe the information is generally known to the public or other directors
 - would be breaching a legal or ethical obligation of confidentiality (For example, you may have information about technical developments in your field, which might affect Tracshion Ltd's business strategy.)
 - 3.3 Thirdly, you are required to exercise the powers and perform the duties of a director
 - in good faith and for proper purpose
 - in the best interests of the company
 - with the degree of care, skill and diligence that may be reasonably expected of a person performing the same functions as a director
 - having a general knowledge, skill and experience of that director
 - 3.4 Essentially this will require you to
 - take reasonably diligent steps to become informed about matters serving before the board
 - have a rational basis for supporting a board decision and believing it was in the best interests of the company (In other words, you must be able to justify your decision when voting on a matter before the board.)
 - 3.5 You are not expected to be "experienced". You are a new director but you will need to be conscientious, diligent, enquiring, and willing to learn.
 - 3.6 A particularly important aspect of point 3.3 is that if you or anyone related to you (as defined), for example, your husband, has any personal financial interest in any matter brought to the board, or which you think the company should know about anyway, you should notify the board of the nature of the interest. For example, if Tracshion Ltd was proposing to enter into a contract with a company in which your husband is a shareholder, the board must be informed. If you are not sure what needs to be disclosed, err on the side of caution; it is wiser to disclose than to keep quiet.
 - 3.7 As a director, in making decisions, you are entitled to rely on other people who provide information, reports, or opinions to the board, for example, employees, accountants, and legal counsel, unless you have reason to believe they are not reliable or competent.
4. 4.1 No, it is only the court that can declare a director under probation. No chairperson may take this decision.

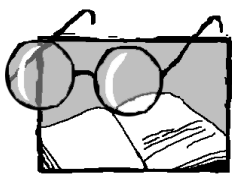
- 4.2 However, the company, a shareholder, a director, company secretary, or a trade union representative (or similar representative) can apply to the court to have a director declared "on probation".
 - 4.3 Certain company regulatory bodies can also make such an application to the court.
 - 4.4 Being declared "on probation" is not an everyday occurrence for directors and is not something you need to worry about if you comply with the required standards. In any event, if things are not going well, you can resign! In a sense, probation is a last option.
- 5. 5.1 You are fully entitled to seek advice from the chairperson of the board, or from any other director.
 - 5.2 You are also entitled to seek assistance from individuals not on the board, as long as you do not breach confidentiality.
 - 5.3 However, the best person to assist you in this regard will be the company secretary of Tracshion Ltd. One of the functions of the company secretary stipulated in the Companies Act is to advise directors on their rights, duties and responsibilities.

5.4.2 Liability of directors and prescribed officers (sec 77)

This section deals with instances in which a director and prescribed officer may be held liable for losses suffered by the company. (Two examples are found in sec 77(2)(a) & (b), and another three examples are found in sec 77(3)(a)–(c)). You should study the various instances carefully to be able to apply one or more of them to a scenario. We will not request you to list all the instances found in various subsections of section 77.

In addition to the list of prescribed officers outlined in this section, directors could also be liable to shareholders for fraudulent acts or acts of gross negligence **[refer to sec 20(6)]** or to any third party who has suffered a loss because of directors breaching the Companies Act **[refer to sec 218(2)]**.

Bear in mind that members of board committees and audit committees have the same liability as directors under **section 77**, even if the members of the board committees are not directors and even though they have no right to vote on any matters considered by board committees.



Study

Study section 77 of the Companies Act.



Activity 5

May a company recover loss, damages or costs sustained by the company from the director under the following circumstances? Give reasons for your answer:

The director participated in a resolution approving a distribution (dividends) despite knowing that the distribution was contrary to the provisions of section 46 of the Companies Act.



Feedback on activity 5

Reference: Section 77(3) (e)(vi) of the Companies Act

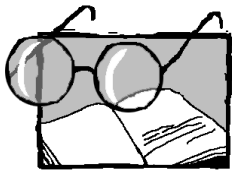
Yes, the company may recover loss, damages or costs sustained by the company from a director, in view of the section mentioned above. This section specifically provides that where directors participated in a resolution approving a distribution (dividends) despite knowing that the distribution was contrary to the provisions of section 46 of the Companies Act, they will be held liable.

5.4.3 Indemnification and directors' insurance (sec 78)

A company may not indemnify (protect against loss or damage) a director against a liability arising from ...

- willful misconduct or breach of trust by the director.
- the director acting without the necessary authority.
- reckless trading.
- trading under insolvent circumstances.
- fraudulent acts of the director.
- a fine relating to an offence committed by the director.

Other than the specific instances mentioned above, a company might indemnify a director against any liability, including the liability arising from the director's negligence. In terms of section 78(7), a company may also purchase insurance to protect a director of the company against any liability in respect of which the company is permitted to indemnify a director.



Study

Study section 78 of the Companies Act.

Summary

In this study unit, you learned about the requirements regarding standards of directors' conduct, liability of directors and prescribed officers, indemnification, and directors' insurance in terms of Companies Act .



Self-assessment

After having worked through the study unit and the references to the prescribed study material, you should be able to do the following:

Give advice, discuss concerns, and apply the requirements regarding standards of directors' conduct, liability of directors and prescribed officers, indemnification, and directors' insurance in scenarios.

CONCLUSION

In this topic about the **standards of directors' conduct, liability of directors and prescribed officers, indemnification, and directors' insurance**, we explained and applied the Companies Act requirements regarding the topic.

6. TOPIC 6 - ENHANCED ACCOUNTABILITY AND TRANSPARENCY

Topic overview

Chapter 3 of the Companies Act, which includes sections 84 to 93, imposes additional accountability and transparency requirements on certain types of companies. These requirements apply to public companies and state-owned companies (that are not exempted from these provisions). Companies may also voluntarily comply with these requirements.

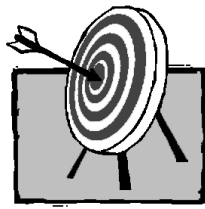
The requirements deal essentially with the appointment of a company secretary (in the manner required in sec 86–89), an auditor (in the manner required in sec 90–93), and an audit committee (in the manner required in sec 94).

Topic 6 is divided into the following study units:

Study unit	Title	Page
6.1	Application and general requirements regarding enhanced accountability and transparency (sec 84 & 85)	67
6.1.1	Registration of company secretary and auditors (sec 84 & 85)	68
6.2	The company secretary, including the mandatory appointment of the company secretary, juristic person or partnership as company secretary, and the duties, resignation or removal of a company secretary (sec 86, 87, 88 & 89)	71
6.2.1	Company secretary (sec 86–89)	72
6.3	Auditors, including the appointment, resignation, rotation, and rights and restricted functions of auditors (sec 90–93)	73
6.3.1	Auditors (sec 90–93)	74
6.4	Audit committees (sec 94)	79
6.4.1	Audit committees (sec 94)	79

Textual amendments and additions

Before proceeding with the study of this topic, please refer to Tutorial Letter 104 for this module to acquaint yourself with any textual amendments and additions that may have been indicated.



Learning outcomes

Study unit	In this topic, we will focus on the following learning outcomes:	Level
6.1 Application of and general requirements regarding enhanced accountability and transparency	<ul style="list-style-type: none"> Give advice, discuss concerns and apply the requirements for the application of and general requirements regarding enhanced accountability and transparency, and vacancies in scenarios. 	3
6.2 The company secretary, including the mandatory appointment of the company secretary, juristic person or partnership as company secretary, and the duties, resignation or removal of a company secretary	<ul style="list-style-type: none"> Give advice, discuss concerns and apply the requirements for the company secretary in scenarios. 	3
6.3 Auditors, including the appointment, resignation, rotation, and rights and restricted functions of auditors	<ul style="list-style-type: none"> Give advice, discuss concerns and apply the requirements for auditors in scenarios. 	3
6.4 Audit committees	<ul style="list-style-type: none"> Give advice, discuss concerns and apply the requirements for audit committees in scenarios. 	3

Study unit 6.1

Application of and general requirements regarding enhanced accountability and transparency



Introduction

This study unit deals with the requirements for appointing a company secretary and an auditor.

6.1.1 Registration of secretaries and auditors (*sec 84 & 85 and Regulation 28*)

Sections 84 and 85 of the Companies Act apply to ...

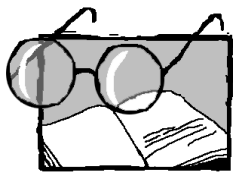
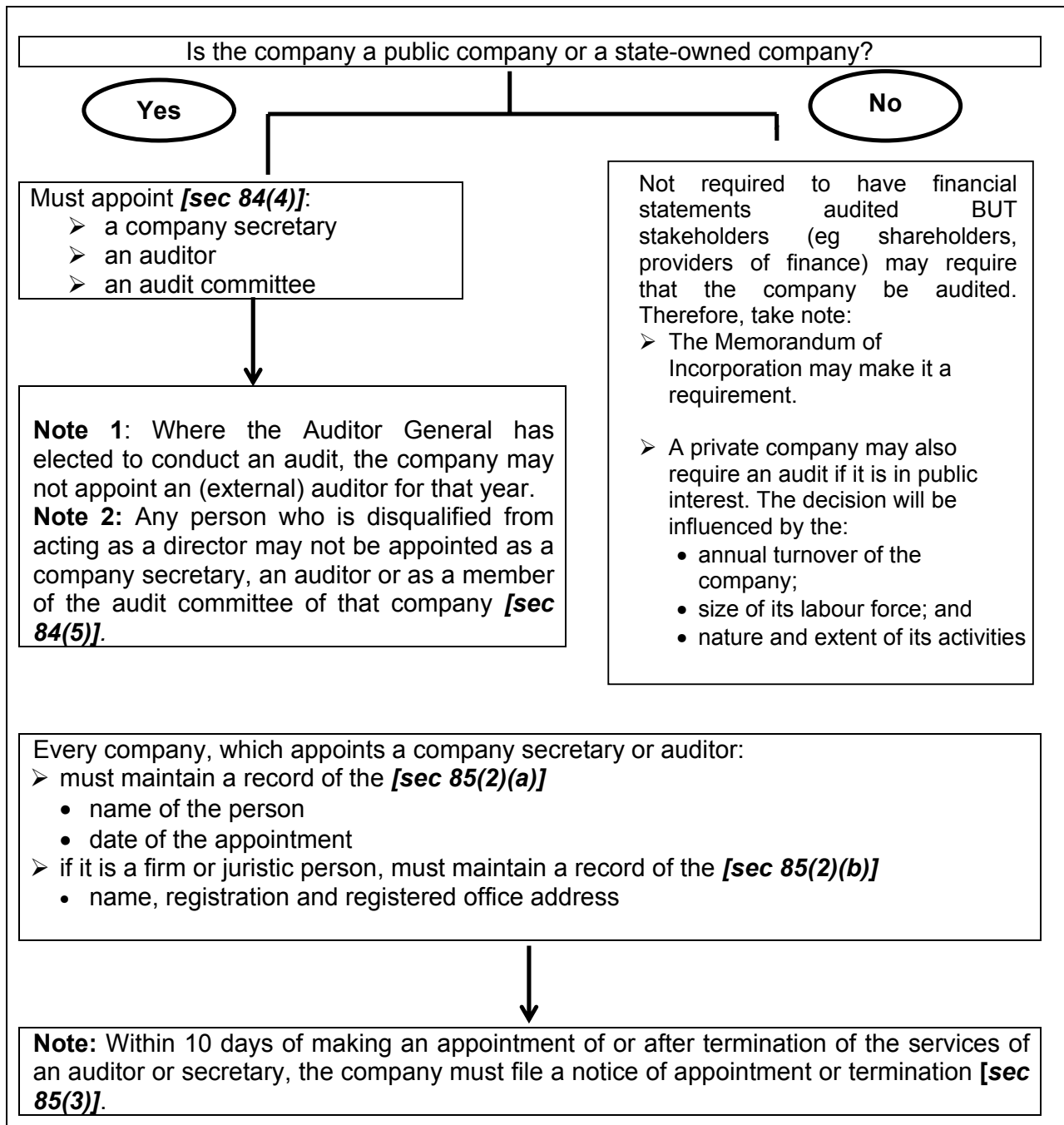
- every public and state-owned company (SOC).
- a private, non-profit and personal-liability company ...
 - if required by this Act or the Regulations to be audited, or
 - to the extent that the company's MOI stipulates that the company comply with this requirement

Regulation 28, which forms part of the Companies Act, requires the following in respect of the categories of companies that have to be audited:

- (1) This Regulation applies to a company unless the company is exempt from having its annual financial statements either audited or independently reviewed in terms of section 30(2A).
- (2) In addition to public companies and state-owned companies, any company that falls within any of the following categories in any particular financial year must have its annual financial statements for that financial year audited. This includes:
 - (a) Any profit or non-profit company if, in the ordinary course of its primary activities, it holds assets in a fiduciary capacity for persons who are not related to the company, and the aggregate value of such assets held at any time during the financial year exceeds R5 million.
 - (b) Any non-profit company, if it was incorporated ...
 - (i) directly or indirectly by the state, an organ of state, a state-owned company, an international entity, a foreign state entity or a foreign company; or
 - (ii) primarily to perform a statutory or regulatory function in terms of any legislation, or to carry out a public function at the direct or indirect initiation or direction of an organ of the state, a state-owned company, an international entity, or a foreign state entity, or for a purpose ancillary to any such function.
 - (c) Any other company whose public interest score in that financial year, as calculated in accordance with Regulation 26 (2) is ...
 - (i) 350 or more.
 - (ii) at least 100, if its annual financial statements for that year were internally compiled.

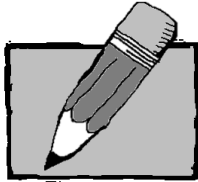
Refer back to the table on page 28 of study unit 3.1.2, where the above requirements for auditing are summarised.

The diagram below summarises the requirement for companies to appoint a company secretary and an auditor.



Study

Study sections 84 and 85, and Regulations 26 and 28 of the Companies Act.



Activity 1

You are knowledgeable about the Companies Act. Lionel Lester and Wendell Webb have made an appointment to see you about a company they would like to form (Sew-Sew (Pty) Ltd).

Lionel Lester has designed a new industrial sewing machine which he has patented and now wants to sell to the clothing industry. Wendell Webb comes from a wealthy background, and he will provide most of the finance required for the venture. Wendell and Lionel will initially be the only shareholders and directors of the company, but it is expected that over time, a few new shareholders will be found as well as one or two directors appointed.

The company will operate from a factory, which they believe will be suitable for a lease. The owner of the factory wants to tie up the lease as soon as possible. Lionel Lester estimates that in the first year of operation, they will employ about twenty people (including themselves). He also thinks that they will generate a turnover of approximately R20 million, and that their liabilities will not exceed R3 million at any time.

You need to answer the following question:

Wendell Webb heard about something called a public interest score (PIS) and that if your business had such a score, it had to be audited externally. He wanted to know more about the public interest score. Lionel Lester added that he had heard that an auditor would have to review their company independently. (8)



Feedback on activity 1

Reference: Sections 84 and 85, and Regulations 26 and 28 of the Companies Act

All businesses have a public interest score. A public interest score is the sum of the points allocated to four stipulated criteria that apply to every company (and CC) in the financial year. The criteria are as follows:

- A number of points are allocated equal to the maximum number of employees in the business.
- One point is allocated for every R1 million (or portion thereof) of turnover.
- One point is allocated for every individual who has a direct or indirect interest in the shares of the company.
- One point is allocated for every R1 million (or portion thereof) in outstanding unsecured debt of the company held by creditors at year end.

Once a company has calculated its public interest score, it must meet certain requirements, depending on the number of points. For example, a **private** company with a public interest score of 350 or more will have to be audited externally.

As Sew-Sew (Pty) Ltd will initially have a public interest score of less than 100 points (in the range of 45), the company's annual financial statements (AFSs) will not have to be audited externally.

PIS calculation:

Every employee – average number	20
Every security holder	2
Every R1m third-party liabilities	3
Every R1m turnover	<u>20</u>
	<u>45</u>

An independent review of the company's AFSs would normally apply to a company with a public interest score of less than 100 points. However, this will not apply to Sew-Sew (Pty) Ltd because owner-managed companies, that is, those in which the shareholders and the directors are the same individuals, are exempt from this requirement.

Summary

In this study unit, we explained and applied the requirements applicable to the registration of the company secretary and auditors in terms of the Companies Act.



Self-assessment

After having worked through the study unit and the references to the prescribed study material, you should be able to do the following:

Give advice, discuss concerns, and apply the requirements regarding the registration of the company secretary and auditors in scenarios.

Study unit 6.2

The company secretary, including the mandatory appointment of the company secretary, juristic person or partnership as company secretary, and the duties, resignation or removal of a company secretary



Introduction

Public companies and state-owned enterprises must appoint a company secretary. The secretary acts as a chief administrative officer of the company. This study unit deals specifically with the duties of the company secretary and with the appointment and removal of the company secretary.

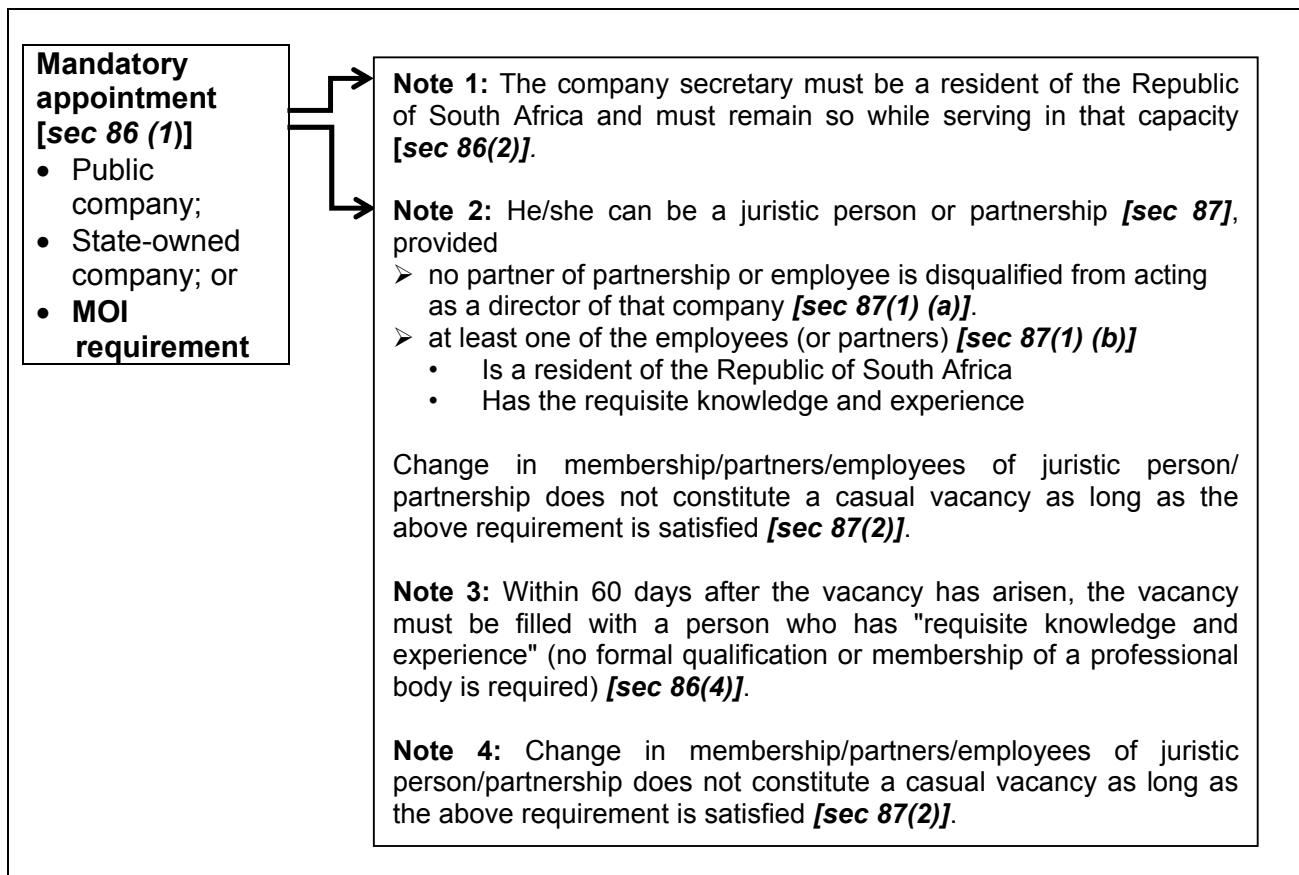
6.2.1 Company secretary (sec 86–89)

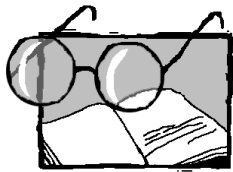
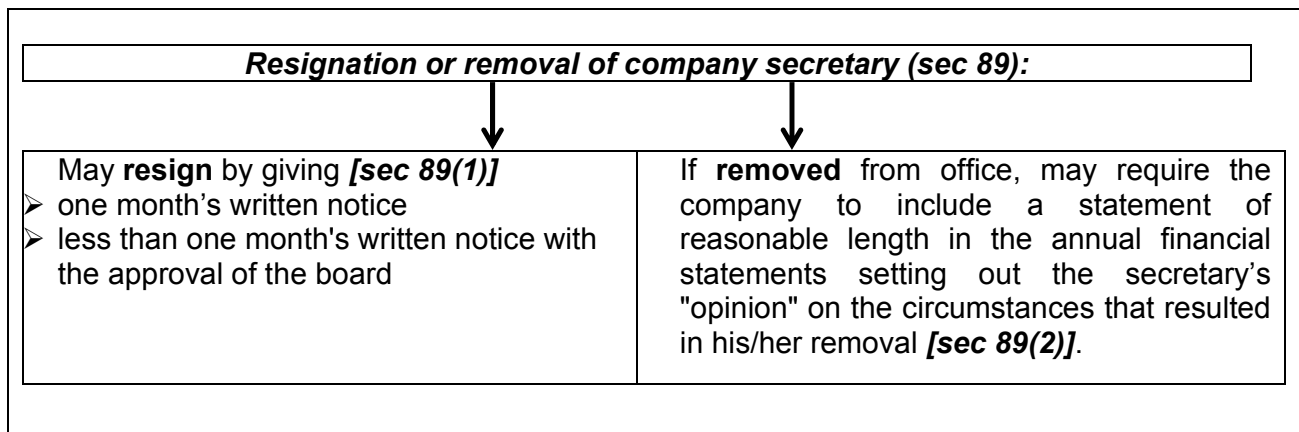
The board of directors appoints the secretary and they must be satisfied that the person is suitably qualified with necessary experience to perform the duties of a company secretary. The secretary is accountable to the board of directors. The secretary's duties are listed below. Study section 88 in this regard.

Duties of the company secretary include the following (but are not restricted to):

- Provide directors with guidance with regard to their duties, responsibilities and powers.
- Make directors aware of any relevant law.
- Report any failure on the part of the company/director to the board in order to comply with the Act or the company's Memorandum of Incorporation.
- Ensure that minutes of all meetings (shareholders, directors, board committees and audit committee) are properly recorded.
- Certify in the annual financial statements that necessary returns and notices in terms of the Act have been filed and that they appear to be true, correct and up to date.
- Ensure that a copy of the annual financial statements is sent to all persons entitled to receive them.

The diagram below summarises the requirements concerning the appointment and resignation or removal of the company secretary in terms of the Companies Act.





Study

Study sections 86 to 89 of the Companies Act.

Summary

In this study unit, you learned about the company secretary, including the mandatory appointment of the company secretary, juristic person or partnership as company secretary, and the duties, resignation or removal of a company secretary.



Self-assessment

After having worked through the study unit and the references to the prescribed study material, you should be able to do the following:

Give advice, discuss concerns, and apply the requirements regarding the company secretary, including the mandatory appointment of the company secretary, juristic person or partnership as company secretary, and the duties, resignation or removal of a company secretary in scenarios.

Study unit 6.3

Auditors, including the appointment, resignation, rotation, and rights and restricted functions of auditors



Introduction

Public and state-owned companies (as well as companies required to do so in terms of their MOI or their public interest score) must appoint an individual or firm as their auditor. This study unit deals with the appointment and resignation of an auditor, as well as with the requirement for auditors to rotate. We will also look at the rights and restricted functions that an auditor has in terms of the Act.

6.3.1 Auditors (sec 90–93)

An auditor can be appointed at incorporation, and thereafter each year at the company's annual general meeting (AGM). The appointed auditor will hold office until the next AGM – in other words, the company cannot remove him or her during the year.

The duties of an auditor in a statutory or voluntary audit are fulfilled in terms of the Auditing Profession Act.

The auditor has, in terms of section 93(1)(a), right of access at all times to ...

- accounting records.
- all books.
- documents.

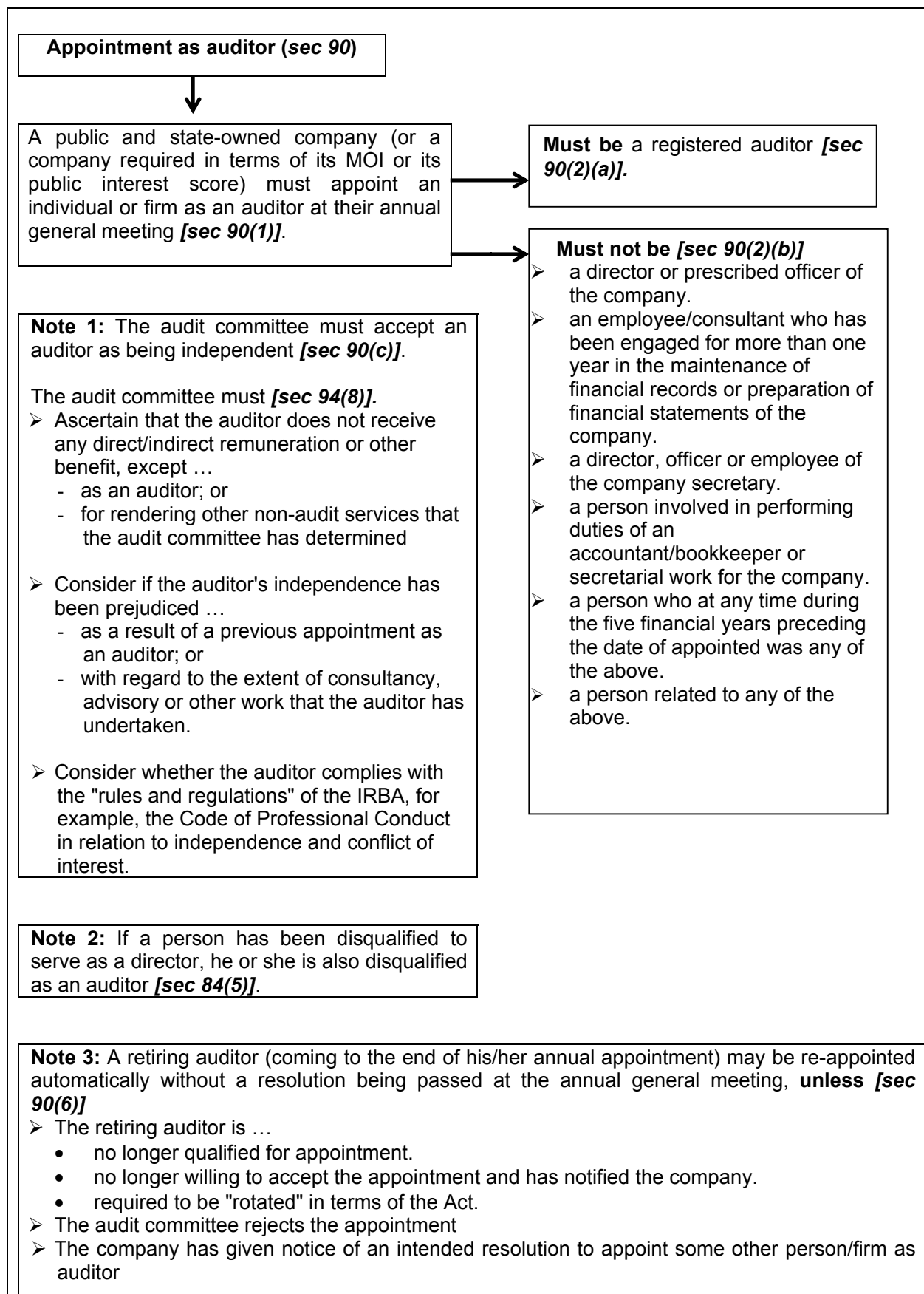
The auditor is also entitled to request any information and explanations necessary for performing his or her duties.

In terms of section 93(1)(c), the auditor is entitled to ...

- attend any general shareholders meeting (including the AGM).
- receive all notices of and other communications relating to any shareholder's meeting.
- be heard at any general shareholder's meeting on any part of the business that concerns his or her duties or functions.

When it comes to rotation requirements, bear in mind that counting the five years should only start from the effective date of the Act, in other words, from 1 May 2011. In effect, an individual who had served as an auditor for longer than five years on 1 May 2011 may still serve another five years from that date before the rotation requirement becomes effective. An audit firm may thereafter appoint another designated auditor in the firm. Audit firms with one partner have to resign after five years (Schedule 5 to the Companies Act, sec 7(11)).

The diagrams below summarise the requirements concerning the appointment and resignation, as well as the rotation, of auditors in terms of the Companies Act.



Resignation of auditors and vacancies (sec 91)

Resignation becomes effective when notice is filed [sec 91(1)]

Vacancies

The new auditor must be appointed within **40 business days** of vacancy arising [sec 91(2)].

Within **15 days**, the board must propose the name of at least one registered auditor to the audit committee [sec 91(3)(a)].

The audit committee has **five business days** after a proposal has been delivered to **reject** it in writing, or else the board may make the appointment [sec 91(3)(b)].

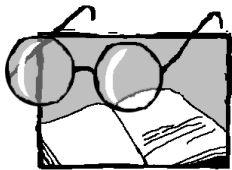
Rotation of auditors (sec 92)

The same individual may not serve as an auditor for more than **five** consecutive years [sec 92(1)].

If an individual has served as an auditor for **two/more consecutive financial years** and then ceases to be the auditor, the individual may not be appointed again as an auditor until the expiry of at least two further financial years [sec 92(2)].

Example

Mr X was the designated auditor of ABC Ltd for the financial years ended 31 March 2007 and 31 March 2008. In 2009, he left the firm, but returned in February 2010. However, he cannot be re-appointed as the auditor of ABC Ltd until **after** the 2010 financial year end. It seems that nothing is preventing him from becoming part of the audit team again.



Study

Study sections 90 to 93 of the Companies Act.



Activity 2

Now try to answer the following question:

Question

One of your audit clients, XYZ Limited, is a public company that owns a number of warehouses. The CEO of XYZ Limited asks you the following questions via e-mail:

- (a) Apparently, your audit firm can only be our auditors for five consecutive years, after which time your firm must step down. This seems quite harsh. Is there any truth in it? (3)
- (b) Is your firm what one could call a "designated auditor"? (2)

(Adapted from Gower & Jackson 2010)

**Feedback on activity 2**

Reference: Section 92 of the Companies Act

- (a) This is not entirely correct. The Act has introduced auditor rotation for public (and certain other) companies. (1)

The following applies to public companies:

- The same individual (not firm) may not serve as a designated auditor for more than five consecutive years. (1)
 - If an individual has served for two consecutive years and then ceases to fill the role, he or she may not be reappointed until two financial years have elapsed. (1)
- (b) No. The designated auditor is the individual partner responsible for XYZ Limited's audit. Our audit firm is appointed as your company's auditors in terms of the Companies Act, and the designated auditor will be the individual auditor (usually a partner) who takes charge of the audit. (2)

**Activity 3**

Read the scenario presented in activity 4.

REQUIRED**Marks**

Explain to John Wayne how the external audit of Canyon (Pty) Ltd's annual financial statements can become a requirement in terms of the company's Memorandum of Incorporation. Your answer must include details of meetings that may have to be held, for example, notice, quorums, etc.

(12)



Feedback on activity 3

If John Wayne wants to include the audit requirement in the company's MOI, the MOI will have to be amended in terms of the Act.

A special resolution to amend the MOI is required.

The board (or shareholders) can call a meeting of shareholders to exercise 10% of the votes. John Wayne will therefore need the approval of his board or the relevant shareholders to call the meeting.

As Canyon (Pty) Ltd is a private company, the following will apply to the meeting:

- A notice period of 10 business days must elapse before the meeting is to begin.
- Notices must include the date, time and location of the meeting.
- The specific purpose for which the meeting has been called (to amend the MOI) must be stated.
- A copy of the proposed resolution **and** the percentage of voting rights needed to pass the resolution must be included, that is, the resolution to amend the MOI for an annual audit requirement, and 75% of voting rights.

The notice must also include a reasonably prominent statement that:

- A shareholder may appoint a proxy (who does not have to be a shareholder).
- Personal identification is required to attend the meeting.

To obtain a quorum, the meeting must have ...

- at least three shareholders present.
- shareholders holding 25% of the voting rights, which can be exercised on the amendment, in attendance before the meeting can begin or the matter be discussed.

Voting of the matter may be done by a show of hands or by polling those present and entitled to vote.

If the resolution is passed, a Notice of Amendment (with the prescribed fee) must be filed with CIPC.

Summary

In this study unit, you learned about the requirements relating to auditors, including the appointment, resignation, rotation, and rights and restricted functions of auditors, in terms of the Companies Act.



Self-assessment

After having worked through the study unit and the references to the prescribed study material, you should be able to do the following:

Give advice, discuss concerns, and apply the requirements regarding the auditors, including the appointment, resignation, rotation, and rights and restricted functions of auditors in scenarios.

Study unit 6.4

Audit committees



Introduction

As discussed in study unit 5.2.1 on page 57, the audit committee is one of the committees that the board appoints. All public and state-owned companies must elect an audit committee. Other companies may elect an audit committee voluntarily.

This study unit deals with the composition and duties of the audit committee in terms of the Companies Act.

6.4.1 Audit committees (sec 94)

At each annual general meeting, a public company or state-owned company must elect an audit committee (for other companies, this is a voluntary requirement) **[sec 94(2)]**.

Composition of an audit committee

An audit committee must consist of at least three members.

A member must **[sec 94(4)(a)]**

- be a director of the company
- satisfy minimum qualifications as prescribed by the Minister (adequate financial knowledge and experience)

A member must not be **[sec 94(4)(b), (c)]**

- involved in day-to-day management (currently or at any time during the previous financial year)
- a prescribed officer, or full-time executive employee of the company or a related/interrelated company, or have held such a post at any time during the previous three financial years
- a material supplier or customer of the company
- a person related to any of the above-mentioned persons

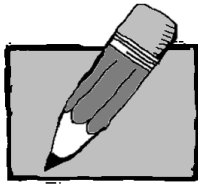
Duties of an audit committee [sec 94(7)]

- Nominates an independent registered auditor for appointment
- Determines the auditor's fees and terms of engagement
- Ensures that the appointment of the auditor complies with provisions of the Act and other legislation
- Determines the nature and extent of any non-audit services
- Pre-approves any proposed agreement with the auditor for provision of non-audit services
- Prepares a report to be included in the annual financial statements for that financial year
 - describing how its functions were carried out
 - stating whether it is satisfied that the auditors were independent
 - commenting on the appropriateness of the financial statements, accounting practices and internal financial control
- Receives and deals appropriately with any concerns/complaints, relating to
 - accounting practices and the internal audit
 - the content or auditing of the financial statements
 - internal financial controls
 - other related matter
- Makes submissions to the board on any matter concerning accounting policies, financial control, records, and reporting of the company
- Performs other functions determined by the board



Study

Study section 94 of the Companies Act.



Activity 4

Canyon (Pty) Ltd is a private company in the paint wholesaling business. John Wayne, the newly appointed chief executive officer, is keen to improve the company's corporate governance. He has subsequently approached you for some advice on various aspects of the Companies Act, 2008, which directly affect governance. Currently, the company's public interest score is about ninety and the company's annual financial statements are subject to independent review.

However, John Wayne informs you that he would like the company's annual financial statements to be audited externally annually, and an audit committee to be appointed. He tells you that the directors have agreed to have the financial statements of the current year audited voluntarily, but that he wants to make the annual external audit a requirement in terms of the company's Memorandum of Incorporation. He believes that an external audit is very beneficial and that it should not be dependent on the company's public interest score.

With regard to appointing an audit committee, John Wayne requires that the audit committee be constituted as required by the Companies Act, 2008, and that its duties be at least those that are required by the Act.

For the voluntary audit of the current financial statements, the board of directors will appoint the auditor but for future years, the auditor will be appointed as laid down in the Companies Act. This is of course, assuming that the annual audit becomes mandatory in terms of the Memorandum of Incorporation.

Canyon (Pty) Ltd's Memorandum of Incorporation is consistent with the Companies Act, 2008, and contains no variations on quorums, notice periods, approval of resolutions, appointments of directors, etc. The company has twenty shareholders.

REQUIRED

Marks

Describe to John Wayne the requirements applicable to appointing an audit committee and outline the duties of the audit committee in terms of the Companies Act, 2008 (do not concern yourself with the King III report).

(15)



Feedback on activity 4

Reference: Section 94 and Regulation 42 of the Companies Act

To comply with the requirements regarding the appointment of an audit committee in terms of the Companies Act ...

- shareholders must appoint the audit committee at each annual general meeting.
- it must consist of at least three members.
- each member must be a director of the company.

- each member must satisfy the minimum qualifications prescribed by the minister to ensure that the audit committee as a whole comprises persons with adequate financial knowledge and experience (Regulation 42 requires that at least one third of the members of the audit committee have academic qualifications or experience in economics, law, accounting, corporate governance, etc.).
 - members of the audit committee **must not** be ...
 - involved in the day-to-day running of the company or have been so involved at any time during the previous financial year.
 - prescribed officers, or full-time executive employees of Canyon (Pty) Ltd (or any related or interrelated company), or have held such post at any time during the previous three financial years.
 - material suppliers or customers of the company, such that a reasonable and informed third party would conclude that, in the circumstances, the integrity, impartiality or objectivity of that member of the audit committee would be compromised.
 - "related persons" to any person subject to these prohibitions, for example, the wife of a full-time executive employee of Canyon (Pty) Ltd.

The duties of the audit committee are to ...

- nominate a registered auditor in order that the shareholders appoint him/her as auditor (The shareholders must be satisfied that the nominated person/firm is independent of Canyon (Pty) Ltd.).
- determine the auditor's fees and terms of engagement.
- ensure the appointment of the auditor complies with the Companies Act and the Auditing Profession Act.
- determine the nature and extent of any non-audit services the auditor may provide to Canyon (Pty) Ltd and pre-approve any agreement with the auditor for the provision of these services.
- prepare a report to be included in the AFS, which ...
 - describes how the audit committee performed its functions.
 - states whether the auditor was independent of the company.
 - includes comments that the committee considers appropriate of the financial statements, the accounting practices and internal controls of the company.
- receive and manage appropriately any concerns or complaints relating to ...
 - the accounting practices and internal audit of the company
 - the content or audit of the AFS.
 - internal financial controls.
 - any other related matters.
- submit to the board any matters dealt with above.
- perform other functions determined by the board.

Summary

In this study unit, you learnt about the requirements for audit committees in terms of the Companies Act.



Self-assessment

After having worked through the study unit and the references to the prescribed study material, you should be able to do the following:

Give advice, discuss concerns, and apply the requirements for the audit committee in scenarios.

CONCLUSION

In this topic about **enhanced accountability and transparency**, we explained and applied the Companies Act requirements and Regulations regarding the topic.

7. TOPIC 7 - TRANSACTIONS

Topic overview

The topic deals with transactions where **financial assistance and loans** are provided (sec 44 & 45, respectively), and with **fundamental transactions** (sec 112 & 115).

Sections 44 and 45 are very important sections for your studies of the Companies Act.

Davis, Cassim, Geach, Mongalo, Buler, Loubser, Coetzee and Burdette (2011:191¹) describe fundamental transactions as transactions that significantly affect ownership of a company's assets or that signal a notable change in shareholding of a company. This attracted additional regulation under the Companies Act; however, some transactions are not permitted at all

Fundamental transactions refer to the following transactions:

- The disposal of all or the greater part of the company's assets or undertaking (sec 112).
- Amalgamations or mergers (sec 113).
- Schemes of arrangement (sec 117).

We will just focus on the first fundamental transaction (sec 112) and you are only required to have a broad idea about the last two types of transactions.

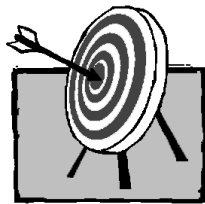
¹ Davies, D, Cassim, F, Geach, W, Mongalo, T, Buler, D, Loubser, A, Coetzee, L & Burdette, D. 2011. *Companies and other business structures in South Africa*. Cape Town, SA: Oxford University Press.

Topic 7 is divided into the following study units:

Study unit	Title	Page
7.1	Financial assistance for subscription of securities (sec 44)	84
7.1.1	Financial assistance for subscription of securities (sec 44)	85
7.2	Loans or other financial assistance to directors (sec 45)	88
7.2.1	Loans or other financial assistance to directors (sec 45)	89
7.3	Proposals to dispose of all or the greater part of assets or undertaking (sec 112 & 115)	93
7.3.1	Proposals to dispose of all or greater part of assets or undertaking (sec 112 & 115)	94

Textual amendments and additions

Before proceeding with the study of this topic, please refer to Tutorial Letter 104 for this module to acquaint yourself with any textual amendments and additions that may have been indicated.



Learning outcomes

Study unit	In this topic, we will focus on the following learning outcomes:	Level
7.1 Financial assistance for subscription of securities	<ul style="list-style-type: none"> Give advice, discuss concerns, and apply the requirements regarding financial assistance for subscription of securities in scenarios. 	3
7.2 Loans or other financial assistance to directors	<ul style="list-style-type: none"> Give advice, discuss concerns, and apply the requirements regarding loans or other financial assistance to directors in scenarios 	3
7.3 Proposals to dispose of all or greater part of assets or undertaking	<ul style="list-style-type: none"> Give advice, discuss concerns, and apply the requirements regarding proposals to dispose of all or greater part of assets or undertaking in scenarios. 	3

Study unit 7.1

Financial assistance for subscription of securities



Introduction

The Act deals with two types of financial assistance. The first is financial assistance for subscription of securities, and the second is loans or other financial assistance to directors. In this study unit, we will deal with the first. An example of financial assistance for subscription of securities would be a company that lends money to someone to enable that person to purchase shares in the company. This will now be discussed in more detail.

7.1.1 Financial assistance for subscription of securities (sec 44)

It is important to note that section 44(1) indicates that financial assistance does not include lending money in the ordinary course of business by a company whose primary business is the lending of money. **For example**, a bank normally lends money in its ordinary course of business. If you were to lend money from the bank, at the same interest rate and repayment terms as would apply to any other person, and thereafter used this money to purchase shares in the bank, which lent you the money, this would **not** constitute financial assistance in terms of section 44.

Financial assistance includes a loan, a guarantee, or the provision of security or otherwise to any person for the purpose of, or in connection with, the subscription of any option, or securities, issued or to be issued by the company or a related or interrelated company, or for the purpose of any securities of the company or a related or interrelated company (sec 44(2)).

From the above paragraph, it is evident that the lending of money is not the only type of financial assistance covered by section 44. If a company would give up a building, which it owns as security in order for you to obtain a loan (to enable you to purchase shares in this company), it would constitute financial assistance in terms of section 44.

In order for financial assistance to be provided legally in terms of section 44 ...

- it should be approved by the board (directors' resolution).
- any restrictions in the company's MOI must be complied with.
- a special resolution should have been passed within the previous two years, which approved such assistance either for the specific recipient or generally for a category of potential recipients, and the particular recipient(s) should fall within this category.
- the board should be satisfied that the solvency and liquidity tests have been satisfied immediately after providing the financial assistance.
- the board should be satisfied that the terms under which the financial assistance is to be given are fair and reasonable to the company.
- the board must ensure that if the company's MOI includes any conditions or restrictions regarding the giving of financial assistance, they must have been complied with (Note: It is not a prerequisite that the company's MOI must authorise such a transaction. In other words, if no reference is made in the MOI to financial assistance, the transaction can still go ahead, provided the company has complied with the other requirements set out above).

The inclusion of the special resolution requirement is an essential safeguard against potential abuse of power by the directors.

Securities referred to above include:

- Bonds, debentures and any other form of security
- The purchase of any securities of the company or a related or interrelated company (in other words, the securities of upward, downward and sideways-related companies)

Remember: Financial assistance can take the form of a loan, a guarantee, a provision of security, etc. Apart from loans, other forms of financial assistance are often hidden in the scenario. An example of this would be a company that passes a bond over its assets to raise money for the purchaser to pay for its shares.

Is the primary business of this company the lending of money?

No

Yes

This is financial assistance in terms of **section 44**.

Section 44 does not apply if the lending takes place in the ordinary course of business **[sec 44(1)]**.

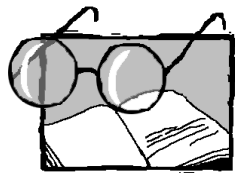
Requirements

The following conditions should be met:

- Any conditions set out in the Memorandum of Incorporation in this regard **[sec 44(3)(b)(i–ii)]**
- Liquidity/solvency test should be satisfied immediately after the financial assistance has been granted
- Fair and reasonable terms should apply to the financial assistance **[sec 44(4)]**
- A special resolution should be obtained (must have been passed within the previous two years) **[sec 44(3)(a)(ii)]**, if not pursuant to an employee share scheme **[sec 44(3)(a)(i)]**

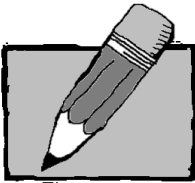
If these requirements (of sec 44) are not adhered to

- the transaction will be void
- the directors can be held liable for losses the company has incurred in this regard **[sec 44(5–6)]**



Study

Study section 44 of the Companies Act.



Activity 1

You have knowledge of the Companies Act.

Relevant details of the Loftus Group are as follows:

Holding company: Loftus (Pty) Ltd

Shareholders of Loftus (Pty) Ltd:

Victor Hatfield	40%
Hein Meyer	15%
Smiley Human	15%
15 minority shareholders	30%

Loftus (Pty) Ltd holds 75% of the shares in Bulle (Pty) Ltd. Frontrow CC holds the other 25% of the shares in Bulle (Pty) Ltd. The members of Frontrow CC are Hotboy Rapele, Barry Boota and Wynand Oliver, each of whom has an equal members' interest.

Loftus (Pty) Ltd also holds 55% of the shares in Sundown (Pty) Ltd; numerous individuals, who are not connected with the Loftus Group at all, hold the other 45% of the shares.

The directors of the various companies are as follows:

<i>Loftus (Pty) Ltd</i>	<i>Bulle (Pty) Ltd</i>	<i>Sundown (Pty) Ltd</i>
Victor Hatfield	Hotboy Rapele	Brave Baloyi
Lane Kershner	Wynand Oliver	Danny Mudow
Hotboy Rapele	Jon Mametsi	Patrick Motsepa
Frans Hougie	Dupree Fourie	Frans Hougie

The following matters with possible legal implications have been referred to you:

Matter 1

Sundown (Pty) Ltd intends issuing shares to all its current shareholders. Bulle (Pty) Ltd agreed to finance the shareholders of Sundown (Pty) Ltd to enable them to purchase those shares. This is not financial assistance pursuant to an employee share scheme.

REQUIRED

Marks

In respect of ***matter 1***, discuss the requirements of the Companies Act, 2008, which must be complied with in respect of the loan to the shareholders of Sundown (Pty) Ltd.

(12)



Feedback on activity 1

Reference: Section 44 of the Companies Act

Situation: Matter 1

Bulle (Pty) Ltd may make this loan, provided ...

- any conditions or restrictions in respect of the granting of "financial assistance" set out in the MOI are adhered to.
- the board is satisfied that immediately after providing the loan, Bulle (Pty) Ltd satisfied the liquidity/solvency test.
- considering the reasonably foreseeable financial circumstances of the company ...

- the assets of the company, fairly valued, equaled or exceeded the liabilities of the company, fairly valued.
- it appears as if the company would be able to pay its debts as they become due in the ordinary course of business for a period of 12 months from the date of considering the liquidity and solvency of the company.
- the board is also satisfied that the terms of the loan are fair and reasonable to the company.
- a **special** resolution was obtained.

The special resolution must have been obtained within the previous two years and could have been for a specific loan to the shareholders of Sundown (Pty) Ltd, or generally for a category of potential recipients, and the specific recipient falls into that category (sec 44(3)(a)(ii).

The MOI cannot permit the granting of a loan in contravention of this section, for example, that it provides that the loan does not require a special resolution.

Summary

In this study unit, we explained and applied the requirements regarding financial assistance for subscription of securities in terms of the Companies Act.



Self-assessment

After having worked through the study unit and the references to the prescribed study material, you should be able to do the following:

Give advice, discuss concerns, and apply the requirements regarding financial assistance for subscription of securities in scenarios.

Study unit 7.2

Loans or other financial assistance to directors



Introduction

In this study unit, we will discuss the second type of financial assistance, namely, loans or other financial assistance to directors. Section 45 applies to loans or financial assistance to directors

and includes the granting of a loan or other financial assistance from a company to one of its directors or a related person (sec 2 of the Act) of the director. The requirements of section 45 are largely similar to those of section 44.

7.2.1 Loans or other financial assistance to directors (sec 45)

To determine if a company may provide financial assistance to any of the parties as set out in **section 45(2)** of the Act, the following should be considered:

Remember: Financial assistance can take the form of a loan, a guarantee, a provision of security, etc. Apart from loans, other forms of financial assistance are often hidden in the scenario.



Exclusions

- The primary business of the company is the lending of money (and the loan in question is in the ordinary course of business).
- The financial assistance is for meeting legal expenses (relating to a matter concerning the company).
- The financial assistance is for paying for expenses to be incurred by the person on behalf of the company.
- The financial assistance is an amount to defray the person's expenses for removal at the company's request **[sec 45(1)(b)]**.



Requirements

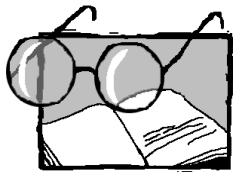
The following conditions should be met before providing the assistance:

- Any conditions set out in the Memorandum of Incorporation in this regard should be met **[sec 45(4)]**.
- The liquidity/solvency test should be satisfied immediately after the financial assistance has been granted **[sec 45(3)(b)]**.
- The terms should be fair and just.
- A special resolution should be obtained (must have been passed within previous two years) **[sec 45(3)(a)(ii)]** (except if the financial assistance is pursuant to an employee share scheme).
- Written notice of the meeting and the intended assistance should be given to all shareholders (unless all shareholders are directors) **[sec 45(5)]**.
- Written notice of the meeting and the intended assistance should be given to any trade union that is representing the employees of the company **[sec 45(5)]**.



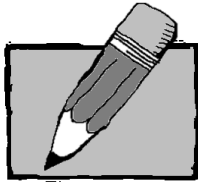
If the requirements (of **sec 45**) are not adhered to

- the transaction will be void
- the directors can be held liable for losses incurred by the company **[sec 45(6-7)]**



Study

Study section 45 of the Companies Act.



Activity 2

After you have studied the relevant sections from your prescribed textbook, you should try to answer the following questions to test your knowledge.

You are a member of the audit team working on the 30 June 2012 audit of Smugglers (Pty) Limited, an export/import company. Borders Limited holds 70% of Smugglers (Pty) Limited's capital, while other companies in the group are Guards (Pty) Limited (of which Borders Limited holds 100%) and Contraband (Pty) Limited (of which 60% is held by Smugglers (Pty) Limited). Eleven private investors hold the remaining shares in Smugglers (Pty) Limited.

Of the four companies within the group, you are responsible for the audit engagement of Smugglers (Pty) Limited only. The three remaining companies are audited by other firms.

Borders Limited purchased 30% of its shares in Guards Proprietary Limited on 31 October 2011. Prior to this, it already owned 70% of the shares.

Your permanent audit file revealed the following:

Directors of:

Borders Limited	Billy Kidd Roy Rogers Davy Crockett Horst Trigger
Smugglers (Pty) Limited	J T Edson Louis L 'amour Bill Ocean
Contraband (Pty) Limited	Roy Rogers Willy Nelson
Guards (Pty) Limited	Bill Haley Chuck Berry

You have been assigned to the audit of statutory matters and as part of the procedures you will need to perform, you have extracted the following matter for consideration:

A loan of R1.5 million made by Smugglers (Pty) Limited to Roy Rogers for his personal use.

REQUIRED**Marks**

Discuss the loan made by Smugglers (Pty) Limited in terms of the Companies Act, 2008.

(8)

**Feedback on activity 2**

Reference: Section 45 of the Companies Act

In terms of section 45 of the Companies Act, the board of Smugglers (Pty) Limited may authorise the loan to a director of itself (not the case) or the director of a related company. Roy Rogers is a director of Smugglers (Pty) Limited's holding company and of its own subsidiary Contraband (Pty) Limited. Roy Rogers therefore qualifies as "related".

In making any loans to directors, the board has to comply with any conditions or restrictions contained in the MOI.

In making the loan, the board must ...

- ensure the loan is pursuant to a special resolution of the shareholders, adopted within the previous two years, which approved the loan specifically to Roy Rogers or generally to a category of potential recipients into which Roy Rogers would fall (for example, directors).
- be satisfied that immediately after providing the financial assistance, Smugglers (Pty) Limited would satisfy the solvency and liquidity test.
- be satisfied that the terms and conditions of the loan are fair.

The MOI cannot overrule the above conditions.

The board must provide written notice of this resolution to the shareholders and any trade union representing Smugglers (Pty) Limited's employees. If the total value of all financial assistance (contemplated under this section) given within the financial year exceeds one-tenth of 1% of the company's net worth at the time of the resolution, this notice must be given within 10 business days of the resolution. If the total value does not exceed one-tenth of 1% of the net worth, the notice period will be 30 days from year end.

If the board approves the loan in contravention of section 45 or the MOI, it will be void.

**Activity 3**

Using the information provided in activity 1 (study unit 7.1) and the following matters, answer the question below.

Matter 1

The board of Loftus (Pty) Ltd approved low-interest unsecured loans of R500 000 each to Frans Hougie and Brave Boloyi to enable them to invest (in their private capacities) in a newly formed company that manufactures rugby and soccer balls. The loans were approved based on a

unanimous decision the four directors of the board made after the board had considered the liquidity and solvency of Loftus (Pty) Ltd and found it to be satisfactory.

REQUIRED

Marks

In respect of **matter 1**, discuss the possible consequences of granting the loans to Frans Hougie and Brave Baloyi.

(15)



Feedback on activity 3

Reference: Sections 45, 76 and 77 of the Companies Act

Situation: Matter 1

These loans were granted in contravention of the Companies Act, 2008. The loans were granted on the strength of the **board's** approval that required a special resolution of the shareholders. A special resolution was required, as the loans were granted to a director (Frans Hougie) of the company itself **and** a company related to Loftus (Pty) Ltd (Sundown [Pty] Ltd) and another director, Brave Baloyi, of the same related company. Sundown (Pty) Ltd is a subsidiary of Loftus (Pty) Ltd.

It is also evident that Frans Hougie voted on a transaction in which he had a direct financial interest. He is not entitled to vote on the matter or even participate in the consideration of the loan.

The board of directors also failed to ensure that the conditions of the loan were fair to the company. Providing **unsecured** low-interest loans, which they should have known were to be invested in a newly formed company, is not fair to the company (Loftus [Pty] Ltd).

It is further evident that these loans were given in contravention of section 45; they will therefore be void. As all four directors voted in favour of the loan, they will be jointly and severally liable for any losses that Loftus (Pty) Ltd may suffer because of, say, the loans not being repaid.

Then there is the matter of the directors' standards of conduct. In terms of section 76, a director must exercise the powers and functions of a director ...

- in good faith and for a proper purpose.
- in the best interest of the company.
- with the degree of care, skill and diligence reasonably expected of a director.

This means that the director should take reasonable, diligent steps to be informed about the matter at hand. A diligent director would definitely have been aware of the authority and procedures required for the proper authorisation of a loan to a director. Thus, the directors have not acted in accordance with the above guidelines.

This raises the question as to whether the directors acted in bad faith. For example, did they approve the loan themselves because they did not want the shareholders to be aware that the directors were granting loans to themselves?

- Any suggestion of bad faith would mean that the auditors of Loftus (Pty) Ltd (whether the company is audited or reviewed independently) would have to consider the possibility of a reportable irregularity.

In terms of section 77, the directors of Loftus (Pty) Ltd may be held liable for any loss, damages or costs the company sustained because of a breach of fiduciary duty. Did they, for example, act in bad faith when approving the loans, or did they act with the necessary degree of care, skill and diligence?

Summary

In this study unit, you learned about the requirements regarding loans or financial assistance to directors in terms of the Companies Act.



Self-assessment

After having worked through the study unit and the references to the prescribed study material, you should be able to do the following:

Give advice, discuss concerns, and apply the requirements regarding loans or financial assistance to directors in scenarios.

Study unit 7.3

Proposals to dispose of all or the greater part of assets or undertaking



Introduction

A company's board of directors has the power to manage the company, but what happens if the board wants to dispose of the whole or the greater part of the company's business or assets? This does not constitute managing the business, but involves putting an end to the business or the greater part of it. This is a decision of a fundamental nature and sections 112 and 115 deal with decisions of this nature.

7.3.1 Proposals to dispose of all or the greater part of assets or undertaking (sec 112 & 115)

Section 112(2) provides that (except for those instances mentioned in sec 112(1)) the requirements for disposal of the greater part of the assets or undertaking include inter alia:

- A special resolution of the shareholders, in accordance with section 115 (A special resolution is required in order to protect minority shareholders in particular by ensuring that a significant minority can block large disposals).
- That the company has satisfied all other requirements set out in section 115, to the extent that those requirements are applicable to such disposal by that company (The protective measure in section 115(4) promotes fairness and decreases the risk of conflicts of interest).
- The notice of a shareholder's meeting to consider a resolution to approve the special resolution in the first point above, which must ...
 - be delivered in terms of section 62.
 - include or be accompanied by a written summary of the precise terms of the transaction to be considered at the shareholder's meeting as well as the provisions of sections 115 and 164.

Section 112(4) requires that where any part of the assets of the company or the undertaking is disposed of, the company must be sold at its fair market value. The price should be that which an interested seller would pay to an interested buyer in an open market.

A resolution contemplated in this section is effective only to the extent that it authorises a specific transaction (sec 112(5)). The effect of this provision is to remove the possibility of a company seeking broad approval at an annual general meeting and then making substantial asset sales soon thereafter.

Section 115 makes provision for approvals required for major disposals, mergers and amalgamations, and schemes of arrangement. It provides inter alia that the proposed transaction must be approved ...

- by a special resolution adopted by persons entitled to exercise voting rights on such matter, at a meeting called for that purpose and at which sufficient persons are present to exercise, in aggregate, at least 25% of all the voting rights that are entitled to be exercised on the matter, or any higher percentage as may be required by the company's MOI, as contemplated in section 64(2).
- by a special resolution, also in the manner described in the above paragraph, by the shareholders of the company's holding company (if applicable), if ...
 - the holding company is a company or an external company.
 - the proposed transaction concerns a disposal of all or the greater part of the assets or undertaking of the subsidiary.
 - having regards for the consolidated financial statements of the holding company, the disposal by the subsidiary constitutes a disposal of all or the greater part of the assets or undertaking of the holding company.
- by the court, to the extent required under the circumstances and in the manner contemplated in subsections (3) to (6) of section 115.

Take note that despite a resolution having been adopted as contemplated in the first two manners set out above, a company may not proceed to implement that resolution without the **approval of a court** and without meeting certain further requirements (refer to sec 115(3)(a) and (b)).



Activity 4

Block (Pty) Ltd is a company that manufactures brass-plumbing requisites. The company has five directors. The most senior directors of Block (Pty) Ltd, John Joint and Eric Elbow, have been concerned about the falling sales of brass-plumbing requisites and the appearance on the market of a new plastic range of plumbing requisites imported from Taiwan. They intend taking the following action:

They are planning to sell all the company's manufacturing equipment, thus getting out of the brass-plumbing requisites market.

A scrutiny of the company's statutory records has revealed that the company has 150 000 authorised shares, 100 000 of which are in issue. John Joint and Eric Elbow hold minor shareholdings, while no other directors hold shares. The authorised shares are no par value shares.

REQUIRED

Discuss the intentions of John Joint and Eric Elbow regarding the selling of all the company's manufacturing equipment in terms of the Companies Act.



Feedback on activity 4

Reference: Sections 112 and 115 of the Companies Act

Disposal of the greater part of the assets

The directors may not dispose of the greater part of the assets of Block (Pty) Ltd without a special resolution taken by the shareholders.

As the two directors are "minor" shareholders, they will not have sufficient voting rights on their own.

The directors need to give 10 business days' notice of the meeting to the shareholders.

The notice must include a written summary of the terms of the transactions (selling the assets).

To form a quorum, sufficient persons (shareholders/proxies) must attend the meeting to exercise at least 25% of the voting rights that are entitled to be exercised on the matter.

Unless the MOI stipulates a different percentage, the resolution must be passed by 75% of the voting rights (exercisable on the matter) present in person or by proxy.

Summary

In this study unit, you learnt about the requirements regarding proposals to dispose of all or the greater part of the assets or undertaking of a company in terms of the Companies Act.



Self-assessment

After having worked through the study unit and the references to the prescribed study material, you should be able to do the following:

Give advice, discuss concerns, and apply the requirements regarding proposals to dispose of all or the greater part of assets or undertaking of a company in scenarios.

CONCLUSION

In this topic about **transactions**, we explained and applied the requirements regarding financial assistance for subscription of securities, loans or other financial assistance to directors and proposals to dispose of all or greater part of assets or undertaking of a company in scenarios.

8. TOPIC 8 - BUSINESS RESCUE, COMPROMISE WITH CREDITORS, WINDING UP AND DEREGISTRATION OF COMPANIES

Topic overview

Many factors may lead to a company's failure, for example, poor management, no demand for the products the company manufactures due to bad planning, and the inability to identify other products in demand, etc. These factors can sometimes lead to the liquidation or take-over of a company (in terms of the old Companies Act, 1973), which may have a huge impact on the employees of the company, group of companies, or the economy.

The Companies Act, 2008, now follows a new approach to financially stressed companies. This Act provides for business rescue proceedings with the aim of saving a business by following certain procedures, even if the outcome is not always positive. If a business is rescued, it means that jobs may be saved and the company's creditors may receive a larger portion of the monies owed to them. Normally, there must at least be the prospect that the company can be rescued before these proceedings are undertaken. According to Cassim (2011:144), rescue means that the company is reorganised in order to restore it to a profitable entity and thereby avoid liquidation.

The Companies Act, 2008, also makes provision for voluntary winding up of solvent companies, but companies that failed and cannot be saved by business rescue proceedings will have to be liquidated.

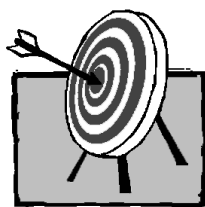
Davies, D, Cassim, F, Geach, W, Mongalo, T, Buler, D, Loubser, A, Coetzee, L & Burdette, D. 2011. *Companies and other business structures in South Africa*. Cape Town, SA: Oxford University Press.

Topic 8 is divided into the following study units:

Study unit	Title	Page
8.1	Winding up of solvent companies and deregistration of companies (sec 79–83)	98
8.1.1	Winding-up of solvent companies (sec 79)	98
8.1.2	Voluntary winding up of solvent company (sec 80)	99
8.1.3	Winding up solvent companies by court order (sec 81)	99
8.2	Business rescue (sec 128–155)	100
8.2.1	Business rescue (sec 128–155)	101
8.3	Protection for whistle-blowers, application to declare a director delinquent or under probation, relief from oppressive or prejudicial conduct or from abuse of the separate juristic personality of the company, complaints to the Commission or Panel, powers to support investigations and inspections, and companies' tribunal adjudication procedures (sec 159, 162, 163 & 168–184)	102
8.3.1	Protection for whistle-blowers (sec 159)	103
8.3.2	Application to declare a director delinquent or under probation (sec 162)	104
8.3.3	Relief from oppressive or prejudicial conduct or from abuse of the separate juristic personality of the company (sec 163)	105
8.3.4	Complaints to the Commission or Panel (sec 168–184)	105

Textual amendments and additions

Before proceeding with the study of this topic, please refer to Tutorial Letter 104 for this module to acquaint yourself with any textual amendments and additions that may have been indicated.



Learning outcomes

Study unit	In this topic, we will focus on the following learning outcomes:	Level
8.1 Winding-up of solvent companies and deregistration of companies	<ul style="list-style-type: none"> Give advice, discuss concerns, and apply the requirements regarding the winding up of solvent companies and deregistration of companies in scenarios. 	3
8.2 Business rescue	<ul style="list-style-type: none"> Give advice, discuss concerns, and apply the requirements for business rescue in scenarios. 	3

Study unit	In this topic, we will focus on the following learning outcomes:	Level
8.3 Protection for whistle-blowers, application to declare a director delinquent or under probation, relief from oppressive or prejudicial conduct or from abuse of the separate juristic personality of the company, complaints to the Commission or Panel, powers to support investigations and inspections, and companies' tribunal adjudication procedures	<ul style="list-style-type: none"> Gain basic knowledge of the requirements regarding <ul style="list-style-type: none"> the protection for whistle-blowers an application to declare a director delinquent or under probation relief from oppressive or prejudicial conduct or from abuse of the separate juristic personality of the company complaints to the Commission or Panel powers to support investigations and inspections company and Tribunal adjudication procedures in scenarios 	3

Study unit 8.1

Winding-up of solvent companies and deregistration of companies



Introduction

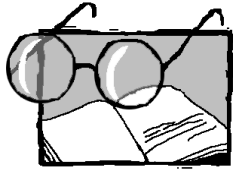
The winding-up of solvent companies is regulated by Part G of Chapter 2 (sec 79–83) under the Companies Act, 2008. Insolvent companies will be wound up under the provisions of the Companies Act, 1973, item 9(1) of Schedule 5 until the proposed Bankruptcy Act is announced. This study unit deals more specifically with the winding-up of solvent companies.

8.1.1 Winding-up of solvent companies (sec 79)

Section 79 provides that a solvent company may be dissolved by:

- Voluntary winding-up** initiated by the company as contemplated in section 80, and conducted either by the company or its creditors as determined by a special resolution adopted by the company
- Winding-up and liquidation by a court order**, as contemplated in section 81

Where a company has adopted a resolution for the voluntary winding-up of a solvent company (sec 80), or after an application has been made to a court for winding-up (sec 81), and subsequently it is determined that the company to be wound up is or may be insolvent, a court, on application by any interested person, may order that the company be wound up as an insolvent company in terms of the laws referred to or contemplated in item 9(1) of Schedule 5.



Study

Study section 79 of the Companies Act.

8.1.2 Voluntary winding-up of a solvent company (sec 80)

As indicated in 8.1.1, a solvent company may be wound up voluntarily if the company has adopted a special resolution to do so. The special resolution may provide for the company or its creditors to perform the winding-up.

Section 80 further provides that such resolution be filed with the Commission, together with the prescribed notice and filing fee. It also provides for arranging for security, satisfactory to the Master, for the payment of the company's debts within 12 months after the start of the winding-up of the company, or obtaining the Master's consent to dispense with security. Section 80(3)(b)(i) & (ii) indicates under which circumstances the Master would consent to dispense with security.

It is interesting to note (sec 80(8)) that the company remains a juristic person and retains all of its powers as such while it is being wound up voluntarily. However, when the company's winding-up starts, the company must stop carrying on its business, except to the extent required for the beneficial winding-up of the company. All the powers of the company's directors also cease, except when specifically authorised in the case of the winding-up of the company, by the liquidator or the shareholders at a general meeting; or in the case of a winding-up by creditors, the liquidator or the creditors.

8.1.3 Winding-up solvent companies by court order (sec 81)

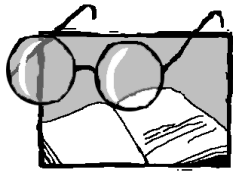
Section 81 provides that a court may order a solvent company to be wound up if ...

- the company has passed a special resolution to the effect that it be wound up by the court; or applied to the court to have its voluntary winding-up continued by the court.
- the practitioner of a company appointed during business rescue proceedings has applied for liquidation in terms of section 141(2)(a), on the grounds that there is no reasonable prospect of the company being rescued.
- one or more of the company's directors have applied to the court.
- the company, one or more directors, or one or more shareholders have applied to the court.
- a shareholder has applied, with leave from the court, for an order to wind up the company.
- the Commission or Panel has applied to the court for an order to wind up the company.

Section 81(2) stipulates the circumstances under which a shareholder may apply to a court, while section 81(3) provides that a court may not make an order applied for in terms of

subsection 1, where certain actions have taken place before the conclusion of the court proceedings. Section 81(4) determines when the winding-up of a company begins.

The dissolution of companies, the removal from the register and the effect of the removal of a company from the register are dealt with in sections 82 and 83.



Study

Study sections 81 to 83 of the Companies Act.

Summary

In this study unit, we explained and applied the requirements regarding the winding-up of solvent companies and deregistration of companies in terms of the Companies Act.



Self-assessment

After having worked through the study unit and the references to the prescribed study material, you should be able to do the following:

Give advice, discuss concerns, and apply the requirements regarding the winding-up of solvent companies and deregistration of companies in scenarios.

Study unit 8.2

Business rescue



Introduction

Section 128 deals with the definitions used in Chapter 6 of the Companies Act. You should study this section; otherwise, you may find it difficult to understand the use of some of these phrases in the sections thereafter and in this study unit.

What is business rescue?

Business rescue is defined as proceedings that facilitate the rehabilitation of a company, which is financially distressed (insolvent), by providing for:

- The temporary supervision of the company and its management, and of its affairs, business and property
- A temporary moratorium (suspension or halt) on the rights of any parties claiming against the company or in respect of property in its possession
- The development and implementation (if approved) of a plan to rescue the company by restructuring its affairs, business, property, debt and other liabilities, and equity in such a manner that:
 - The company is given a better chance of continuing its existence in a solvent manner, or
 - If not possible, it will result in a better return for the company's creditors or shareholders, than in the case of immediate liquidation of the company

8.2.1 Business rescue (sec 128–155)

According to section 129(1), the board of a company may resolve that the company voluntarily begin business rescue proceedings if the board has reasonable grounds to believe that:

- The company is financially distressed (sec 128(1)(f)).
- There is a reasonable prospect that the company can be rescued.

Section 129 also provides the further steps to be followed, including the appointment of a practitioner. The practitioner's functions and terms of appointment are included in sections 138 to 143.

Please note that Regulation 126 categorises companies in terms of their public interest score and business rescue practitioners in terms of their experience. This is done to match business rescue practitioners to the right companies. For example, a "medium" public company with a public interest score of less than 500 points will require the services of an "experienced" practitioner who is a member of an accredited professional body (that is, the South African Institute of Chartered Accountants). Such a practitioner must have at least five years business turnaround/rescue experience.

Section 130 provides for objections (by an affected person) to a company's resolution regarding voluntary business rescue by applying to the court for an order setting aside the resolution. It also provides for a period restriction and the grounds on which the application may be made.

Section 131 provides that an affected person may apply to the court for an order placing the company under supervision and commencing business rescue proceedings where the company itself has not adopted a resolution for voluntary business rescue.

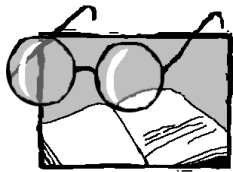
The rights of affected persons during business rescue proceedings are included in sections 144 to 149.

After the practitioner has consulted with the creditors, other affected persons and the management of the company, he or she must prepare a business rescue plan (sec 150) for consideration and possible adoption at a meeting to determine the future of the company (sec 151). At that meeting, the practitioner must also inform the meeting, for example, whether there may be a reasonable prospect of the company being rescued (sec 152).

Section 153 deals with the steps that should be followed when the business rescue plan has been rejected as contemplated at the above-mentioned meeting.

Section 155 provides that, irrespective of whether or not a company is financially distressed, or not, unless it is engaged in business rescue proceedings, the board of the company or the liquidator of the company, if the company is being wound up, may propose an arrangement or a compromise of its financial obligations to all of its creditors, or to all the members of any class of its creditors, by delivering a copy of the proposal and notice of the meeting to consider the proposal to...

- every creditor or every member of the relevant class of creditors whose name or address is known to or can reasonably be obtained by the company.
- the Commission.



Study

Study sections 128 to 155 of the Companies Act.

Summary

In this study unit, we explained the requirements for business rescue in terms of the Companies Act.



Self-assessment

After having worked through the study unit and the references to the prescribed study material, you should be able to do the following:

Give advice, discuss concerns, and apply the requirements for business rescue in scenarios.

Study unit 8.3

Protection for whistle-blowers, application to declare a director delinquent or under probation, relief from oppressive or prejudicial conduct or from abuse of the separate juristic personality of the company, complaints to the Commission or Panel, powers to support investigations and inspections, and Companies' tribunal adjudication procedures



Introduction

This study unit is presented at knowledge level 3, and you are therefore only required to have a basic understanding of the sections discussed in the study unit.

8.3.1 Protection for whistle-blowers (sec 159)

Whistle-blowers, who disclose information about a company or its directors, must be provided with protection against dismissal, demotion or legal action.

The diagram below indicates that a whistle-blower must make any disclosures in **good faith** and to the effect that the information disclosed shows or tends to show that the company or a director (or prescribed officer) has contravened an act or legislation, failed to comply with a legal obligation or engaged in certain conduct, etc.

A company cannot override this section of the Companies Act in its Memorandum of Incorporation or in its rules.



Section 159 applies to whistle-blowers

who disclose in good faith that the company or director has

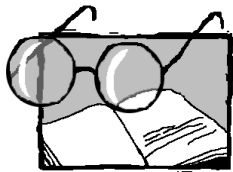
- contravened the Companies Act or another act enforced by the Commission
- failed (or is failing) to comply with any legal obligation to which the company is subject
- engaged in conduct that poses a health or safety risk to any individual, or a risk of environmental damage
- discriminated unfairly against any person
- contravened any legislation that could expose the company to risk/liability **[sec 159(3)(b)]**

by offering

- qualified privilege in respect of the disclosure
- immunity from civil, criminal or administrative liability with regard to the disclosure **[sec 159(4)]**

to the following whistle-blowers with regard to the company:

- Shareholders
- Directors
- Company secretary
- Prescribed officers
- Employees
- Trade unions
- Other representatives of employees
- Suppliers of goods or services
- Employees of such suppliers



Study

Study section 159 of the Companies Act.

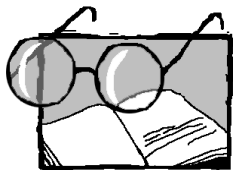
8.3.2 Application to declare a director delinquent or under probation (sec 162)

Some of the parties, who may apply to a court for an order declaring a person delinquent or under probation, are set out in section 162(2). They include the company, shareholders, directors, company secretary or prescribed officer of a company, a registered trade union that represents employees of the company, or another representative of the employees of a company. The prerequisites for taking this action are included in section 162(2)(a) and (b). Other parties that may apply to the court include the Commission or the Panel and any organ of state responsible for the administration of any legislation (sec 162(3) & (4)).

You should be able to list the instances in which the court must make an order declaring a person a delinquent director (sec 162(5)) and the court may make an order placing a person under probation (sec 162(7)).

Note that a declaration of delinquency is unconditional and subsists for the lifetime of the person declared delinquent, if so declared in terms of subsection 5(a) or (b) – for example, where a director acted as a director while he or she was ineligible or disqualified in terms of section 69.

Where a person was declared delinquent under subsection 5(c) to (f), it may be made subject to any conditions that the court considers appropriate and will subsist for seven years from the date of the order, or such longer period as determined by the court. Examples of the latter would be where a director grossly abused the position of director or took personal advantage of information or an opportunity, contrary to section 76(2)(a).



Study

Study section 162 of the Companies Act.



Activity 1

The shareholders of your company have recently appointed a friend of yours, Maria Bueno, as a director of GPS Limited, an electronics company specialising in the development and manufacturing of global positioning systems (GPSs) for vehicles and motorcycles. The company is not listed. Maria is considered a valuable individual with regard to the future of the company, particularly concerning its research and development programmes.

Maria has never filled the position of a company director before and although she is excited about her promotion, she is concerned about her responsibilities as a director, particularly those arising from the Companies Act. She has heard that the Companies Act contains sections dealing with standards of directors' conduct and that if she does not perform, she can be removed from the board and dismissed from the company. She has also heard that the chairperson of the board can put her on probation as a director or declare her delinquent.

She has put the following questions to you:

Can the chairperson or any other party put me on probation? What requirements must be met in this regard in terms of the Companies Act? (4½)



Feedback on activity 1

Reference: Section 162 of the Companies Act

Can the chairperson or any other party put me on probation?

No, in terms of section 162, **only the court** can put you as director on probation; the chairperson cannot make this decision. (1½)

However, the **company, a shareholder, a director, company secretary, a trade union representative (or similar representative) can apply to the court to have you declared "on probation"**. (1½)

Certain **company regulatory bodies**, such as the **Companies and Intellectual Property Commission** (the **Commissioner**) can also make **an application to the court** if, for example, a director **grossly abused the position of director** or took **personal advantage of information or an opportunity** contrary to the standards of directors' conduct (sec 76). (1½)
(4½)

8.3.3 Relief from oppressive or prejudicial conduct or from abuse of the separate juristic personality of the company (sec 163)

This section enables a shareholder or a director of a company to apply to a court for relief if any of the circumstances are present (subsec 1(a)–(c)). You should be able to list the various interim or final orders that a court considers fit (subsec (2)(a) to (l)).

8.3.4 Complaints to the Commission or Panel (sec 168–184)

You should be aware of complaints to the Commission or Panel (at awareness level) by carefully reading the relevant sections in the prescribed book.

Summary

In this study unit, we explained and applied the requirements regarding protection for whistle-blowers, application to declare a director delinquent or on probation, relief from oppressive or prejudicial conduct or from abuse of the separate juristic personality of the company, complaints

to the Commission or Panel, powers to support investigations and inspections, and Companies' tribunal adjudication procedures in terms of the Companies Act.



Self-assessment

After having worked through the study unit and the references to the prescribed study material, you should be able to do the following:

Have a basic understanding of the requirements regarding protection for whistle-blowers, application to declare a director delinquent or under probation, relief from oppressive or prejudicial conduct or from abuse of the separate juristic personality of the company, complaints to the Commission or Panel, powers to support investigations and inspections, and Companies' tribunal adjudication procedures in scenarios.

CONCLUSION

In this topic about **compromise with creditors, winding-up and deregistration of companies, business rescue and protection for whistle-blowers, application to declare a director delinquent or on probation, relief from oppressive or prejudicial conduct or from abuse of the separate juristic personality of the company, complaints to the Commission or Panel, powers to support investigations and inspections, and companies' tribunal adjudication procedures**, we explained and applied the Companies Act requirements in scenarios.

9. TOPIC 9 - REGULATORY AGENCIES, OFFENCES AND PENALTIES

Topic overview

The Companies Act relies on a system of administrative enforcement combined with a minimum number of criminal sanctions. Enforcement of the Companies Act takes place through various bodies and by way of various mechanisms.

The Companies Act also makes provision for instances that are deemed to be offences. These instances include:

- Disclosing any confidential information concerning the affairs of any person, obtained in a certain way.
- False statements, reckless conduct and non-compliance with a compliance notice.
- Hindering, obstructing or improperly attempting to influence the Commission and certain other parties when they are exercising a power or performing a duty in terms of the Act.

The Act, in section 216, also makes provision for penalties for contravention of sections 213 to 215.

In section 218, the Act provides for civil actions where loss suffered can be recovered from a person who contravened any provision in the Act and section 219 provides for a limited time to initiate complaints.

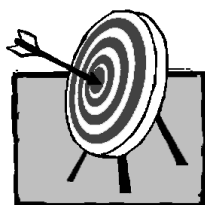
Bear in mind that this topic as a whole is at knowledge level 3, which entails that you should gain a basic understanding of the sections of the Act covered in the topic.

Topic 9 is divided into the following study units:

Study unit	Title	Page
9.1	Regulatory agencies and their functions (sec 185–204)	108
9.1.1	Regulatory agencies and their functions (<i>sec 185–204</i>)	108
9.2	Breach of confidence, false statements, reckless conduct and non-compliance, hindering administration of the Act and penalties (sec 213–216)	109
9.2.1	Breach of confidence, false statements, reckless conduct and non-compliance, hindering administration of the Act and penalties (<i>sec 213–216</i>)	110
9.3	Civil actions and limited time for initiating complaints (sec 218 & 219)	111
9.3.1 & 9.3.2	Civil actions and limited time for initiating complaints (<i>sec 218 & 219</i>)	112

Textual amendments and additions

Before proceeding with the study of this topic, please refer to Tutorial Letter 104 for this module to acquaint yourself with any textual amendments and additions that may have been indicated.



Learning outcomes

Study unit	In this topic, we will focus on the following learning outcomes:	Level
9.1 Regulatory agencies and their functions	<ul style="list-style-type: none"> Gain a basic understanding of the Companies Act requirements for regulatory agencies. 	1
9.2 Breach of confidence, false statements, reckless conduct and noncompliance, hindering administration of the Act and penalties	<ul style="list-style-type: none"> Gain a basic understanding of the requirements regarding breach of confidence, false statements, reckless conduct and noncompliance, hindering administration of the Act and penalties in scenarios. 	1
9.3 Civil actions and limited time for initiating complaints	<ul style="list-style-type: none"> Gain a basic understanding of civil actions and limited time for initiating complaints. 	1

Study unit 9.1

Regulatory agencies and their functions



Introduction

Enforcement of the Companies Act takes place through various bodies and by way of various mechanisms.

The regulatory agencies under the Act are:

- The Companies and Intellectual Property Commission (CIPC)
- The Companies Tribunal (CT)
- The Take-Over Regulation Panel (TORP or Panel)
- The Financial Reporting Standards Council (FRSC)

Each of the agencies has specific functions.

9.1.1 Regulatory agencies and their functions (sec 185–204)

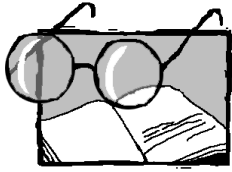
The **Companies and Intellectual Property Commission (CIPC)** (sec 185–192), which was previously known as CIPRO, registers companies, juristic persons and intellectual property rights, maintains information on companies, inter alia, and enforces the Companies Act and other Schedule 4 acts. You need to know that the Close Corporations Act is one of these acts.

The **Companies Tribunal (CT)** (sec 193–195), which is an independent juristic person, has to perform its functions impartially and without fear, favour or prejudice and in a transparent manner. The Minister appoints its members and the functions of these members are to adjudicate on any application made to it in terms of the Act, assist in voluntary resolutions of disputes, and perform functions assigned to it in terms of the Companies Act or other acts included in Schedule 4. It functions basically as an appeal body.

The **Take-Over Regulation Panel (TORP or Panel)** (sec 196–202) has been long in existence and is an independent juristic person that must perform its functions impartially without fear, favour or prejudice. Its members include the Commissioner (the head of the CIPC) and stipulated positions. The Minister appoints other members of the Panel. The duties of the Panel are to regulate and investigate complaints about affected transactions and offers (that is, mergers), to apply to the court to wind up a company in certain cases, and to consult with the Minister about amendments to the Take-over Regulations.

The last agency is the **Financial Reporting Standards Council (FRSC)** (sec 203–204), which is established by the Minister and which members are appointed by the Minister in terms of the requirements of the Act (for example, four practising auditors, two persons knowledgeable about company law, etc). The duties of the FRSC are to receive and consider any relevant information on the reliability of and compliance with financial reporting standards, to advise and

consult with the Minister on financial reporting standards, and to make regulations establishing financial reporting standards.



Study

Study sections 185 to 204 in the Companies Act. You are only expected to know what is stated above.

Summary

In this study unit, we explained the requirements for regulatory agencies in terms of the Companies Act.



Self-assessment

After having worked through the study unit and the references to the prescribed study material, you should be able to do the following:

Have a basic understanding of regulatory agencies.

Study unit 9.2

Breach of confidence, false statements, reckless conduct and non-compliance, hindering administration of the act, and penalties



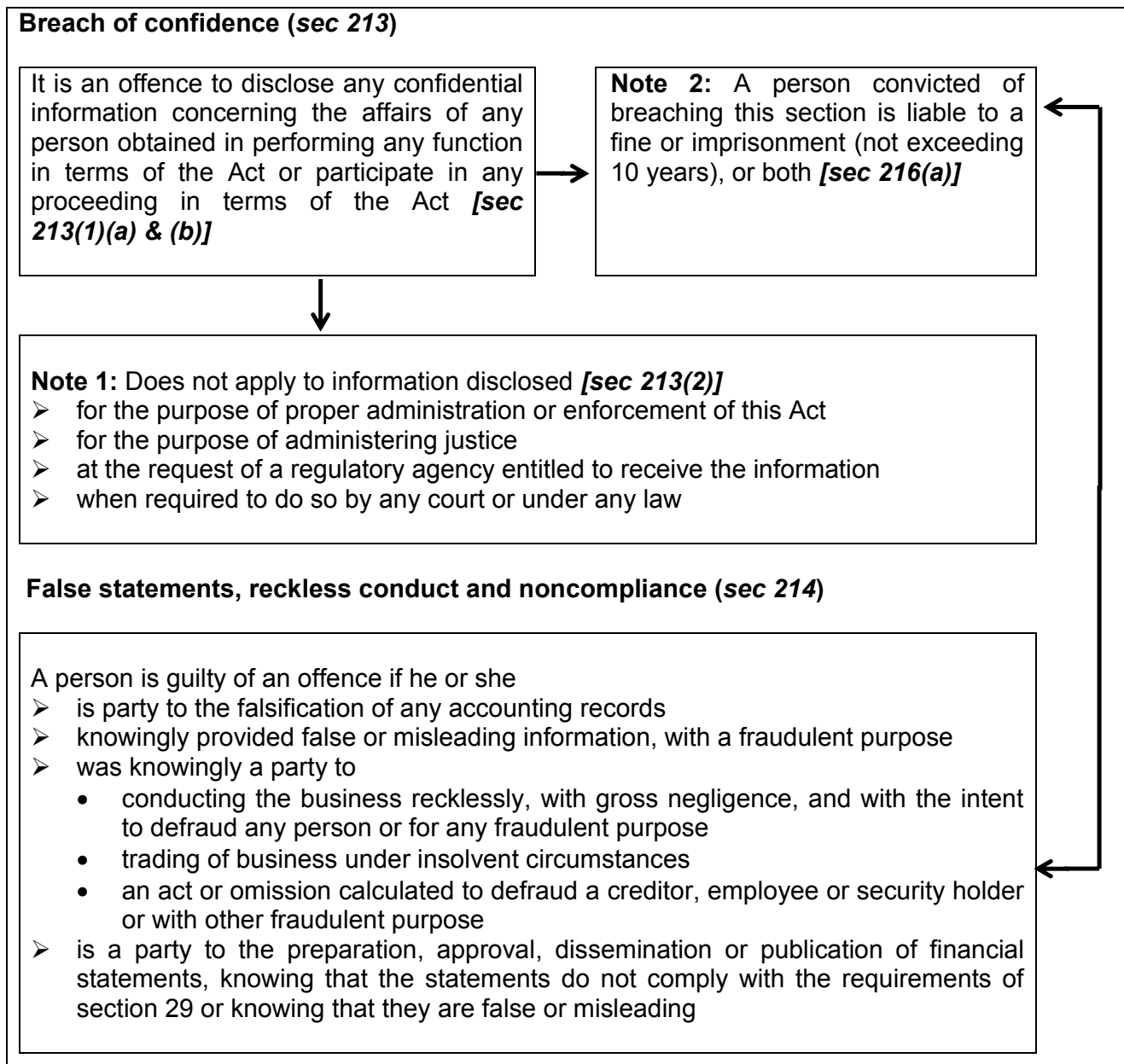
Introduction

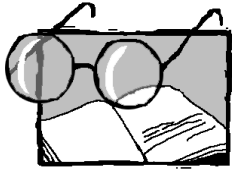
The Companies Act makes provision for instances where certain actions may lead to offences (sec 213–215) and eventually to penalties (sec 216).

9.2.1 Breach of confidence, false statements, reckless conduct and non-compliance, hindering administration of the Act, and penalties (sec 213–216)

The diagram below summarises sections 213 and 214. An example of an offence in terms of false statements is a company that issues a prospectus to the public in order to invite subscribers to subscribe to securities/shares they want to issue. As the prospectus must contain the prescribed specifications and all the information that an investor may reasonably require to assess the assets and liabilities, as well as the company's financial position, profits and losses, cash flow, etc, it may very well happen that the preparer include untrue statements. The sections mentioned are therefore included for the protection of investors.

You have to be aware of the applicable penalties.





Study

Study sections 213 to 216 in the Companies Act.

Summary

In this study unit, we explained the requirements regarding breach of confidence, false statements, reckless conduct and non-compliance, hindering administration of the Act, and penalties in terms of the Companies Act.



Self-assessment

After having worked through the study unit and the references to the prescribed study material, you should be able to do the following:

Have a basic understanding of the breach of confidence, false statements, reckless conduct and non-compliance, hindering administration of the Act, and penalties.

Study unit 9.3

Civil actions and the limited time for initiating complaints



Introduction

This study unit gives a broad overview of civil actions with regard to any person who contravenes any provision of the Act as well as the limited time for initiating complaints in terms of the Act.

9.3.1 Civil actions (sec 218)

Section 218 provides that any person who contravenes any provision of the Act is liable to any person for any loss or damage suffered by that person because of that contravention.

This section also provides that nothing in the Act renders void any other agreement, resolution or provision of an agreement, MOI or rule 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.

9.3.2 Limited time for initiating complaints (sec 219)

Section 219 provides that complaints in terms of the Act may not be initiated by or made to the Commission (that is, complaints concerning alleged contraventions of the Act (sec 187(2)(c)) or the Panel (that is, complaints relating to the affected transactions and offers (sec 201(1)(b)), more than three years after the act or omission that is the cause of the complaint; or in the case of a course of conduct or continuing practice, the date on which the conduct or practice ceased.

Summary

In this study unit, you learned about the requirements for civil actions and the limited time for initiating complaints in terms of the Companies Act.



Self-assessment

After having worked through the study unit and the references to the prescribed study material, you should be able to do the following:

Have a basic understanding of civil actions and the limited time for initiating complaints.

CONCLUSION

In this topic about **regulatory agencies, offences and penalties**, we explained the requirements regarding regulatory agencies and their functions, breach of confidence, false statements, reckless conduct and non-compliance, hindering administration of the Act, and penalties. We also discussed civil actions and the limited time for initiating complaints. Can you explain the link to the other study units?

10. TOPIC 10 - SCHEDULES TO THE COMPANIES ACT AND OTHER LEGISLATION APPLICABLE TO COMPANIES

Topic overview

There are five Schedules to the Companies Act, of which you are required to study Schedules 2, 3 and 5.

We do not expect you to study the Close Corporations Act in detail, even though it is discussed in a study unit below. However, you must be aware that this form of business is still very much in use and will over time be phased out. It is also important to know that certain sections of the Companies Act and/or the Companies Regulations are also applicable to close corporations.

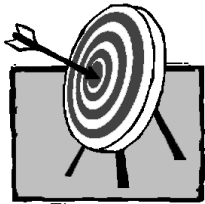
Moreover, you must be aware that other legislation also applies to companies. You will not be examined on the content of that legislation in this module, however.

Topic 10 is divided into the following study units:

Study unit	Title	Page
10.1	Schedules to the Companies Act (Schedules 2, 3 & 5)	114
10.1.1	Schedule 2: Conversion of close corporations to companies, clauses 1 and 2	114
10.1.2	Schedule 3: Amendments of laws, specifically relating to the Close Corporations Act	114
10.1.3	Schedule 5: Transitional arrangements	116
10.2	Close Corporations Act	117
10.2.1	Close Corporations Act	117
10.3	Other legislation	118
10.3.1	Other legislation	119

Textual amendments and additions

Before proceeding with the study of this topic, please refer to Tutorial Letter 104 for this module to acquaint yourself with any textual amendments and additions that may have been indicated.



Learning outcomes

Study unit	In this topic, we will focus on the following learning outcomes:	Level
10.1 Schedules to the Companies Act (Schedules 2, 3 & 5)	<ul style="list-style-type: none"> Give advice and apply the requirements included in certain Schedules to the Companies Act, in scenarios. 	3
10.2 Close Corporations Act	<ul style="list-style-type: none"> Gain a basic awareness of the Close Corporations Act. 	1
10.3 Other legislation	<ul style="list-style-type: none"> Gain a basic awareness of other legislation of relevance to an auditor. 	1

Study unit 10.1

Schedules to the companies act (Schedules 2, 3 & 5)

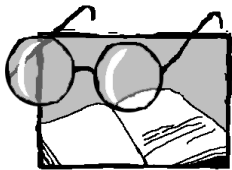


10.1.1 Schedule 2: Conversion of close corporations to companies, items 1 and 2 (items are sometimes also referred to as clauses or sections)

Close corporations could be registered up until section 13 of the Companies Act came into operation on 1 May 2011. Since that date, no company could be converted into a close corporation. Close corporations continue to exist until they are deregistered or dissolved in terms of the Close Corporations Act, or if they are converted to a company in terms of the Companies Act.

Item 1 provides for the conversion of close corporations to companies. When a notice of conversion is lodged, it must be accompanied by a written statement approving the conversion, signed by members of the close corporation holding in aggregate at least 75% of the members' interest in the corporation; an MOI; and the prescribed filing fee. In this section, the responsibility of the Commission upon conversion is also dealt with.

Item 2 stipulates that every member of a close corporation, which is converted into a company, be entitled to become a shareholder of the company. However, the shares to be held in the company by the shareholders individually need not necessarily be in proportion to the members' interests previously held. The effect of conversion on the juristic person that existed as a close corporation before conversion; in whom the assets, liabilities, rights and obligations will vest after conversion; and so forth, are also dealt with in item 2.



Study

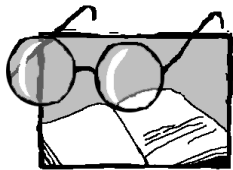
Study items 1 and 2 in Schedule 2 to the Companies Act.

10.1.2 Schedule 3: Amendments of laws, specifically relating to the Close Corporations Act

When reading the points below, you will become aware of provisions in the Companies Act and the Companies Regulations, which also apply to a close corporation. References are made to sections in the Close Corporations Act.

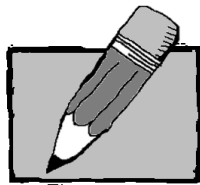
Some of the changes/additions/repeals are as follows:

- The Minister may make regulations prescribing **financial reporting standards, or the form and content requirements** for financial statements (sec 10(3)) – refer to item 5 in Schedule 3.
- Certain categories of companies are required to have their **annual financial statements audited**. This also applies to close corporations (section 58(2A)) – refer to item 5 in Schedule 3.
- **No more conversions from a company to a close corporation** will be allowed because section 27 of the Close Corporations Act has been repealed – refer to item 2 in Schedule 3.
- The **provisions regarding persons being removed from an office of trust** on account of misconduct; or persons convicted of theft, fraud, etc, who had previously been disqualified from taking part in the management of a close corporation, except if a court authorised them to take part in the management, have been repealed (sec 47(1)(b)(ii) & (iii)) – refer to item 5 in Schedule 3.
- A **person, who has been put on probation by a court in terms of section 162 of the Companies Act**, may not participate in the management of the business of a corporation, except to the extent permitted in the order of probation (sec 47(1A)) – refer to item 5 in Schedule 3.
- **Application of accountability provisions** (sec 34(2) & Chapter 3) **of the Companies Act to a close corporation** (sec 62A) has been amended – refer to item 5 in Schedule 3. **This means that a close corporation should be audited under certain circumstances.**



Study

Concentrate only on the points listed above, since this will be sufficient for your studies.



Activity 1

After you have studied the relevant sections from your prescribed textbook, you should try to answer the following questions to test your knowledge. This should help you identify the specific relationships in a given scenario.

1. Can a private company convert itself into a close corporation? Give a reason for your answer. (1½)
2. All close corporations must calculate a public interest score. True or false? Give a reason for your answer. (1½)
3. If a CC must be audited because of its public interest score, its accounting officer may conduct the audit, provided the accounting officer is registered with Independent Regulatory Board (IRBA). Discuss. (3)



Feedback on activity 1

1. No. In terms of Schedule 3 of the Companies Act, 2008, no new close corporations may be registered as from 1 May 2011.
2. True. Section 62A of the Close Corporations Act, section 34(2) and section 84(1)(c) of the Companies Act and Companies Regulations 26 and 28 become applicable should the public interest score of a close corporation indicate that an audit is required.
3. The accounting officer is a prescribed officer of the close corporation. In terms of the Act and its Regulations, a company or a close corporation, which must be audited, cannot be audited by its own prescribed officer (sec 90(2)(b)(i)).

10.1.3 Schedule 5: Transitional arrangements

Every company that was incorporated or recognised in terms of the Companies Act 61 of 1973 continues to exist as a company as of 1 May 2011, as if it had been incorporated and registered in terms of the Companies Act 71 of 2008, as amended, using the same name and registration number previously assigned to it under the old Act (Item 2).

An existing company may file, within two years from 1 May 2011, without charge ...

- an amendment to its MOI to harmonise it with the Act.
- if necessary, a notice of a name change and the copy of a special resolution under section 16 to alter its name to meet the requirements of the Act (Item 4(2)).

During the period of two years immediately following 1 May 2011, if there is conflict between a provision of the Act and a provision of a pre-existing MOI of the company, the latter prevails (Item 4(4)(a)).

Item 4(1)(a) to (d) makes provision for Section 21 companies, Section 53(b) companies, companies falling within the definition of state-owned companies and companies limited by guarantee, and they are respectively all deemed to change their MOIs. Each company should state in its MOI that it is a non-profit company; a personal-liability company; that it changed its name in so far as required to complying with section 11(3); and lastly, that it elects to become a profit company, failing which it must change its MOI to state that it is a nonprofit company.

Any shares of an existing company that have been issued at a nominal or par value and are held by a shareholder immediately before 1 May 2011 will continue to have the nominal or par value assigned to them when issued (Item 6(2)).

A person holding office as a director, company secretary or auditor of an existing company immediately before 1 May 2011 continues to hold that office as from 1 May 2011, subject to the company's MOI and this Act (Item 7(1)). Where the person referred to above in terms of the Act is ineligible to be or disqualified from being a director, alternative director, prescribed officer, company secretary or auditor, that person is regarded as having resigned from every such office in any company as from 1 May 2011 (Item 7(2)).

The approval of any distribution, financial assistance, insider share issues or options is subject to the Companies Act, even if a company's shareholders approved such action before 1 May 2011, despite anything to the contrary in the company's MOI (Item 7(6)).

Summary

In this study unit, we explained and applied certain Schedules to the Companies Act.



Self-assessment

After having worked through the study unit and the references to the prescribed study material, you should be able to do the following:

Give advice, discuss concerns, and apply the requirements of Schedules 2, 3 and 5 of the Companies Act, in scenarios.

Study unit 10.2

Close Corporations Act



10.2.1 Close Corporations Act

The future of the Close Corporations Act

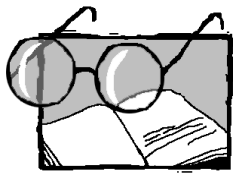
Registration of close corporations (CCs) will cease under the new Companies Act that came into effect on 1 May 2011. However, currently registered CCs will still be maintained. The new Companies Act provides for the continued existence of currently registered CCs, but negates any further registrations of new CCs. All existing CCs registered with the Companies and Intellectual Property Registration Office (CIPRO) as of the effective date of the new Act (1 May 2011) will continue to exist. The new Companies Intellectual Property Commission (CIPC), which was implemented at the same time that the Act was put into effect, will accommodate all amendments to CCs.

The new Act does not force CCs to convert into companies, but because of simplified legislation, reduction of regulatory burden and simplicity of formation, conversion is encouraged. Under the new Act, the private company will replace the CC as the preferred vehicle for small

and medium businesses. CCs will probably be phased out over the next ten years, specifically if one takes into account the amendments made to the Close Corporations Act (see study unit 10.1.2 above).

What we expect you to know about the Close Corporations Act

We expect you to gain a broad knowledge of the Close Corporations Act in respect of sections 1, 2, 12, 13, 15, 22, 24, 28 to 30, 33 to 40, 46 to 54, 57 to 60, and 62 and 63, as well as the amendments to the Close Corporations Act through Schedule 3 of the Companies Act as referred to in study unit 10.1.2 above. **You will not be examined on any individual sections.**



Study

Study the sections listed above as well as the amendments to the Close Corporations Act through Schedule 3 of the Companies Act.

Summary

In this study unit, we explained what we want you to know about the Close Corporations Act.



Self-assessment

After having worked through the study unit and the references to the prescribed study material, you should be able to do the following:

Give broad advice on the Close Corporations Act in scenarios.
--

Study unit 10.3

Other legislation



10.3.1 Other legislation

Depending on the type of company or business, the following legislation is of relevance to an accountant: the Income Tax Act, Banking Act, Insurance Act, Attorneys Act, Insolvency Act, Administration of Estates Act, Insider Trading Act and the Public Finance Management Act.

You must be aware of the various acts that may be relevant and may apply to your client, but are not required to study the individual Acts mentioned.

Summary

In this study unit, we explained other legislation of relevance to an auditor.



Self-assessment

After having worked through the study unit and the references to the prescribed study material, you should be able to do the following:

Give broad advice on other legislation applicable to companies, which the accountant must take into account in scenarios.

CONCLUSION

In this topic about **schedules to the Companies Act and other legislation applicable to companies**, we explained and applied the requirements regarding the Schedules to the Companies Act and explained the Close Corporations Act and other legislation applicable to companies.

You have now completed this part of this module. The second part will be included in Tutorial Letter 502/3/2013.