

# *An overview of company law reform in South Africa: From the Guidelines to the Companies Act 2008*

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This article provides a broad overview of the company law reform process. The contribution does not attempt to discuss substantive provisions of the Companies Act 71 of 2008. Instead, the author explains the process followed in the drafting of this groundbreaking piece of legislation. The article begins by setting out the underlying fundamental objectives which drove the process of reforming company law in South Africa. Then it discusses the structure established for the completion of the process, starting with the appointment of the Project Manager, the establishment of the working committees on broad company law areas to assist the process of preparing drafter's instructions, the establishment of the local and international reference teams to advise on policy and legislative consistency, the drafting and consultation processes, the introduction of the legislation into Parliament, the passing of the legislation by Parliament and the signing of the Act into law by the President. Finally, the article explains the process which still needs to unfold between the signing of the law by the President and the scheduled implementation later in 2010.

## I INTRODUCTION

I should state at the outset that most of the information contained in this article is derived from my personal experiences in my capacity as the project manager for Company Law Reform within the Department of Trade and Industry in South Africa (the DTI) from the official launch of the process in 2003 to the enactment of the Companies Act by Parliament in 2008. As a result, in this article, the main emphasis will be on the process followed in the corporate law reform initiative in South Africa and not on substantive issues of company law. The Companies Act was signed into law by the State President on 8 April 2009 and was gazetted on 9 April 2009 as the Companies Act 71 of 2008, although the Act is envisaged to come into operation by mid-2010.

This article is divided into 10 sections as follows: (1) The conception of the process; (2) Key participants in the South African corporate law

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reform process; (3) The initial round table of the local and international reference teams; (4) The development of and consultation on the guidelines for corporate law reform; (5) The engagement of the chief drafter and the development of the drafter's memorandum; (6) The drafting process and the release of the exposure draft for internal consultation and focus group consultations; (7) The Cabinet process and the publication of the initial draft of the Companies Bill for public consultation and comment; (8) Consideration of public comments and the revision of the Bill; (9) The Introduction of the Bill in Parliament; and (10) The way forward.

(1) *The conception of the process*

The Deputy Director-General of the Consumer and Corporate Regulation Division (CCRD) within the DTI announced on 11 July 2003 that the company law reform process in South Africa was started in 1998, but that 'it had been a stop start exercise'.<sup>1</sup> The process was officially launched on 11 July 2003.<sup>2</sup>

On the day of the official launch of the process, the DTI announced that the starting point would be the formulation of a policy framework which would guide the law reform process.<sup>3</sup> Although the project manager was already appointed at the time of the launch of the proceedings in July 2003, he officially commenced his duties on 22 September 2003.

The DTI's intention of undertaking a comprehensive overhaul of company law was clearly indicated by the brief from the then Deputy Director-General (DDG), Ms Astrid Ludin, made at the round table on 11 July 2003.<sup>4</sup> The DDG challenged the participants to think about the

<sup>1</sup> See the Record of the Proceedings of the Local and International Roundtable on Company Law Reform hosted by the Department of Trade and Industry in Johannesburg on 11 and 12 July 2003 at 9.

<sup>2</sup> *Ibid.*

<sup>3</sup> The Policy Framework for Company Law Reform was only finalised in May 2004 and was published on 23 June 2004 as 'South African Company Law for the 21st Century: Guidelines for Corporate Law Reform' in *Government Gazette* 26493, vol 468, Notice 1183 of 2004. (Hereafter 'Guidelines for Corporate Law Reform').

<sup>4</sup> Original participants at the round table were the following:

1. *MS ASTRID LUDIN*, Former Deputy Director-General for the Consumer and Corporate Regulation Division (CCRD) of the DTI in South Africa;
2. *MR JAMES J HANKS JR*, a partner at Venable LLP, a 450-person law firm with offices in Baltimore, Maryland, and Washington DC. Mr Hanks is also an Adjunct Professor of Law at Cornell Law School and North Western Law School in the USA, former member of the American Bar Association's Committee on Corporate Laws who chaired the international section of the Committee which advises and works with other countries on corporate law reform issues.
3. *PROF SAMUEL C THOMPSON JR*, who at the time was a Professor at the University of California Los Angeles (UCLA) School of Law and the Director of its Centre for the Study of Mergers and Acquisitions.

purpose of the round table and requested them to identify, on a clean piece of paper, the fundamental principles of the desired company law for South Africa.<sup>5</sup> This made it clear that the DTI was not just looking to amend the existing legislation, viz the Companies Act 61 of 1973, which at the time had been in force for almost 30 years and had never been subjected to any fundamental reform. Rather, the stage was set for a far-reaching fundamental revamp of the corporate legislation for South Africa.

The process for the reform was discussed and clearly outlined at this first round table on 11 July 2003<sup>6</sup> and it was clear that the DTI envisaged the first step to be the production and publication of a document setting

4. *MR NIGEL BOARDMAN*, a partner at Slaughter and May, a London-based law firm specialising in corporate and commercial work.
5. *MR DINES GIHWALA*, who at the time was the Chairman of a law firm called Hofmeyr Herbstein and Gihwala with offices in Johannesburg and in Cape Town. The firm subsequently merged with Cliffe Dekker to become Cliffe Dekker Hofmeyr and Mr Gihwala is the current Chairman of this firm.
6. *JUDGE BASHEER WAGLAY*, who at the time was a Judge in the Labour Court of South Africa and a member of the Standing Advisory Committee on Company Law in South Africa. Mr. Waglay is currently a Judge in the Cape High Court and is the Vice-Chairperson of the Standing Advisory Committee on Company Law in South Africa.
7. *MS NICKY NEWTON-KING*, the Deputy CEO of the JSE Limited and member of the Standing Advisory Committee on Company Law in South Africa.
8. *JUDGE LUCY MAILULA*, a Judge of the High Court in Johannesburg then known as the Witwatersrand Local Division and former Vice-Chairperson of the Standing Advisory Committee on Company Law in South Africa. Ms Mailula is the current Chairperson of the Committee.
9. *MR TSHEPO H MONGALO*, Former Senior Lecturer at the University of Natal in Durban and project manager for Company Law Reform in South Africa.
10. *MR NORMAN MANOIM* from the Competition Tribunal, which is the court of first instance of the Competition Authorities in South Africa.
11. *DR ALISTAIR RUITERS*, the former Director-General of the DTI in South Africa.

This group of Local and International Reference Team was to grow exponentially in the following months and years. Some of the more influential members who subsequently joined the team included Prof Michael Katz, the Chairman of Edward Nathan Sonnenbergs Inc; Judge Dennis Davis, Judge of the Western Cape High Court in Cape Town and the Judge-President of the Competition Appeal Court; Mr Nicolaas van Wyk, Technical Executive of the South African Institute of Professional Accountants; the late Prof Michael Larkin, the former Professor of Commercial Law at the University of Cape Town and Head of its Commercial Law Department; Mr Ignatius Schoole, Executive President of the South African Institute of Chartered Accountants; Mr Bernard Aghulus, Director of Auditing Standards for the Independent Regulatory Board of Auditors; Mr Trevor S Norwitz, a partner of the New York law firm of Wachtell, Lipton, Rosen & Katz LLP and member of the American Bar Association; and Mr Phillip Knight, a Vancouver-based legal counsel and plain-language drafting expert, who was subsequently appointed the chief drafter for the company law reform process. For a full list of all the participants, records held at the DTI will be useful.

<sup>5</sup> From the record of the round-table proceedings on 11 July 2003 at 7.

<sup>6</sup> In the words of the then Deputy Director-General of CCRD, 'Corporate law reform processes that have been adopted around the world have been quite different from the one we envisage in South Africa. What we envisage is a fairly simple process in terms of formulating a policy and legislation without a lot of committees. I think in many countries, in the UK recently, there have been task teams and various committees appointed. That is not what we

out the guidelines for corporate law reform. These guidelines were to form the basis for drafting instructions which would subsequently be prepared for the chief drafter in drafting the Companies Act.

(2) *Key participants in the South African company law reform process*

At the round table of 11 and 12 July 2003, the DDG made it clear that the process was going to be as broadly inclusive as possible.<sup>7</sup> This was subsequently made clear by the project manager's establishment of the broad structure for the undertaking of the process. The company law reform process was largely conducted along the following lines, which proved to be effective in producing the results within a period of five years of the commencement of the process. The process was led by the project manager, who was assisted by the chief policy adviser<sup>8</sup> and the chief drafter.<sup>9</sup> In addition to these three, the team consisted of six working groups divided according to priority areas identified for consideration,<sup>10</sup> namely, (1) corporate formation; (2) corporate finance; (3) corporate governance; (4) business rescue and mergers and takeovers; (5) not-for-profit companies; and (6) administration and enforcement. The primary function of the working groups was to recommend broad principles for the drafting of the relevant provisions within the specified area of consideration. Once these broad principles were formulated, they were then referred to specialists who were divided into (1) a local reference team,<sup>11</sup> and (2) an international reference team.<sup>12</sup> In order to minimise the

envisage here, but the emphasis will be on consultation on both the policy document and on the legislation.', at 10 of the record of the round table proceedings of 2003.

<sup>7</sup> *Supra* (n 6).

<sup>8</sup> Judge Dennis Davis served as the chief policy adviser to the corporate law reform process in South Africa.

<sup>9</sup> The chief drafter appointed for the company law reform process was Mr Phillip Knight, the plain-language drafting expert and legal practitioner based in Vancouver, Canada.

<sup>10</sup> Many members of the local and international reference teams assisted in these working groups.

<sup>11</sup> This team consisted of experts in corporate commercial law and non-profit organisation law, who were either in practice or in academia. Many of the team members were also the members of the Standing Advisory Committee on Company Law in South Africa, which is constituted in terms of s 18 of the Companies Act, 1973 (Act No. 61 of 1973). The full list of the Local Reference Team members is available at the Department of Trade and Industry.

<sup>12</sup> International reference team members included Mr. John F Olson, a partner at the Washington, DC-based law firm of Gibson, Dunn and Crutcher LLP; James J Hanks Jr, a partner at a Baltimore, MD-based law firm, Venable LLP; Prof Jean Jacques du Plessis, Corporate Law Professor at the University of Deakin in Australia; Mr Nigel Boardman, a partner at the London law firm of Slaughter and May; Prof Samuel C Thompson Jr, professor of Corporation and Securities Law at the University of Pennsylvania's Dickinson School of Law and the Director of its Centre for the Study of Mergers and Acquisitions; Trevor S Norwitz, a partner at a New York law firm, Wachtell, Lipton, Rosen & Katz; Mr Jonathan Rushworth, a former partner in the City of London law firm, Slaughter and May, and now retired, who was head of the firm's corporate recovery and insolvency practice and who, through a professional committee, was involved in the UK's recent reform of company law; and Mr Richard Fries, a fellow at the Centre for Civil Society at the London School of Economics.

composition of the working groups and to facilitate the working process, some members of the local and international reference teams also assisted in the work of the working groups. Also, depending on the expertise of members, some of them served in more than one working group. The membership of the working groups was constantly altered as some members withdrew due to the pressures of their demanding professional lives. In the end, the committees worked very effectively with a few constant members who were able to consider a broad range of issues and implications of their recommendations to other areas of corporate law under consideration for reform.

In summary, the key participants can generally be divided into three main groups. Group 1 consisted of the core team made up of the project manager, the Deputy Director-General of Consumer and Corporate Regulation Division (CCRD) of the DTI, the chief policy adviser, the chief drafter, and a drafting team consisting of no more than 10 participants taken from the local and international reference teams. Group 2 consisted of the broader local and international reference team members, including the Standing Advisory Committee on Company Law in South Africa. Group 3 consisted of the six working groups as indicated above.

### *(3) The initial round table of the local and international reference teams*

When the first round table was convened on 11 and 12 July 2003, deliberate efforts were made to ensure that both the local and international reference team members were part of the deliberations. This was done in order to create a collegiate working environment which has outlived the corporate law reform process. Most of the local reference team members were the then members of the Standing Advisory Committee for Company Law in South Africa (SACCL).<sup>13</sup> Members of the international reference team were appointed on the basis of their expertise in one or more of the following areas: (i) corporate formation; (ii) corporate finance; (iii) corporate governance; (iv) takeovers and business rescue; (v) not-for-profit companies; and (vi) administration and enforcement. Broad principles for reform which resulted from the initial round table of July 2003 reflected the need for the overhaul of the law in each of the areas mentioned above. In brief, those principles may be summarised as follows:

#### *(a) Corporate formation*

On this point, simplification was identified as a primary guiding principle as it was realised that the corporate formation process provided for under the Companies Act of 1973 was cumbersome and inflexible and, as such,

<sup>13</sup> See n 11 above.

discourages incorporation of companies and contributes to a low level of corporate business activity within the economy.

*(b) Corporate finance*

On this point, the round table noted the inflexible nature of the capital maintenance doctrine and the continued imposition of the inflexible capital rules under the Companies Act, which necessitated, among other things, archaic concepts such as par value for shares, as the primary hindrance to capital formation in South Africa. Modernisation of capital rules was fundamental to the reform of corporate finance.

*(c) Corporate governance*

In the aftermath of the global corporate collapses and failure of corporate governance systems, deliberations on this point centred on the improvement of corporate governance in appropriate circumstances and the consideration of the adoption of a general statement on the duties of directors and director liability. Thus, appropriate improvement of corporate governance standards, centered on the principle of certainty, guided the reform in this area.

*(d) Business rescue*

At the time, there was already a widespread acceptance that the existing judicial management process under chapter XV of the Companies Act of 1973 was failing the local economy as few, if any, judicial management processes resulted in success. Consequently, predictability, effectiveness and flexibility guided the reform in this area.

*(e) Mergers and takeovers*

On the side of mergers, the lack of a self-standing merger provision which would facilitate business amalgamations with less judicial involvement was mooted as one of the priority areas. On takeovers, the review of the role of the Securities Regulation Panel and the reconsideration of fundamental and affected transactions were identified as priority areas. As such, clarity was the guiding principle.

*(f) Not-for-profit companies*

There was acceptance of the fact that the existing rules for the formation and maintenance of non-profit companies and companies limited by guarantee were outdated and not in keeping with the needs for the development of a thriving not-for-profit sector. Modernisation of non-profit law was the priority consideration in this regard.

*(g) Administration and enforcement*

From early on during the deliberations, a consensus was reached that appropriate decriminalisation of company law should be pursued where

necessary and that more effective administrative and civil remedies for enforcement of company law breaches should be investigated and implemented.

(4) *The development of and consultation on the guidelines for corporate law reform*

Following the initial round table in 2003, the process of drafting the guidelines for corporate law reform commenced in earnest and lasted from September 2003 to May 2004. The drafting process involved a number of stakeholders, primarily the project manager, the chief policy adviser, the Deputy Director-General, some of the international reference team members and members of the Standing Advisory Committee on Company Law for South Africa.

In devising the guidelines for corporate law reform, there was an acknowledgement by the designers that:

- (a) At its essence, South Africa's company law should continue to be a specialised contract law that ensures that directors and managers are faithful to the interests of their companies.<sup>14</sup>
- (b) South Africa's company law reform must be limited to core company law issues and should not be what, in a civil law or European context, might be called broad-based company law, ie a distinction must be made between company law, which concerns itself with the internal affairs of the company, on the one hand, and regulatory law,

<sup>14</sup> This objective is now mirrored by s 76(3)(b) of the Companies Act 71 of 2008, which provides that: ' . . . a director of a company, when acting in that capacity, must exercise the powers and perform the functions of director . . . (b) in the best interests of the company.' Designers of the new company law were of a view that "a company has to have an awareness of its impact upon its stakeholders, but that it would be too difficult for a board to have to weigh up and be answerable to all the stakeholders in a legal sense . . . ' In other words, the view was that it would be chaotic to have a system in which directors have a duty otherwise than to the company as a continuing legal entity, although they (directors) should always take stakeholders into account in some form or another.

It was conceded that a company is an economic vehicle, which is, historically in company law, a separate legal person and as such should be run with a purpose of wealth creation, maintenance and maximisation of such wealth. It was argued that the purpose of the company is not so much just about the shareholders because in many companies the shareholders are a constantly changing group of people, whose interests will certainly be divergent. For example, a 90-year-old widower who is dependent on dividends has a very different interest than the 25-year-old shareholder who does not care about dividends but is in the investment for growth, which is why the board should focus on the interest of the company as a continuing legal entity. Consequently, it was agreed that the board needs to focus on the company as a continuing separate legal person existing through time. Boards may thus take into account the interests of other stakeholders to the extent that they benefit the company.

It was concluded that it would be silly to run the company for the short-term profit maximisation today. See 14–19 and 31 of the record of the roundtable proceedings on 11 July 2003.

which concerns itself with the imposition of broader checks and balances on companies, on the other hand.<sup>15</sup>

- (c) Consequently, aspects related to company law, such as labour law, competition law, environmental law, mining law and other related areas of law, should not be part of South Africa's company law, but those matters should continue to be primarily governed at national level by regulatory regimes originating in parliamentary enactments and administered through agencies of the national government, like the Competition Commission and Competition Tribunal, among others.<sup>16</sup>
- (d) South Africa's company law should primarily govern the relationship between corporate managers (ie directors and officers), shareholders and, where appropriate, relevant stakeholders.<sup>17</sup>
- (e) As a result, and in line with this largely contractarian vision, the new Companies Act continues, by design, to be a broad enabling statute that permits and facilitates company specific procedures. In other words, the new statute is still different from what one might find in a civil law nation, which would be more likely to have a prescriptive company law which attempts to regulate every aspect of law that may be reasonably linked to the operation of corporate entities.<sup>18</sup>
- (f) South Africa's company law should keep statutory mandates to a minimum and, in addition, some of the mandatory terms should be subject to being overridden through the Memorandum of Incorporation and company rules.<sup>19</sup>
- (g) By the same token, the law should give corporate promoters tremendous power to use the company constitution, ie the Memorandum of Incorporation, to vary otherwise mandatory terms.<sup>20</sup>
- (h) The efficiency and the flexibility brought about by the corporate statute should not only serve the interests of corporate directors, but should also be vital for safeguarding the interests of shareholders and, where appropriate, those of the relevant stakeholders.

<sup>15</sup> This is reflected on page 16 of the Guidelines for Corporate Law Reform.

<sup>16</sup> *Ibid.*

<sup>17</sup> See, generally, the record of the proceedings of the roundtable of 11 and 12 July 2003.

<sup>18</sup> *Ibid.*

<sup>19</sup> This principle enhanced the flexibility offered by the adopted Companies Act which provides for alterable, unalterable and default provisions. Moreover, the current s 6 of the Act exemplifies this flexibility by allowing a provision in the Memorandum of Incorporation or the Rules to override unalterable provisions of the Act, if so authorised by the Companies Tribunal, so long as the MoI or Rules are not intended to defeat the policy of the statute provision.

<sup>20</sup> This is clearly reflected by the proposed s 6 of the Companies Act 71 of 2008, which promotes the flexibility of allowing the Companies Tribunal to exempt any provision of the constitution, any scheme or resolution, from complying with the unalterable provisions of the Act, provided it can be shown that the alternative scheme was not designed to defeat the policy of the provision.

- (i) Consequently, shareholders should have the freedom to devise company constitution provisions that address their company specific needs.<sup>21</sup>
- (j) Even though shareholders should be allowed the flexibility to craft a company constitution that addresses their company specific needs, the fundamental principle that should underlie the corporate decision-making trajectory is that the business and affairs of the corporation should be managed by or be under the direction of the board of directors.<sup>22</sup>
- (k) In that regard, South African company law should invest the board of directors with wide discretion to make business decisions and a wide choice of means to effect those decisions, subject to limitations generally acceptable in corporate law circles.<sup>23</sup>
- (l) With this wide discretion and choice afforded to directors, South Africa's company law should be alive to the danger of possible abuse of powers by directors and, as a result, should deploy means to prevent and remedy disloyalty.<sup>24</sup>
- (m) At a minimum, these safeguards should include (i) the general statement of the minimum duties of directors in a statutory form,<sup>25</sup> (ii) the mandatory requirement for public company shareholders to meet annually to elect directors,<sup>26</sup> and (iii) the identification of certain transactions that may not be implemented by the directors without shareholder approval.<sup>27</sup>

At the end of the process of developing the guidelines, the following five objectives for company law reform emerged:<sup>28</sup>

<sup>21</sup> Many provisions in the Act provide for a particular stated eventuality unless the shareholder crafted Memorandum of Incorporation provides otherwise.

<sup>22</sup> This is mirrored in s 66(1) of the Companies Act, which provides that 'the business and affairs of a company must be managed by or under the direction of its board, which has the authority to exercise all of the powers and perform any of the functions of the company, except to the extent that this Act or the company's Memorandum of Incorporation provides otherwise.'

<sup>23</sup> This principle is clearly reflected in s 36 of the Act which provides the board with wide powers concerning equity financing, subject to limitations in the Memorandum of Incorporation.

<sup>24</sup> These measures are primarily contained in ss 76–78 which deal with directors' standards of conduct, liability and limitation of insurance and indemnity.

<sup>25</sup> See ss 76 and 77 of the Companies Act.

<sup>26</sup> Section 61(7) and (8) of the Companies Act.

<sup>27</sup> These transactions include those that are referred to as fundamental transactions found in Chapter 5 of the Act and they include (a) sales of all or the greater part of the assets of the company; (b) mergers or amalgamations, and (c) schemes of arrangements. Amendments of corporate constitution provisions also require a heightened majority shareholder approval of special resolutions in terms of s 65(11)(a).

<sup>28</sup> See page 11 of the Guidelines for Corporate Law Reform (n 3) above. These objectives are reflected in s 7 of the Act dealing with purposes of the legislation.

1. Encouraging entrepreneurship and enterprise diversity by simplifying the formation of companies and reducing costs associated with the formalities of forming a company and maintaining its existence, thereby contributing to the creation of employment opportunities;
2. Promoting innovation and investment in South African markets and companies by providing a predictable and effective regulatory environment and flexibility in the formation and the management of companies;
3. Promoting the efficiency of companies and their management;
4. Encouraging transparency and high standards of corporate governance, recognising the broader social role of enterprises;
5. Ensuring compatibility and harmonisation with best-practice jurisdictions internationally.

Having completed the Guidelines for Corporate Law Reform in May 2004, the DTI approached the Cabinet of the Republic of South Africa in early June 2004 for approval to publish the guidelines and to conduct public information sessions and to solicit public comments on the proposed guidelines. The DTI conducted public consultation sessions in all the nine provinces from 24 June to 23 September 2004. At the same time, the department tabled the guidelines within the National Economic Development and Labour Council's (NEDLAC's) Trade and Industry Chamber as required in terms of the National Economic Development and Labour Council Act.<sup>29</sup>

In addition to public consultations conducted by the department on the guidelines, the department also held briefing workshop sessions with the Portfolio Committee on Trade and Industry of the National Parliament of South Africa as is required in terms of the legislative process. The Portfolio Committee on Trade and Industry is the committee of the National Assembly of Parliament. In addition to the briefing workshop with the Portfolio Committee, the department also held a briefing workshop with the Select Committee on Economic and Foreign Affairs. This latter committee is the committee of the National Council of Provinces, the second House of Parliament.

Having held public and stakeholder consultations on the guidelines for corporate law reform, the department updated the guidelines with a view to preparing drafter's instructions which are contained in the drafter's memorandum and handed over to the chief drafter for the purpose of the commencement of the drafting process. By this time most of the groundwork on possible drafting options had been completed by the project manager with the help of the chief policy adviser, the working groups and reference teams.

<sup>29</sup> Act 35 of 1994. In particular, ss 5 and 6.

(5) *The engagement of the chief drafter and the development of the drafter's memorandum*

Just before the completion of the drafting instructions, the project manager approached the Deputy Director-General for the identification and appointment of the chief drafter, who acted as a consultant to the department. The chief drafter worked closely with the internal and divisional legislative drafter,<sup>30</sup> who liaised very closely with the departmental legislative drafter<sup>31</sup> and the office of the Chief State Law Adviser in Cape Town. The appointment of the chief drafter was facilitated by the project manager and it was the project manager who monitored his performance.

(6) *The drafting process and the release of the exposure draft for internal consultation and focus group consultations*

Once the drafter's memorandum was prepared by mid-2005, the process of legislative drafting began in August 2005. The process continued until the finalisation of the first exposure draft in April of 2006. Following the finalisation of the exposure draft, the department undertook the consultation process internally within the department, ie with other divisions of the department and regulatory agencies which fall within the regulation of the department, such as the Competition Commission and Tribunal and the Companies and Intellectual Property Registration Office (CIPRO). Once the internal consultation was underway, the department was also preparing for focus group consultations with identified relevant stakeholders within labour, business and civil society sectors. The focus group consultations took place in July 2006, after which the Bill was finalised for submission to the Minister and to Cabinet for approval to publish for general public consultations.

(7) *The Cabinet process and the publication of the initial draft for public consultation and comment*

After focus group consultations, the drafting team updated the Bill in line with comments made in the internal and focus group consultation processes. It was during this process that both the local and international reference team members played a crucial role in fine-tuning the Bill before submission to Cabinet. Cabinet memorandum and submissions were submitted to Cabinet, together with the Bill, for approval to publish for public consultation and comment. The Bill, with accompanying documentation, was considered by the Cabinet Committee on Economic

<sup>30</sup> This role was ably undertaken by Mr Brian Muthwa, the erstwhile director for legislative drafting in Consumer and Corporate Regulation Division (CCRD) of DTI.

<sup>31</sup> The departmental legislative drafter was Dr Johan Strydom.

Sector on 31 January 2007 and the decision of the committee was ratified by the full Cabinet sitting on 7 February 2007, with the result that the Bill was published for public comment on 12 February 2007 for public consultation and comment.

Substantial comments were received during the ensuing public consultation stage and the department also consulted with relevant stakeholder groups to get comments on specialised areas of the Bill which received little or no substantial comments during the public consultation stage. The public consultation process and stakeholder engagements took place between the months of February 2007 and April 2008, a period of over one year. The involvement of the local and international reference team members became even more intense in the process of updating the Bill following public comments and stakeholder engagements.

(8) *Consideration of public comments and the revision of the Bill*

In addition to the oral submissions received during public consultation sessions, the DTI received comments which amounted to more than 3000 written pages. Furthermore the DTI consulted with targeted regulatory agencies (such as the Securities Regulation Panel and the JSE Limited) and other stakeholders on particular issues of the Bill.

In general, the public comments supported the core principles and policies of the reform project, but questioned and challenged many of the legal instruments and provisions that had been proposed to give effect to those policies and principles. Responding to those challenges, the DTI instructed the drafting team to re-consider and revise the Bill as previously published in a manner that would continue to give effect to the policies directing the project, but address and accommodate the issues and concerns raised, in so far as practicable.

Subsequently, and in line with public comments, the Bill reverted to the distinction between private and public companies and appropriately eliminated the proposed categorisation of companies into (i) widely held, (ii) closely held and (iii) public-interest companies. Since this latter categorisation, particularly the public-interest companies category, was introduced in order that some measured and balanced imposition of transparency and accountability provisions can be imposed upon companies, the drafting team appropriately streamlined these provisions and introduced the two-tiered approach as discussed later by Caroline Ncube.

(9) *The Introduction of the Bill in Parliament, the public hearings and the adoption*

The revised Bill, now called the Companies Bill, 2008, was formally introduced into Parliament in June 2008. After the introduction of the Bill into Parliament, public hearings were scheduled within the Portfolio

Committee on Trade and Industry for August 2008 and the Bill was finally adopted on 19 November 2008, with minor amendments as the Companies Bill B61D of 2008.

(10) *The way forward*

After a lengthy process which included the translation of the Bill into another official language, the Companies Bill B61D of 2008, was finally assented to by the State President on 8 April 2009 and was subsequently gazetted on 9 April 2009 in *Government Gazette* 32121 (Notice No. 421) as the Companies Act 71 of 2008.

The Act makes it clear that its provisions do not take effect upon publication. Section 225 provides that:

This Act is called the Companies Act 2008 and comes into operation on a date fixed by the President by proclamation in the *Gazette*, which may not be earlier than one year following the date on which the President assented to this Act.

The delay of not less than one year between the Act being published and becoming operational is necessary for a number of reasons, which include that:

- (i) the Minister of Trade and Industry has to determine and publish Regulations as required in many sections of the Act;
- (ii) the DTI has to re-arrange current institutional structures to accommodate envisaged changes incorporated in the Act;
- (iii) significant changes to IT systems will have to be made to accommodate the electronic filing and other envisaged procedures; and
- (iv) existing companies and close corporations need to have time to adapt their procedures to comply with the requirements of the new legislation.

## II CONCLUSION

When this article is published, the Companies Act will be about to come into operation and this will be the culmination of a largely consultative legislative process in which the late Prof Michael Larkin was involved, initially as a member of the local reference team and subsequently as a member of the Standing Advisory Committee on Company Law. It can cogently be asserted that he would have been proud of the turn of events in this process.