REPUBLIC OF SOUTH AFRICA

COMPANIES AMENDMENT BILL

(As introduced in the National Assembly as a section 75 Bill)

(MINISTER OF TRADE AND INDUSTRY)

[B 17—99]

REPUBLIEK VAN SUID-AFRIKA

MAATSKAPPY-WYSIGINGSWETSONTWERP

(Soos ingedien in die Nasionale Vergadering as 'n artikel 75-wetsontwerp)

(MINISTER VAN HANDEL EN NYWERHEID)

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GENERAL EXPLANATORY NOTE:

[ ] Words in bold type in square brackets indicate omissions from existing enactments.

Words underlined with a solid line indicate insertions in existing enactments.

BILL

To amend the Companies Act, 1973, so as to provide for a company to acquire its own shares; to provide for the disclosure of a beneficial interest in securities; to provide for the mandatory appointment of a secretary for a public company; to further provide for the disclosure of directors' emoluments, pension and details in respect of their service contracts; and to provide for certain penalties; and to provide for matters connected therewith.

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:—

Amendment of "Arrangement of Act" of Act 61 of 1973, as amended by section 1 of Act 78 of 1989

1. The ''Arrangement of Act'' of the Companies Act, 1973 (hereinafter referred to as the principal Act), is hereby amended—

(a) by the substitution opposite ''CHAPTER V'' for the words ''Reduction of Capital'' of the words ''Acquisition by Companies of own shares''; and

(b) by the insertion after ''CHAPTER IX'' of the following expression: ''CHAPTER IXA Secretary for Public Companies ... 268A–268I''.

Amendment of section 1 of Act 61 of 1973, as amended by section 1 of Act 76 of 1974, section 1 of Act 64 of 1977, section 26 of Proclamation 234 of 1978, section 1 of Act 84 of 1980, section 1 of Act 83 of 1981, section 1 of Act 29 of 1982, section 1 of Act 31 of 1986, section 1 of Act 82 of 1992 and section 1 of Act 35 of 1998

2. Section 1 of the principal Act is hereby amended by the substitution in subsection (1) for the definition of ''officer'' of the following definition:

'' 'officer', in relation to a company, includes any managing director, manager or secretary thereof **[but excludes a secretary which is a body corporate]**;''.

Amendment of section 38 of Act 61 of 1973

3. Section 38 of the principal Act is hereby amended by the insertion of ''or'' at the end of paragraph *(c)* of subsection (2) and the addition of the following paragraph:

''*(d)* the provision of financial assistance for the acquisition of shares in a company by the company or its subsidiary in accordance with the provisions of section 85 for the acquisition of such shares.''.

Amendment of section 39 of Act 61 of 1973, as amended by section 3 of Act 76 of 1974

4. Section 39 of the principal Act is hereby amended—

(a) by the substitution for subsection (1) of the following subsection:

''(1) Save as is provided in subsection (2), if shares in a company are acquired in accordance with section 89 by its subsidiary, for so long as such shares are held by the subsidiary—

(a) no voting rights attaching to such shares may be exercised; and

(b) the percentage of votes able to be cast at any meeting of shareholders shall be reduced by the number of shares held by the subsidiary:

Provided that this subsection shall not apply where the shares are acquired in a subsidiary of the holding company which is also a subsidiary of the acquiring company.'';

(b) by the deletion of subsections (3) and (4).

Amendment of heading to Chapter V of Act 61 of 1973

5. The heading to Chapter V of the principal Act is hereby amended by the substitution for the words ''Reduction of Capital'' of the words ''Acquisition by Companies of own Shares''.

Amendment of section 76 of Act 61 of 1973, as amended by section 5 of Act 76 of 1974 and section 3 of Act 82 of 1992

6. Section 76 of the principal Act is hereby amended by the insertion of ''or'' at the end of paragraph *(c)* of subsection (3) and the addition of the following paragraph:

''*(d)* for the payment of the premium over the par value in the case of an acquisition of shares in accordance with section 85.''.

Substitution of heading before section 83 of Act 61 of 1973

7. The following heading is hereby substituted for the heading before section 83 of the principal Act:

''*Acquisition by Companies of own Shares*''.

Repeal of sections 83 and 84 of Act 61 of 1973

8. Sections 83 and 84 of the principal Act are hereby repealed.

Substitution of section 85 of Act 61 of 1973

9. The following section is hereby substituted for section 85 of the principal Act:

"Company may under certain circumstances acquire shares issued by it

85. (1) Subject to the provisions of this section and any other applicable law, a company may by special resolution of the company, if authorized thereto by its articles, approve the acquisition of shares issued by the company.

(2) The approval by special resolution may be a general approval or a specific approval for a particular acquisition.

(3) If the approval is a general approval, it shall be valid only until the next annual general meeting of the company, but it may be varied or

revoked by special resolution by any general meeting of the company at any time prior to such annual general meeting.

(4) A company shall not make any payment in whatever form to acquire any share issued by the company if there are reasonable grounds for believing that—

(a) the company is, or would after the payment be, unable to pay its debts as they become due in the ordinary course of business; or

(b) the consolidated assets of the company fairly valued would after the payment be less than the consolidated liabilities of the company.

(5) In the case of the acquisition of par value shares issued by the company, the issued capital shall be decreased by an amount equal to the par value of the shares so acquired.

(6) In the case of the acquisition of no par value shares issued by the company, the stated capital of the class of shares so acquired shall be decreased by an amount derived by multiplying the number of shares of that class so acquired with the amount arrived at by dividing the stated capital contributed by issued shares of that class by the number of issued shares of that class.

(7) If par value shares are acquired at a premium over the par value, the premium may be paid out of reserves, including statutory non-distributable reserves.

(8) Shares issued by a company and acquired under this section shall be cancelled as issued shares and restored to the status of authorized shares forthwith.

(9) Shares in the capital of a company may not be acquired under this section if, as a result of such acquisition, there would no longer be any shares in issue other than convertible or redeemable shares.''.

Substitution of section 86 of Act 61 of 1973

10. The following section is hereby substituted for section 86 of the principal Act:

''Liability of directors and shareholders under certain circumstances

86. (1) The directors of a company who, contrary to the provisions of section 85(4), allow the company to acquire any share issued by it, are jointly and severally liable to restore to the company any amount so paid and not otherwise recovered by the company, subject to any relief granted by the Court under section 248.

(2) A director who is liable under subsection (1) may apply to the Court for an order compelling a shareholder or former shareholder to pay to the company any money that was paid to such shareholder contrary to section 85(4).

(3) Where the acquisition by the company of shares issued by it is in contravention of the provisions of section 85(4), any creditor who was a creditor at the time of the acquisition, or who is a creditor by reason of a cause of debt which arose before such acquisition, or any shareholder, may apply to the Court for an order, and the Court may, if it finds it equitable to do so—

(a) order a shareholder or former shareholder to pay to the company any money or return any consideration that was paid or given by the company to acquire the shares;

(b) order the company to issue an equivalent number of shares to the shareholder or former shareholder;

(c) make such other order as it thinks fit.

(4) An action to enforce a liability imposed by this section must be instituted within three years after the date of completion of the acquisition.

(5) Nothing contained in this section shall limit or diminish any liability which any person may incur under this Act or any other law, or the common law.

(6) For the purposes of this section and section 89 'director of a company' includes any director of a holding company of such company.''.

Substitution of section 87 of Act 61 of 1973

11. The following section is hereby substituted for section 87 of the principal Act:

"Procedure of acquisition of certain shares by company

87. (1) Save as is provided in subsection (2), a company that proposes to acquire shares issued by it shall—

(a) deliver or mail a copy of the written offering circular in the prescribed form, to each registered shareholder on record as at the date of the offer in such manner as may be provided in the articles of the company for the sending of any notice of a meeting of shareholders, stating the number and the class or kind of its issued shares which the company proposes to acquire, and specifying the terms and reasons for the offer;

(b) lodge a copy of the offering circular with the Registrar within 15 days of the date that it is delivered or mailed to the shareholders of the company.

(2) The provisions of subsection (1) shall not apply—

(a) if, and to the extent that, the shares are acquired in terms of the special resolution passed in terms of section 85(3);

(b) in the case of a company whose shares are listed on a stock exchange within the Republic, to the acquisition by that company of shares in terms of transactions effected on such stock exchange in accordance with the rules and listing requirements of that exchange.

(3) The provisions of sections 160, 161, 162 and 163 shall apply *mutatis mutandis* to all documents issued in terms of subsection (1).

(4) Where in response to any offer to acquire shares, the shareholders propose to dispose of a greater number of shares than the company offered to acquire, the company shall acquire from all of the shareholders who offered to sell, *pro rata* as nearly as possible disregarding fractions: Provided that this subsection shall not apply to the acquisition of shares in terms of transactions effected on a stock exchange within the Republic.

(5) A company that acquires shares issued by it shall notify the Registrar within 30 days of the date of the acquisition in the prescribed form of the date, number and class of shares that it has acquired.

(6) A stock exchange within the Republic may, in addition to any requirements contained in this Act, determine further requirements with which a company whose shares are listed on such exchange shall comply prior to such company acquiring its own shares.''.

Substitution of section 88 of Act 61 of 1973

12. The following section is hereby substituted for section 88 of the principal Act:

"Enforceability of contracts for acquisition by company of certain shares

88. (1) A contract with a company providing for the acquisition of shares

issued by it is enforceable against the company, except if the company cannot execute the contract without being in breach of section 85(4).

(2) In an action brought on a contract referred to in subsection (1), the company has the burden of proving that execution thereof is or will be in breach of section 85(4).

(3) Until the company has fully performed its obligations in terms of a contract referred to in subsection (1), shareholders who dispose of their shares retain the status of claimants entitled to be paid as soon as the company is lawfully able to do so or, on liquidation, to be ranked subordinate to creditors and shareholders whose claims are in priority to the claims of the class of shares which they disposed of to the company, but in priority to the claims of the other shareholders.''.

Substitution of section 89 of Act 61 of 1973

13. The following section is hereby substituted for section 89 of the principal Act:

''Subsidiary may acquire certain shares in its holding company or subsidiary of its holding company

89. A subsidiary company may *mutatis mutandis* in accordance with sections 85, 86, 87 and 88, acquire shares in its holding company or in a subsidiary of its holding company to a maximum of 10 per cent of the number of issued shares of the holding company or of the subsidiary of the holding company: Provided that this section shall not apply to the acquisition of shares by a holding company in a subsidiary of itself.''.

Substitution of section 90 of Act 61 of 1973

14. The following section is hereby substituted for section 90 of the principal Act:

''Payments to shareholders

90. (1) A company may make payments to its shareholders subject to the provisions of this section and if authorized thereto by its articles.

(2) A company shall not make any payment in whatever form to its shareholders if there are reasonable grounds for believing that—

(a) the company is, or would after the payment be, unable to pay its debts as they become due in the ordinary course of business; or

(b) the consolidated assets of the company fairly valued would after the payment be less than the consolidated liabilities of the company.

(3) For the purposes of this section 'payment' includes any direct or indirect payment or transfer of money or other property to a shareholder of the company by virtue of the shareholder's shareholding in the company, but excludes an acquisition of shares in terms of section 85, a redemption of redeemable preference shares in terms of section 98, any acquisition of shares in terms of an order of Court and the issue of capitalisation shares in the company.

(4) A shareholder shall be liable to the company for any payment received contrary to the provisions of subsection (2).''.

Amendment of section 98 of Act 61 of 1973, as amended by section 4 of Act 64 of 1977, section 15 of Act 69 of 1989 and section 6 of Act 35 of 1998

15. Section 98 of the principal Act is hereby amended by the substitution for subsection (4) of the following subsection:

''(4) The capital redemption reserve fund may, notwithstanding anything in this section contained, be applied by the company in paying up unissued shares of the

company to be issued to members of the company as fully paid-up capitalization shares or for the payment of the premium over the par value in the case of an acquisition of shares in terms of section 85.''.

Insertion of section 140A in Act 61 of 1973

16. (1) The following section is hereby inserted after section 140 of the principal Act:

"Disclosure of beneficial interest in securities

140A. (1) In this section, unless the context otherwise indicates—

'beneficial interest', in relation to a security, means—

(a) the right or entitlement to receive any dividend or interest payable in respect of that security; or

(b) the right to exercise or cause to be exercised, in the ordinary course, any or all of the voting, conversion, redemption or other rights attaching to such security,

but does not include any interest held by a person in a unit trust or collective investment scheme in terms of the Unit Trusts Control Act, 1981 (Act No. 54 of 1981);

'exchange' means a stock exchange in the Republic licensed in terms of the Stock Exchanges Control Act, 1985 (Act No. 1 of 1985), or a financial market in the Republic licensed in terms of the Financial Markets Control Act, 1989 (Act No. 55 of 1989);

'security' means—

(a) any listed security as defined in section 1 of the Stock Exchanges Control Act, 1985; and

(b) any financial instrument which confers the right to convert such instrument into a listed security referred to in paragraph *(a)*.

(2) A person is deemed to have a beneficial interest in a security if—

(a) the spouse of the person married in community of property or the minor children of that person have a beneficial interest in such security;

(b) that person acts in terms of an agreement with another person holding a beneficial interest and the agreement is in respect of the co-operation between them for the acquisition, disposal or any other matter relating to a beneficial interest in such security;

(c) it is the holding company of a company that has a beneficial interest in such security;

(d) a body corporate or trust has a beneficial interest in such security and—

(i) the body corporate or its directors or the trustees are accustomed to act in accordance with the directions or instructions of that person; or

(ii) that person is entitled to exercise or control the exercise of the majority of the voting rights at general meetings of the body corporate or trust; or

(e) the security is held *nomine officii* by another person on that person's behalf.

(3) Where securities of an issuer are registered in the name of a person, and that person ('the registered shareholder') is not the holder of the beneficial interest in all of the securities held by the registered shareholder, the registered shareholder shall disclose to the issuer the identity of each person on whose behalf the registered shareholder holds securities which in aggregate reach, or if once reached, fall below 5%, 10%, 15%, 20%, 25%, 30%, 35%, 40%, 45%, 50%, 55%, 60%, 65%, 70%, 75%, 80%, 85% or 90% of the total number of the securities of that class issued by the issuer.

(4) The information required in terms of subsection (3) shall be furnished

in writing so as to be received by the issuer within seven days of the date of registration of the securities in the name of the registered shareholder.

(5) *(a)* An issuer may by notice in writing require a person who is a registered shareholder of, or whom the issuer knows or has reasonable cause to believe to have a beneficial interest in, securities issued by that issuer, to confirm or deny whether or not such person holds a beneficial interest in such securities, and if the security is held for another person, the person to whom the request is made shall disclose to the issuer the identity of the person on whose behalf that security is held.

(b) The registered shareholder may levy such fee for the furnishing of information requested as may be prescribed by the Minister from time to time.

(6) A notice under subsection (5) may, in addition, require the addressee to give particulars of the extent of the beneficial interest held during the three years preceding the date of the notice.

(7) The information required in terms of subsections (5) and (6) shall be furnished within a reasonable time specified in the notice, but not later than 14 days from the date of receipt of the notice.

(8) *(a)* All issuers of securities shall establish and maintain a register of the disclosures made in terms of this section and shall publish in their annual financial statements a list of the persons who hold beneficial interests equal to or in excess of five per cent of the total number of securities of that class issued by the issuer together with the extent of those beneficial interests.

(b) Such register shall be open to inspection *mutatis mutandis* as if it were a register contemplated in section 113.

(9) A person who fails to make a disclosure as required by this section or who makes a false disclosure, may, at the suit of the issuer, after the institution of civil proceedings, be deprived by the Court of all or some of the benefits attaching to the relevant securities, including the right to transfer the securities, to exercise any voting rights or to receive any dividends or interest in respect of the securities and to receive, in any manner other than on liquidation any benefit that may otherwise attach to such securities.

(10) Where an order contemplated in subsection (9) has been granted in respect of securities—

(a) any agreement which seeks to transfer the securities or any right or benefit which attaches to them or which otherwise seeks to avoid the consequences of such an order, shall be void; and

(b) the issuer of the relevant securities shall forthwith send a copy of the order to the exchange on which such securities are listed and the exchange shall make the order public within 48 hours of receipt thereof.''.

(2) Subsection 1 shall come into operation six months after the promulgation of this Act.

Amendment of section 227 of Act 61 of 1973, as amended by section 7 of Act 82 of 1992

17. Section 227 of the principal Act is hereby amended by the substitution for paragraph *(c)* of subsection (1) of the following paragraph:

''*(c)* by way of such compensation, consideration or other reason in connection with any **[take-over scheme referred to in section 314]** scheme or transaction which constitutes an affected transaction as contemplated in Chapter XVA (hereinafter in this section referred to as a take-over offer or take-over scheme),''.

Insertion of Chapter IXA in Act 61 of 1973

18. The principal Act is hereby amended by the insertion after section 268 of the following chapter:

"CHAPTER IXA

SECRETARY FOR PUBLIC COMPANIES

Mandatory appointment of secretary

268A. The directors of any public company having a share capital, excluding a share block company as defined in section 1 of the Share Blocks Control Act, 1980 (Act No. 59 of 1980), shall appoint a secretary who is permanently resident in the Republic and who, in the opinion of the directors, has the requisite knowledge and experience to carry out the duties of a secretary of a public company.

First appointment of secretary

268B. The majority of the subscribers to the memorandum of a public company or its directors shall appoint the first secretary of that company and the provisions of sections 269(1), (2), (4) and (5) shall apply *mutatis mutandis* to such first appointment.

Filling of casual vacancy of secretary

268C. (1) A casual vacancy in the office of secretary shall be filled by the directors of the public company within 90 days of the vacancy occurring.

(2) The public company shall and any director may, if the directors fail to appoint a secretary in terms of subsection (1), within seven days after the expiration of the 90 day period, lodge with the Registrar a notice to that effect.

(3) The directors of a public company who knowingly fail to comply with subsection (1) and a public company which fails to comply with subsection (2), shall be guilty of an offence.

(4) During any period that the office of secretary is vacant, the directors may generally or specifically authorize any officer of the company to carry out certain or all of the secretary's duties.

(5) If the directors fail to appoint a secretary within the 90 day period, the Registrar or the Court, upon application by a member or director, may order the public company and its directors to appoint a secretary.

(6) If a public company and its directors knowingly fail to appoint a secretary within two months of being ordered to do so by the Registrar or the Court in terms of subsection (5), the company and its directors shall be guilty of an offence.

Body corporate or partnership may be appointed secretary

268D. (1) A body corporate or partnership may be appointed to hold the office of secretary of a public company provided that at least one person in the employment of that body corporate or partnership complies with the requirements referred to in section 268A.

(2) A change in the membership of a body corporate which holds office as secretary shall not constitute a casual vacancy in the office of secretary, provided that the body corporate continues to have at least one person in its employment who complies with the requirements referred to in section 268A.

(3) A change in the composition of a partnership which holds office as secretary shall not constitute a casual vacancy in the office of secretary provided that the new partnership continues to have as a partner or employee at least one person who complies with the requirements referred to in section 268A.

(4) A body corporate or partnership which holds office as secretary shall immediately upon the services of the last remaining person who complies with the requirements referred to in section 268A no longer being available, notify the directors of the public company thereof and that notification shall

be deemed to be a resignation of the secretary by which a casual vacancy shall have been constituted.

Consent to act as secretary, entries in register of directors and officers and lodging of returns

268E. (1) A person who accepts an appointment as secretary shall sign and lodge with the company the prescribed form referred to in section 211 confirming such person's consent to act as secretary, or if a partnership or body corporate is appointed as secretary, the written consent of the partners or the directors of such partnership or body corporate to so act.

(2) No person shall act as secretary and no appointment of secretary shall have legal force for the purposes of this Act or any other law, unless the prescribed form of consent has been lodged with the company and the company has complied with the provisions of sections 215 and 216.

(3) The provisions of section 214 shall apply *mutatis mutandis* to the appointment of a secretary.

Disqualification for appointment as secretary

268F. The provisions of section 218(1)*(b), (c)* and *(d)* and (2) and (3) shall apply *mutatis mutandis* to the appointment of a secretary.

Duties of secretary

268G. A secretary's duties include, but are not restricted to—

(a) providing the directors of the company collectively and individually with guidance as to their duties, responsibilities and powers;

(b) making the directors aware of all law and legislation relevant to or affecting the company and reporting at any meetings of the shareholders of the company or of the company's directors, any failure to comply with such law or legislation;

(c) ensuring that minutes of all shareholders' meetings, directors' meetings and the meetings of any committees of the directors are properly recorded in accordance with section 242;

(d) certifying in the annual financial statements of the company that the company has lodged with the Registrar all such returns as are required of a public company in terms of this Act and that all such returns are true, correct and up to date;

(e) ensuring that a copy of the company's annual financial statements is sent, in accordance with section 302, to every person who is entitled thereto in terms of this Act.

Name of secretary to be stated on trade catalogues, trade circulars and business letters of company

268H. (1) The first names, or the initials thereof, and the surname of the secretary of a public company shall be stated on every trade catalogue, trade circular and business letter bearing the company's name.

(2) A company which fails to comply with the provisions of subsection (1), shall be guilty of an offence.

Notice to be given of resignation or removal of secretary

268I. (1) When during any financial year the secretary of a public company resigns, or is removed from office, the company shall in the prescribed form notify the Registrar thereof within 21 days of such resignation or removal.

(2) If the secretary is removed the secretary may require the company, in its annual financial statements relating to that financial year, to include a statement, not exceeding a reasonable length, setting out the secretary's contention as to the circumstances that resulted in the removal.

(3) If the secretary wishes to exercise the power referred to in subsection (2), the secretary shall give written notice to that effect to the company by not later than the end of the financial year in which the removal took place and such notice shall include the statement referred to in subsection (2).

(4) The statement of the secretary referred to in subsection (2) shall be included in the directors' report in the company's annual financial statements and if no directors' report is required in respect of the company's annual financial statements, it shall be included under a separate heading in the company's annual financial statements.

(5) A company and its directors who knowingly fail to comply with the provisions of this section, shall be guilty of an offence.''.

Amendment of section 297 of Act 61 of 1973, as amended by section 26 of Act 64 of 1977

19. Section 297 of the principal Act is hereby amended—

(a) by the substitution for subsection (1) of the following subsection:

''(1) The annual financial statements of a company shall **[in so far as the information necessary for the purpose is contained in the records of the company or is otherwise available to it]** contain particulars showing—

(a) the **[aggregate]** amount of the **[directors' emoluments]** emoluments received by directors;

(b) the **[aggregate]** amount of **[directors' or past directors' pensions; and]** the pensions paid or receivable by directors and past directors;

(c) the **[aggregate]** amount of any compensation paid to directors **[or]** and past directors in respect of loss of office; and

(d) details of directors' service contracts.'';

(b) by the insertion after subsection (1) of the following subsection:

''(1A) *(a)* The information required to be furnished in terms of this section shall in each case be furnished in two separate categories, namely, one dealing with the executive directors in the aggregate (and past directors where appropriate), and the other dealing with non-executive directors in the aggregate (and past directors where appropriate).

(b) For the purposes of this section, 'executive director' means a director who is involved in the day-to-day management of the company and 'non-executive director' means a director who has no involvement in the day-to-day management of the company.'';

(c) by the substitution for subsection (2) of the following subsection:

''(2) The **[amount to be shown]** information to be disclosed under subsection (1)*(a)* shall show the amount of any emoluments paid to or receivable by persons in respect of—

(a) **[shall include any emoluments paid to or receivable by any person in respect of his services as a director of the company or any of its subsidiaries or in respect of services rendered in any other capacity while director of the company or of any subsidiary or otherwise in connection with the carrying on of the affairs of the company or any such subsidiary]** services rendered as directors of the company;

(b) **[shall distinguish between emoluments in respect of services as a director, whether of the company or of its subsidiary, and other emoluments**

and for the purposes of this section 'emoluments' in relation to a director, includes fees and percentages, salaries, any sums paid by

way of expenses allowance, any contribution paid under any pension scheme and the estimated money value of any other material benefits received] services rendered while being directors of the company—

(i) as directors of any of its subsidiaries; and

(ii) otherwise in connection with the carrying on of the affairs of the company or any of its subsidiaries.'';

(d) by the insertion after subsection (2) of the following subsection:

''(2A) For the purposes of this section 'emoluments' includes the following:

(a) (i) Fees paid for services rendered as directors; and

(ii) any amounts paid to a person in respect of such person's acceptance of the office of director, which shall for the purposes of this section be deemed to be fees paid for services rendered;

(b) basic salary;

(c) bonuses and performance related payments;

(d) sums paid by way of expense allowances;

(e) the estimated monetary value of any other material benefits received;

(f) contributions paid under any pension scheme not otherwise required to be disclosed in terms of subsection (3)*(a)*;

(g) (i) gains made on the exercise of share options, the gain being the difference between the price paid for the shares and the market price of the shares on the date of exercise, and that date being the date on which the director takes ownership of the shares and is entitled to dispose of them; and

(ii) the details of such gains shall be presented in tabular form, unless inappropriate, with explanatory notes where necessary.'';

(e) by the substitution for subsection (3) of the following subsection:

''(3) The **[amount to be shown]** information to be disclosed under subsection (1)*(b)*—

(a) shall include details of the amount of any pension paid or receivable in respect of any **[such]** services of **[a director or]** any directors and past **[director referred to in subsection (2)]** directors of the company whether to or by **[him]** such directors or past directors or on **[his]** any of their nomination or, by virtue of dependence on or other connection with **[him]** any of them, to or by any other person, but shall not include any pension paid or receivable under a pension scheme, if the contributions payable thereunder are substantially adequate for the maintenance thereof; and

(b) shall distinguish between pensions in respect of services as **[a director]** directors or otherwise **[whether]** of the company or its subsidiary, and other pensions

[and for the purpose of this section, the expression 'pension' includes any superannuation allowance, superannuation gratuity or similar payment, the expression 'pension scheme' means a scheme for the provision of pensions in respect of services as a director or otherwise which is maintained in whole or in part by means of contributions, and the expression 'contribution', in relations to a pension scheme, means any payment (including any insurance premium) paid for the purpose of the scheme by or in respect of persons rendering services in respect of which pensions will or may become payable under the scheme, but does not include any payment in respect of two or more persons if the amount paid in respect of each of them is not ascertainable].'';

(f) by the insertion after subsection (3) of the following subsection:

''(3A) For the purposes of this section—

(a) 'pension' includes any superannuation allowance, superannuation gratuity or similar payment;

(b) 'pension scheme' means a scheme for the provision of pensions in respect of services rendered as directors or otherwise which is maintained in whole or in part by means of contributions; and

(c) 'contribution', in relation to a pension scheme, means any payment (including any insurance premium) paid for the purposes of the scheme by or in respect of persons rendering services in respect of which pensions will or may become payable under the scheme, but does not include any payment in respect of two or more persons if the amount paid in respect of each of them is not ascertainable.'';

(g) by the substitution for subsection (4) of the following subsection:

''(4) The **[amount]** information to be **[shown]** disclosed under subsection (1)*(c)*—

(a) shall include any **[sums]** amounts paid to or receivable by **[a director]** directors or past **[director]** directors by way of compensation **[for]** in respect of—

(i) the loss of office as a director of the company; or

(ii) **[for]** the loss, while **[a director]** being directors of the company or on, or in connection with, **[his]** ceasing to be **[a director]** directors of the company, or any other office in connection with the carrying on of the company's affairs or of any office as director or otherwise in connection with the management of the affairs of any subsidiary thereof; and

(b) shall distinguish between compensation in respect of the office of director, whether of the company or its subsidiary, and compensation in respect of other offices.

[and for the purpose of this section 'compensation for loss of office' shall include sums paid as consideration for or in connection with a persons retirement from office].''.

(h) by the insertion after subsection (4) of the following subsection:

''(4A) For the purposes of this section 'compensation for loss of office' includes sums paid as consideration for or in connection with a person's retirement from office.''.

(i) by the substitution for the words preceding paragraph *(a)* of subsection (5) of the following words:

''The **[amounts to be shown]** information to be disclosed under **[each paragraph]** paragraphs *(a)*, *(b)* and *(c)* of subsection (1)—'';

(j) by the insertion after subsection (8) of the following subsection:

''(8A) The information to be disclosed under paragraph *(d)* of subsection (1) shall include details of—

(a) directors' service contracts with notice periods in excess of one year and with provisions for predetermined compensation on termination of the contracts exceeding one year's salary and benefits in kind, giving reasons for such notice period; and

(b) the unexpired term of any director's service contract of a director proposed for election or re-election at the forthcoming annual general meeting or, if any director proposed for election or re-election does not have a director's service contract, a statement to that effect.'';

(k) by the substitution for subsection (10) of the following subsection:

''(10) If in respect of any annual financial statements the requirements of this section are not complied with, the auditor of the company by whom the annual financial statements are examined, shall include in his report thereon, so far as he is reasonably able to do so, a statement giving the required particulars or, in the event that such auditor is unable to furnish the required particulars, he shall make a statement to that effect in his report.''.

Repeal of section 440G of Act 61 of 1973

20. Section 440G of the principal Act is hereby repealed.

Amendment of section 441 of Act 61 of 1973, as substituted by section 5 of Act 78 of 1989, and amended by section 7 of Act 69 of 1990, section 14 of Act 82 of 1992 and section 19 of Act 35 of 1998

21. Section 441 of the principal Act is hereby amended—

(a) by the substitution for paragraph *(g)* of subsection (1) of the following paragraph:

''*(g)* in section 242, 268C, 268I or 287, to a fine or to imprisonment not exceeding a period of three months or to both such fine and imprisonment;'';

(b) by the substitution for paragraph *(h)* of subsection (1) of the following paragraph:

''*(h)* in section 168, 185, 256(6), 312(4), **[or]** 331(1) or 333(1), to a fine;'' and

(c) by the substitution for paragraph *(m)* of subsection (1) of the following paragraph:

''*(m)* in section 171, 200(5), 268H or 311, to a fine;''.

Short title

22. This Act shall be called the Companies Amendment Act, 1999.

MEMORANDUM ON THE OBJECTS OF THE COMPANIES AMENDMENT BILL, 1999

This Bill addresses mainly four matters, namely, the ability of a company to acquire its own shares, the disclosure of beneficial interests in securities held by nominee companies, the mandatory appointment of a company secretary for public companies having a share capital and the disclosure of directors' emoluments.

Acquisition by a company of its own shares

South African company law has always accepted the principle that a company's share capital is effectively a guarantee fund for its creditors. As such the creditors should have had the assurance that the capital of the company, which is the initial safeguard required for the right of limited liability, will not be diminished other than in the ordinary course of business or in accordance with the provisions of the Companies Act. In addition to the Companies Act, various common law principles constitute a further safeguard that companies may not, other than in certain limited circumstances, reduce their share capital. In this regard mention may be made of the prohibition against the acquisition by a company of its own shares as being part of the foregoing common law principles.

The principles of capital maintenance have undergone significant changes in almost all countries. The modern notion of capital maintenance is that companies may reduce capital, including the acquisition of their own shares, but subject to solvency and liquidity criteria. This has the advantage of affording protection to creditors whilst at the same time giving flexibility to companies to achieve sound commercial objectives. These aspects of flexibility and achievement of sound commercial objectives have become extremely important since South Africa's re-entry into the global markets.

In this regard it should be pointed out that our financial markets have lately entered into derivative activities on a large scale and the Johannesburg Stock Exchange (JSE) and SAFEX are rapidly becoming more complex and sophisticated. Markets have weakened considerably and this can be attributed to, *inter alia*, market manipulation by international banks and other speculators with unlimited financial resources. This factor alone poses a fundamental danger to our economy.

There are inherent dangers in the impact of speculative derivative, futures and currency trading activities which are taking place in virtually all developed investment markets and now also in South Africa. These activities if taking place in an unscrupulous way, can easily suppress the prices of shares on the stock market. South Africa has now become a magnet for profitable trading by these speculators. This has resulted in the decline in value of most leading South African shares. Acquiring control of sound companies through these methods could lead to significant job losses and businesses closing down due to asset stripping and other irregular activities.

One of the accepted and effective defences against this negative action in the international marketplace is the ability of strong companies to repurchase and cancel their own issued shares which levels the playing field in relation to those speculators wishing to reduce the value of a company's shares by indiscriminate market activities. Legislation in most of the EEC, USA and other developed markets permits the repurchase of a company's issued share capital, subject to solvency and liquidity criteria.

Allowing a company to acquire its own shares to support the market for its shares, thus also preserving for its shareholders the value of their shares, is but one advantage. There are several other advantages. It is particularly useful in relation to employee share schemes in enabling the shares of employees to be repurchased on their ceasing to be employed by the company; it provides a means to avert a hostile take-over; it provides a means whereby a shareholder, or the estate of a deceased shareholder, in a company whose shares are not listed, can find a buyer.

The main argument against the power to acquire own shares is that it may be abused. Proper checks and balances are, however, being built into the proposed provisions. Shares may only be repurchased if authorised by a special resolution passed at a general

meeting of shareholders. A company may not acquire its own shares if after the acquisition it will be unable to pay its debts as they become due or if its consolidated assets would be less than its consolidated liabilities. Proper disclosure is required and directors may be held responsible if the solvency and liquidity criteria are not met.

Disclosure of beneficial interests in securities held by nominee companies

Large volumes of shares in public companies are held by nominee companies on behalf of their clients. The proliferation of nominee companies resulted in ±35% of shares on the JSE being held by nominee companies. Furthermore over 50% of the shares in some 157 companies listed on the JSE are held by nominee companies.

Problems arising out of this situation are, for instance, that insider trading becomes impossible to detect; minority shareholders are unable to detect a change of controlling shareholder and could be prejudiced if a new controlling shareholder is an asset-stripper or, at least, someone in whom they don't have confidence; the board and shareholders ought to be able to be fore-warned of a hostile takeover; competition legislation is virtually impossible to administer; a company itself does not know who a large percentage of its shareholders is and communication with all shareholders is virtually impossible.

An obligation on nominee companies to identify beneficial shareholders is essential in the maintenance of free, fair and acceptably regulated securities markets. It is wholly consistent also with South Africa's progress from a secretive and narrowly empowered society to an open market democracy where transparency and accountability have become of paramount importance. South Africa's obligations in international markets and the growing trend towards disclosure in these markets also compel legislative support for the principle of transparency of shareholdings.

Mandatory appointment of company secretary

The King Committee on Corporate Governance recommended that the appointment of a company secretary be made mandatory. The Standing Advisory Committee on Company Law considered this recommendation and after wide consultation with listed companies recommended that appointment of a company secretary should be made mandatory but only for public companies having a share capital. The secretary has a key role to play in assisting the board of directors in ensuring that proper corporate governance is applied. In terms of the duties as proposed in the Bill the secretary will also play a watch-dog role in ensuring that the board of directors of a company complies with all legal requirements.

Disclosure of directors' emoluments

The present provisions in respect of disclosure of directors' emoluments in the company's annual financial statements are lacking in various respects, which results in poor disclosure. These provisions have been revisited with a view to ensuring more transparency. The disclosure of directors' emoluments should with the proposals be sufficient to enable stakeholders to inspect the level of remuneration without compromising the individual's right to privacy.

Departments/bodies consulted

Standing Advisory Committee on Company Law
Financial Services Board
JSE
Chamber of Mines
South African Institute of Chartered Accountants
Law Society of South Africa

Life Offices Association of South Africa
many other bodies and persons

Parliamentary procedure

The Department of Trade and Industry and the State Law Advisers are of the opinion that the Bill should be dealt with by Parliament in accordance with section 75 of the Constitution of the Republic of South Africa, 1996 (Act No. 108 of 1996), since it contains no provision to which the procedures set out in section 74 or 76 of the Constitution apply.