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13 December 2018

Director-General, department of Trade and Industry

For Attention: Mr Desmond Ramabulana

Private Bag X84

Pretoria

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Dear Mr Ramabulana

The Banking Association South Africa is grateful for the opportunity to comment on the long-awaited amendments to the Companies Act.

We appreciate the fact that some of our previous comments have been considered favourably and that we were in a position to assist the Department with input that could be used.

Our members have participated in the collation of the comments contained in this submission and we trust that you will find our proposals to be helpful and constructive.

We note that the proposed amendments may also impact certain relevant Regulations to the Companies Act and we suggest that the DTI should also amend the relevant regulations. In addition, all required consequential amendments to the Companies Act itself should be addressed. We have noted but a few of them.

We would appreciate the opportunity to engage with you in a workshop to talk through our suggestions and our office will engage with you shortly to explore suitable dates.

Our submission consists of Part A which deals with comments that we deem critical for consideration and Part B which deals with less critical comments but relating to matters that are still important for business in general.

We are looking forward to an opportunity to engage with you on our submission.

Regards

Adri Grobler

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**PART A CRITICAL COMMENTS** **please note that our suggested drafting** *is indicated in blue text, underlined and in italics*

**1. Section 26(2)**

| REFERENCE IN BILL | COMMENT (Why is it a problem?) | PROPOSED WORDING/CHANGE |
|---|---|---|
| **S26(2)** | The proposed amendment may create obligations for both the company and the natural person in the company receiving the request, which could not have been the intention. | We suggest the following wording:<br>(2) A person not contemplated in subsection (1) has a right to inspect and copy upon payment of no more than the prescribed maximum charges for any such inspection and any copy, the information contained in the record referred to in subsection(1)(a), (b), (d) and (e), *provided that no person (other than a person contemplated in subsection (1)) shall have the right to inspect and copy the information contemplated in subsection (1)(d) in respect of private companies*. |

**2. Section 26(5)**

| REFERENCE IN BILL | COMMENT (Why is it a problem?) | PROPOSED WORDING/CHANGE |
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| **S26(5)** | • The replacement of the word "company" with the word "person" as the party which may receive a request for information in terms of S26(4)(b) may create problems. S26(4)(b) still refers to a direct request made to a company, but the proposed change now refers to the same request having been received by a person, which is defined to include a juristic entity such as a company but can also include the individual natural person who received | We request that the word "company" in S26(5) be retained and not be replaced with the word "person". |

| REFERENCE IN BILL | COMMENT (Why is it a problem?) | PROPOSED WORDING/CHANGE |
|---|---|---|
| | such request. It cannot be the intention of the Act to place an obligation on both the receiving company, as juristic entity, as well as on the individual in the company, to adhere to the said time period. It is proposed that the word "company' be retained.<br>• We are also concerned that there will be risk when "person" is used as in a large organisation the request might be directed at a person who does not have access to the relevant information, or who is not aware of whom the request should be directed to and the necessary response not being provided timeously.<br>• The proposed 5 business day period is too short, and the existing 14 business day period remains reasonable and appropriate as it is an offence not to comply within the prescribed period. | Where a person receives a request in terms of subsection (4)(b) it must within *14 business days* comply……. |

**3. Section 30(4)**

| REFERENCE IN BILL | COMMENT (Why is it a problem?) | PROPOSED WORDING/CHANGE |
|---|---|---|
| **S30(4)** | The wording in section 30(4) read with section 30(5)(b) and 66(8) and (9) is unclear and confusing insofar as it relates to disclosure of director or prescribed officer remuneration notably as to what comprises remuneration in relation to the disclosing company.<br>Henochsberg expresses the following view:<br>"It should be noted that the disclosure of remuneration is governed by s 66 (8) and (9), i.e. it must be in respect of a position of director (in the particular company) and the remuneration must have been approved as required. It is submitted that remuneration that falls outside these requirements will not be subject to s 30." This view is supported by Delport.<br>We request that the wording in section 30(5)(b)(ii) of the Act be amended to limit the broad ambit of the subsection.<br>The practicalities of the concerns expressed above are obvious in respect of employees of a holding company that also act as directors on the boards of relevant subsidiaries of the holding company. These employees are typically middle to senior management (i.e. not directors or prescribed officers<br>of the holding company). They do not earn any directors' fees and it is irrelevant to the subsidiary board and its shareholder what other upstream remuneration is earned by such subsidiary director. We do however concede that it is relevant to the subsidiary board and its shareholder what other downstream remuneration is earned by such director or prescribed officer. | Please note the proposed changes to section 30(5) below. |

**4. Section 30(5)**

| REFERENCE IN BILL | COMMENT (Why is it a problem?) | PROPOSED WORDING/CHANGE |
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| **Section 30(5)** | We suggest that section 30(5)(b)(ii) is drafted too wide in that it follows an upstream and downstream approach. In contrast s 226A(1) of the UK Companies Act, 2006 follows only a downstream approach.<br>The term 'remuneration' reads as follows: "[*A*]*ny form of payment or other benefit made to or otherwise conferred on a person as consideration for the person — (a) holding, agreeing to hold or having held office as director of a company, or (b) holding, agreeing to hold or having held, during a period when the person is or was such a director — (i) any other office or employment in connection with the management of the affairs of the company, or (ii) any office (as director or otherwise) or employment in connection with the management of the affairs* ***of any subsidiary undertaking of the company****, other than a payment for loss of office*." | We suggest the following wording:<br>**30(5).** The information to be disclosed under subsection (4) must satisfy the prescribed standards, and must show the amount of any remuneration or benefits paid to or receivable by persons in respect of–<br>(a) services rendered as directors or prescribed officers of the company; or<br>(b) services rendered while being directors or prescribed officers of the company–<br>(i) as directors or prescribed officers of any other company within the same group of companies; or<br>(ii) otherwise in connection with the carrying on of the affairs of the company or any *of its subsidiaries*. |

**5. Section 45**

| REFERENCE IN BILL | COMMENT (Why is it a problem?) | PROPOSED WORDING/CHANGE |
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| **S45(2A)** | The words "its own subsidiary" suggests that the provisions of financial assistance will not apply in scenarios where an entity is an indirect subsidiary e.g. where company A is HoldCo for company B, company B owns the majority of shares in company C. If company A is required to give supporting collateral for company C – will the requirements for the financial assistance apply to company A? | We support this proposed amendment and suggest deleting the word "own" before subsidiary to align with the definition of subsidiary in section 3 of the Act which provides that a subsidiary includes directly and indirectly held subsidiaries |

**6. Section 48**

| REFERENCE IN BILL | COMMENT (Why is it a problem?) | PROPOSED WORDING/CHANGE |
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| **S48(8),(9)** | If a special resolution is required in s48 then Section 66(5) also needs to be amended.<br>We propose that the content of the proposed new subsection 48(9) be incorporated in the existing subsection 48(8) as follows:<br>48(9)(a) and (b) under 48(8)(a) to enable easy reading and application and in addition,we propose an amendment to subsection 48(8)(b) in order to provide for a waiver of the onerous provisions of sections 114 and 115 for private companies. | We suggest the following wording instead of the newly proposed section 48(9):<br>**48. Company or subsidiary acquiring company's shares.**<br>(8) A decision by the board of a company contemplated in subsection (2) (a)—<br>(*a*) must be approved by a special resolution of the shareholders of the company<br>*(i) if any shares are to be acquired by the company from-*<br>*(aa) a director;*<br>*(bb) a prescribed officer of the company;*<br>*(cc) a person related to a director or prescribed officer of the company; or*<br>*(ii) if it entails the acquisition of shares in the company other than due to-*<br>*(aa) a pro rata offer made to all shareholders of a company or a particular class of shareholders of the company; or*<br>*(bb) transactions effected in the ordinary course on a recognised securities exchange on which shares of the company are traded; and*<br>(*b*) is subject to the requirements of sections 114 and 115 if, considered alone, or together with other transactions in an integrated series of transactions, it involves the. acquisition by the company of more than 5% of the issued shares of any particular class of the company's shares, *provided that if the company is a private company, the shareholders of the company may by special resolution waive the requirements of subsections 114(2) and 114(3)* |

**7. Section 118**

| REFERENCE IN BILL | COMMENT (Why is it a problem?) | PROPOSED WORDING/CHANGE |
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| **S118** | The purpose of the proposed amendment to section 118 is to limit the application of Part C and the Takeover Regulations to a limited group of significant private companies. It is submitted that by inserting the reference to private companies which fall within the provisions of section 84(1)(c), the pool of affected private companies are in fact enlarged given specifically the inclusion of section 30(2)(b)(ii). The proposal is to rather insert a reference to section 30(2)(b)(i) in the clause below. The rationale is that the proposed amendment to section 118 will then limit the application of Part C and the Takeover Regulations to a limited pool of significant private companies. | **118. Application of this Part, Part C and Takeover Regulations**<br>(1) Subject to subsections (2) to (4), this Part, Part C and the Takeover Regulations apply with respect to an affected transaction or offer involving a profit company or its securities if the company is–<br>(a) a public company;<br>(b) a state-owned company, except to the extent that any such company has been exempted in terms of section 9; or<br>(c) a private company, but only if–<br>(i) at the time of the relevant affected transaction, the private company falls within the provisions of section *30(2)(b)(i)*; or<br>(ii) the Memorandum of Incorporation of that company expressly provides that the company and its securities are subject to this Part, Part C and the Takeover Regulations, irrespective of whether the company falls within the criteria set out in subparagraph (i).<br>(2) *[Deleted]* |

**8. Section 195**

| REFERENCE IN BILL | COMMENT (Why is it a problem?) | PROPOSED WORDING/CHANGE |
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| **S195 (1)(d)** | Insert wording any 'Companies Act' matters in order to limit scope of application of the Tribunal | (d) adjudicate on any *Companies Act* matters affecting a company as may be referred to it in the prescribed manner by the B-BBEE Commission in terms of the Broad-Based Black Economic Empowerment Act, 2003 (Act No. 53 of 2003); and |

**9. Amendment to the old Companies Act, 1973: Section 394 of 1973 Companies Act**

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| We wish to propose an amendment to the old Companies Act, 1973, which still applies in respect of liquidations of companies.<br><br>Section 394 of the 1973 Companies Act deals with banking accounts and investments in regard to liquidated companies.<br>We suggest changes to the following sections:<br>1. Section 394(1)(a) stipulates that a liquidator "shall open a current account" in the name of the company in liquidation.<br>2. Section 139(4) describes how cheques should be issued. | • We propose that section 394 be amended **by deleting the reference to current account and substituting it with "transactional account" and to remove the references to payment by way of cheque**. The current reality is that the fraud risk associated with cheques and the development in the electronic payment era has obviated the use of cheques and instead payments are made electronically through direct electronic fund transfers and payments.<br>• We recommend that the wording be changed from "current account" to **transactional account**.<br>• We recommend that the wording be changed from "by cheque" to inserting "or *payable*".<br>**394. Banking accounts and investments.** —<br>(1) The liquidator of a company—<br>(*a*) shall open a ~~current~~ *transactional account* from which amounts are withdrawable ~~by cheque~~ or *payable*, in the name of the company in liquidation with a banking institution registered under the Banks Act, 1965 (Act No. 23 of 1965), within the Republic, and shall from time to time deposit therein to the credit of the company all moneys received by him on its behalf;<br>(4) (~~All cheques or orders drawn upon any such account shall contain the name of the payee and the cause of payment and shall be drawn to order and be signed by the liquidator or his duly authorized agent.)~~ |

**PART B GENERAL COMMENTS** **please note that our suggested drafting** *is indicated in blue text, underlined and in italics*

| REFERENCE IN BILL | COMMENT (Why is it a problem?) | PROPOSED WORDING/CHANGE |
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| **B-BBEE Commission** | Drafting comment. | Include 'Black' in this definition:" means the Broad-Based *Black* Economic Empowerment Commission as established in terms of the B-BBEE Act"; |
| **S16(9)(b)** | We note the suggested wording and understand the underlying practical issue that is being addressed.<br>We propose that the wording be amended to provide clarity and that the existing section 16(9)(b)(ii) be retained to enable a company to elect the date of amendment. | In order to ensure more clarity, we suggest the following wording:<br>(b)(i) in any other case, 10 business days after receipt of the Notice of Amendment *by the Commission, unless endorsed or rejected, with reasons, by the Commission prior to the expiry of that 10-business day period*<br>(b)(ii) *the date if any, set out in the Notice of Amendment, provided that such date shall not be a date prior to expiry of the 10 business days provided for in subsection 16(9)(b)(i).* |

| REFERENCE IN BILL | COMMENT (Why is it a problem?) | PROPOSED WORDING/CHANGE |
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| **Insertion of new section 38A** | **General comment**<br>• We conceptually support the approach being adopted with the new insertion, however we are uncertain how this will work in practice. We therefore request that more thought, consideration and dialogue be afforded to the practicalities around the proposed changes.<br>• The interplay between sections 38(2) and the new section 38(A) requires consideration and clarification. We are concerned about issues relating to time of effective date (retroactive effective date possible?), the impact on any existing resolutions passed and the potentially broad powers of the court.<br>• There is no provision made for the period between the application and the court order. How are resolutions meant to be passed during this period?<br>• There may be an issue with the terms of creation as one of the terms of creation is the date of creation, unless a court could be swayed to impose a condition that provides that the date of creation is a later date.<br>**Specific comments**<br>We would like to draw your attention to the following comments made by leaders in the Companies Act environment.<br><u>Prof Delport states the following</u>:<br>“A new section 38A will facilitate the validation of a creation, allotment or issuing of shares (not securities) that is invalid due to a provision of the CA or the Memorandum of Incorporation of the company. This court application is in addition to the powers of the board and/or the shareholders in terms of section 38 and the order must be lodged with the Companies and Intellectual Property Commission. An order to rectify the share register should presumably also be made, due to the importance of the share register which is held solely by the company, because the fact that the shares are “deemed” to be validly allotted etc., does not mean the allotted is a shareholder.”<br><u>Edward Nathan Sonnenberg attorneys noted the following:</u><br>“One of the proposed new amendments is to include the power of the court, upon application by an interested person or by the company, to order that shares that were created, allotted or issued invalidly or in an unauthorised manner, to be validly created, allotted or issued if it is ""just and equitable"" to do so. No reference is made to the plight of the existing shareholders and their say of whether they would prefer the admittance of a new shareholder. What is "just and equitable" will, no doubt, depend on the facts of each particular case but it cannot be just to enable an outside person to be permitted to be a shareholder, notwithstanding the harm to such person, if the existing body of shareholders have not approved such ""retroactive authorisation"" in terms of section 38(2). Section 38(3)(a) is clear that a | |

| REFERENCE IN BILL | COMMENT (Why is it a problem?) | PROPOSED WORDING/CHANGE |
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| | share issue is a nullity if it exceeds any authorisation and a shareholder resolution under section 38(2) has not been passed. The new section 38(A) does not appear to be constrained by this fact and may operate as another bite at the cherry for the purported shareholder. In addition, no provision is made for the period between the application and any resultant court order. For instance, how are resolutions meant to be passed during this period – does the purported shareholder have a right to be present and to vote? This issue does not arise in section 38(2) because there is a limited duration for a retroactive resolution to be passed (60 business days) but this period can be substantially longer with a court application. The issue arises as the proposed section 38A(3) states that ""the shares must be deemed to have been validly created upon the terms of the creation.""<br>We will appreciate clarification in respect of the distinction between section 38(3) and 38A. The section does not make reference to the plight of the existing shareholders and their say of whether they would prefer the admittance of a new shareholder. Section 38(3)(a) is clear that a share issue is a nullity if it exceeds any authorisation and a shareholder resolution under section 38(2) has not been passed. The new section 38(A) does not appear to be constrained by this fact. No provision is made for the period between the application and any resultant court order. One of the terms of creation is the date of creation, and therefore this will be a problematic provision going forward unless a court could be swayed to impose a condition that stipulates that the date of creation is a later date. It is also clear that provision should be made in a company's memorandum of incorporation for as much of the governance regime as possible as, if another shareholder is admitted, it would ipso facto bind them – as opposed to including provisions in a shareholder's agreement which would not. | |
| **S40 (5)(b)(ii)** | • The amendment has removed the reference to the issued shares to be transferred to a third party to be held "in trust", and replaced "in trust" with reference to "in terms of a stakeholder agreement…", but then goes on to state "and later transferred to the subscribing party in according with the trust agreement". The retention of the word trust in this context is incorrect.<br>• We will appreciate clarity on the intention with the use of the term "stakeholder". Can this be any trusted third party? An attorney maybe? Or should it be a stakeholder, such as a shareholder? In our view, the shares will be held in "escrow" by an "escrow agent". We propose that the legislator provides for a definition of stakeholder for purposes of this section. | • It is proposed the words "the trust" be replaced with the words "the stakeholder agreement".<br>(b) upon receiving the instrument or entering into the agreement, the company must–<br>(i) issue the shares immediately; and<br>(ii) cause the issued shares to be transferred to a third party, to be held by the third party as a stakeholder in terms of a stakeholder agreement but not as agent for either the company or the subscribing party, and later transferred to the subscribing party in accordance with the *stakeholder* agreement.<br>• In addition, further changes will have to be made to S40(6) wherever reference to "held in trust" occurs. |

| REFERENCE IN BILL | COMMENT (Why is it a problem?) | PROPOSED WORDING/CHANGE |
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| **S56** | This section requires disclosure by the registered shareholder of the details of the beneficial shareholder. A nominee company, acting as custodian for its clients' securities, is the registered shareholder when acting in this capacity. Considering that there may be a further chain of custody (especially in relation to foreign clients) where there is no obligation to disclose beneficial shareholders held in a nominee structure as per CSD rules, the nominee company can only disclose on whose behalf it is holding the securities and is not obliged to investigate or confirm the further chain of custody. | The addition of the following words at the beginning of section 56(3)(b) *to the extent that such information has been provided to the registered holder,* the identity of each person with a beneficial interest in the securities so held, the number and class of securities held for each such person with a beneficial interest, and the extent of each such beneficial interest. |
| **S61** | An exemption is requested for both the social and ethics report and the remuneration report that if the public company is a subsidiary of another ***public*** company which social and ethics committee report and remuneration report covers the subsidiary, it may be exempt from this provision. | |
| **S72: insertion of a new subsection (3A)** | It is presumed that the intention of this amendment is to allow a holding company that has a social and ethics committee, to carry out this function for its subsidiaries, rather than to be linked to the number of members which the SEC should comprise. | We suggest that the two exceptions contained in 3A)(b)(i) and (ii) should in fact be applied to 3A(a) rather than (b). See proposed amendments below. |

| REFERENCE IN BILL | COMMENT (Why is it a problem?) | PROPOSED WORDING/CHANGE |
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| **S72 (3A)(c)(i) & (ii)** | We note that there may be inconsistencies in the requirements of the Social & Ethics Committee composition as a prescribed officer, by definition, is involved in the day to day affairs of the Company. | Section 72 of the principal Act is hereby amended –<br>(a) by the insertion after subsection (3) of the following subsection:<br>"(3A) (a) A public company or a state-owned company must appoint a social and ethics committee at each annual general meeting, *unless*<br>*i) the company is a subsidiary of another company that has established a social and ethics committee; and*<br>*ii) the social and ethics committee of the other company referred to in subparagraph (i) performs the functions required under this section, on behalf of the subsidiary company*<br>(b) A social and ethics committee must comprise of at least three members.<br>(c) Each member of the social and ethics committee of a public company or state-owned company must-<br>i) be a director of the company, who satisfies any applicable requirements prescribed in terms of subsection (5A) (a) and (b)<br>ii) not be involved in the day-to-day management of the company's business or have been so involved at any time |

| REFERENCE IN BILL | COMMENT (Why is it a problem?) | PROPOSED WORDING/CHANGE |
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| **S72 (3A)(c)(i) & (ii) continued** | | iii) during the previous financial year: or<br>iv) not be related to any director who falls within any of the criteria set out in subparagraph (ii).";<br>(b) by the insertion after subsection (5) of the following subsection:<br>(5A) (a) A social and ethics committee appointed in *respect of a company in* terms of subsection (4*), unless –*<br>*i) the company is a subsidiary of another company that has established a social and ethics committee: and*<br>*ii) the social and ethics committee of the other company referred to in subparagraph (i) performs the functions required under this section on behalf of the subsidiary company; and*<br>must comprise of not less than three directors or prescribed officers of the company, and at least one *member* must *be a director which is* not involved in the day-to-day management of the company, and must not have been so involved within the previous three financial years<br>(5)(f) A social and ethics committee must prepare a report in the prescribed manner and form. |
| **S128** | We note that section 128 does however not define "creditor". We submit that by amending section 128 read with section 1 of the Act to provide for a definition of "creditor" would clarify the current uncertainty related to: (i) which parties are considered to be a creditor of the company during business rescue proceedings; (ii) when a party is considered to be a creditor of the company for purposes of business rescue proceedings i.e. at commencement of business rescue proceedings or subsequent to commencement of business rescue but prior to voting in terms of section 152(2) of the Act.<br>Creditors are afforded a voting interest for purposes of section 128(1)(j) read with other sections of Chapter 6 but more specifically section 152(2) of the Act. This will alleviate the current uncertainty and/or ambiguity as far as it relates to whether post commencement creditors and/or post commencement financiers are afforded a voting interest in business rescue proceedings. | |

| REFERENCE IN BILL | COMMENT (Why is it a problem?) |
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| **S135(1)(1A)** | We suggest the following wording in s135(1A):<br>(1A) To the extent that any amounts due by *a* company to any owner of property, including a landlord, in respect of any property of such owner or landlord which is the subject of a contract with a company that is placed in business rescue is not paid *by the company* to such owner or landlord during business rescue from the date that *that* company is placed in business rescue, provided that such amounts do not exceed the aggregate of all disbursements and *expenses* , including rates and taxes, electricity and water, pay*able* by such owner or landlord to third parties during the period referred to in this *sub*section, the money *so paid is* regarded as post-commencement financing *and will* be paid to such owner *or landlord* in the order *of preference* set out in subsection (3)(b). |
| **S138(3)(a) and (b)** | • We submit that a minimum formal business rescue qualification be prescribed by the Minister for a person to practice as a business rescue practitioner.<br>• We further submit that the role of CIPC must be enhanced as regulator to deal with accreditation, licensing and enforcing of the provisions of Chapter 6. |
| **S141** | We suggest that the legislature amend the section to include a mechanism similar to the mechanism found in section 417 and 418 of the Companies Act to interrogate directors, management and any other person who can assist the practitioner in investigating the issues as referred to in section 141(2)(c). |
| **S143(6)** | • We acknowledge that the prescribed tariff of statutory fees are set in the regulations but we suggest that a prescribed tariff of fees and costs in respect of actual cost of disbursements or expenses incurred by the practitioner during business rescue will curtail the extreme high cost of business rescue as opposed to informal credit workout mainly caused by the utilisation of consultants (management, accounting, legal or other) which makes business rescue too expensive for smaller companies.<br>• Creditors can test the statutory tariff of practitioners against the existing tariff of fees as set out in the regulations however a similar tariff of fees related to reasonable expenses incurred does not exist and creditors are unable to test and/or challenge actual expenses incurred against a prescribed tariff. |
| **S153(5)** | • We suggest that the obligation to apply for the liquidation of the company must be imposed as set-out in section 141(2)(a)(ii).<br>• The obligation in section 141(2)(a)(ii) applies where the business rescue practitioner at any time during his investigation finds that the business can't be rescued. We submit that the same onus must be on the business rescue practitioner to convert the business rescue proceedings to liquidation proceedings when the business rescue plan composed and published by the business rescue practitioner was rejected and no party takes any steps as catered for in section 153(1) to 153(4). Under the current drafting we find that where plans have been rejected and no party takes any further steps as catered for in section 153 that the matter remains in limbo and no finality on the conversion of the proceedings are stipulated. |

| REFERENCE IN BILL | COMMENT (Why is it a problem?) |
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| Proposed general amendment iro business rescue | We submit that specialised courts be created to deal with business rescue to ensure that effect is given to the temporary supervision and temporary moratorium intention as set out in section 128(1)(b)(i) and (ii) of the Act |

| The old Companies Amendment Act: Key Concerns | | |
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| **REFERENCE IN BILL** | **COMMENT (Why is it a problem?)** | **PROPOSED WORDING/CHANGE** |
| Section 136(2) | The Banking Association appreciates the proposed amendments to Section 136(2) which deal with the powers of the business rescue practitioner. The amendments go far in addressing the serious concerns that the banking industry had with the original wording in the Act. However, to give full intent to spirit of the amendment, we would like to propose that the wording be further amended to provide more clarity.<br>South African banks typically source the funds they need to make loans into the South African economy in the form of capital from shareholders, deposits from customers and loans from other financial institutions. Banks also lend money to each other, buy, and sell financial products from and to one another to spread risk and enhance returns. This results in most South African banks having simultaneous claims upon each other and cross-border loans from international institutions.<br><br>The regulations under the Banks Act, No 94 of 1990 require banks to hold a minimum amount of share capital relative to their liabilities to ensure stability of the banking sector. Where a bank simultaneously owes and is owed money by another bank or similar counterparty the said regulations allow the bank concerned to use its net exposure to that bank or counterparty in calculating the minimum regulatory capital to be held provided that those exposures can be netted (i.e. set-off) against one another even in the event of insolvency. This results in banks not holding more capital than is necessary with a resultant curtailment of the cost of banking from which the economy benefits. | The proposed amendment whereby a Court may on application by a business rescue practitioner cancel any agreement will, we submit, negate the certainty that sections 35A and 35B of the Insolvency Act introduced as, as currently proposed, creditors of South African banks can be assured that netting or set-off will apply only until a Court might order otherwise. This will foreseeably prevent lawyers from opining that cross-border loans will be enforced according to their terms and from opining that claims and counterclaims will be offset against each other even in insolvency. If this occurs the cost to South African borrowers of raising funds in international markets will substantially increase, existing international borrowings will become repayable immediately or be substantially re-priced upwards and the banking industry will be forced to raise considerably more regulatory capital than is currently required. This could result in it becoming more difficult and more expensive for South African companies to finance their business operations, expansion, and investment plans. The borrowing costs for parastatals, such as Eskom and Transnet, would be negatively impacted. Ultimately, economic growth, employment and development could be jeopardized.<br>In order to provide greater certainty and avoid ambiguity, we propose the following deletions (in brackets) and the following additions underlined.<br>“(2A) When acting in terms of subsection (2)-<br>(a) a business rescue practitioner may not suspend any provision of:<br>(i) an employment contract; or |

| REFERENCE IN BILL | COMMENT (Why is it a problem?) | PROPOSED WORDING/CHANGE |
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| | Separately, banks that trade financial instruments with one another typically require assurance that their claims against one another can be legally netted or set-off and that security in the form of cash collateral or similar to be provided by the debtor bank to the creditor bank will be returned against payment of the debt. Debtor banks naturally are reluctant to provide such security where it could become tied up in the insolvency of the creditor bank and therefore usually will decline to conduct such trade in jurisdictions where netting or set-off of the debtor bank's debt against its claim for return of the security is not assured by law.<br><br>To cater for both the above-mentioned market needs and render South Africa an attractive destination for trade in financial instruments sections 35A and 35B of the Insolvency Act were introduced. It is also for these reasons that section 136 is intended to be subject to the said provisions of the Insolvency Act. | (ii) an agreement to which section 35A or 35B of the Insolvency Act, [or] [applies] would have applied had the entity been liquidated;<br>(b) a court may not cancel any provision of –<br>(i) an employment contract, except as contemplated in subsection (1);<br>(ii) an agreement to which sections 35A and 35B of the Insolvency Act, (Act No. 24 of 1936) would have applied had there been a liquidation;<br>(iii) an agreement or an agreement whereby security has been granted by the company or over the assets of the company." |

| REFERENCE IN BILL | COMMENT (Why is it a problem?) | PROPOSED WORDING/CHANGE |
|---|---|---|
| **S130** | Section 130 gives an affected person the right to apply to [court] tribunal<br>• To set aside a resolution;<br>• Set aside the appointment of a BR practitioner;<br>• Require practitioner to furnish security.<br>When considering the application, a [court] tribunal may make the following orders:<br>1. Set aside the resolution (on grounds contained in S 130(1));<br>2. Afford the BR practitioner time to assess whether a company is financially distressed (and if not, to set aside the resolution) or whether there is a reasonable prospect to rescue the company (and if not, to set aside the resolution);<br>**3. In addition to 1 and 2 above, may make an order to place the company into liquidation.**<br>Point 3 is the concern. Surely a tribunal does not have the authority in law to change a company's status? It is generally OK to approach a tribunal (as opposed to court) in respect of administrative matters such as setting aside a resolution, replacing a practitioner, requiring a practitioner to furnish security, etc. but not to convert a business rescue into liquidation. A tribunal should not have this power. That power should rest with a court only. | As long as a creditor always has the right to approach court to convert a business rescuer into liquidation on the grounds that (a) the company is insolvent and (b) there is no reasonably prospect that a company will be rescued, then we recommend the deletion of S130(5)(c)(i) in its entirety. |