Memorandum on the Companies Amendment and Second Amendment Bills

On 28 August 2023, the Minister of Trade, Industry and Competition published proposed amendments (the Companies Amendment Bill and Companies Second Amendment Bill) to the Companies Act No. 71 of 2008. We set out herein a summary of certain of these amendments, which in our view are noteworthy, and our views in respect thereof.

On 18 October 2023, we made submissions to the Portfolio Committee on Trade, Industry and Competition in respect of those amendments which concerned us.

We are yet to receive written feedback from the Committee, however we are hopeful that the views expressed by ourselves, and other market participants with a vested interest in these amendments, will guide the Portfolio Committee and the Department of Trade, Industry and Competition in their formulation of the published amendments to the Act.
Please feel free to reach out to Baker McKenzie should you have any queries or comments on the contents of this memo.

Amendments to the Companies Act 71 of 2008 ('the Act')

Section	Effect of proposed amendment as per Amendment Bill	Comments on proposed amendment
1: Definitions	The definition of 'securities' has been amended such that a security is defined solely as shares or debentures, and reference to 'other instruments' has been deleted.	We believe the proposed amendment will result in this definition being interpreted too narrowly, limiting the types of instruments that will be captured by the provisions of the Companies Act. Looking comparatively at the definition of securities used in the Financial Markets Act No 19 of 2012, as well as the definitions used in the JSE Listings Requirements and the CTSE Listings Requirements, we are of the view that a definition which encompasses more than just a share and debenture is required. We have proposed a definition which references shares, debentures and/or any other instrument issued by the Company which gives the holder thereof the right to participate in the company in relation to voting and/or economic benefit.
16: Amending Memorandum of Incorporation	The amendments to section 16 provides certainty as to when an amendment to a company's Memorandum of Incorporation (MOI) will take effect (i.e. one is no longer required to wait for the CIPC to "accept the amendment on file"). The amendments propose that any amendments to the MOI will take effect 10 business days after receipt of the Notice of Amendment by the CIPC unless rejected within that time period, or on the date set out in the Notice (provided such date is not prior to the expiry of the aforementioned 10 business day period).	We believe this is a much-needed amendment to the Act and will now provide certainty as to when an amendment to the MOI becomes effective.

25: Location of company records	Currently in terms of the Act, companies are required to file a notice setting out the location at which certain company records (i.e., those referred to in section 24 of the Act) are kept. The amendments now require the CIPC to publish such notice as prescribed.	While we believe the amendments will increase transparency and accountability, the Companies Regulations, 2011 (Regulations) will need to be amended to ensure the public understands what the CIPC is obliged to do in this regard, where the notice will be published and the detail that will be contained in the notice.
26: Access to company records	As we understand it, the Amendment Bill proposes that persons who have no beneficial interest in a company can apply to the CIPC to inspect various records of a company upon paying a fee. These accessible records will include (i) the company's securities register (which must contain the details of its beneficial owners) and (ii) if applicable, the beneficial interest register. In understanding the purpose behind the General Laws (Anti-Money Laundering and Combating Terrorism Financing) Amendment Act, No. 22 of 2022) and the rationale for imposing an obligation on companies to record the details of their beneficial owners and beneficial interest holders, it seems clear that this information need not be accessible to the public at large and rather should only be accessible to those organisations who have been mandated by the Government to assist in combatting anti-money laundering and terrorist financing.	In terms of the recent amendments to the Act (as introduced by the General Laws (Anti-Money Laundering and Combating Terrorism Financing) Amendment Act, No. 22 of 2022), affected companies are required to maintain a register of their beneficial interest holders and non-affected companies are required to include in their securities register, details of their beneficial owners and beneficial interest holders. In our view, permitting a person who has no beneficial interest in a company from obtaining such information infringes upon such person's right to privacy and should not be permitted. When providing copies of the documents for inspection (to a third party who does not hold an interest in the company), all companies should be permitted to redact (i) the securities register (ii) the information in respect of their beneficial owners and (iii) the information in respect of their beneficial interest holders. In respect of parties who hold an interest in the company, we believe, they should only be entitled to request the specific information of the beneficial owners and beneficial interest holders on good cause shown.
30: Annual financial statements	The provision of section 30 of the Act has now been extended such that in addition to disclosing the remuneration and benefits of each director or prescribed officer in the company's AFS, the name of the prescribed officer must also now be disclosed.	We believe that the proposed requirement to name the prescribed officer is unnecessary, and an overreach by the regulator. The application of the definition of 'prescribed officer' in the Act is fluid, and as individual roles in organisation change, they may fall in and out of this position at different times. Including the name of the prescribed officer, in our view, will not assist in creating additional transparency and will likely have unintended consequences.

30A: Duty to prepare and present company's remuneration policy and remuneration report	A new section 30A has been inserted, which section requires public companies and SOC's to prepare and present a remuneration policy, remuneration report and implementation policy to its shareholders and board for approval. The remuneration policy must be approved by the board by ordinary resolution at the AGM of the company, and thereafter, every 3 years, or whenever there is a material change to the policy. The remuneration report must be prepared annually and include: a background statement; the approved remuneration policy; an implementation report; total remuneration of the highest earning employee; total remuneration of the lowest earning employee; and average and median remuneration of all employees, and the remuneration gap reflecting the ratio between the total remuneration of the top 5% highest paid and lowest paid employees. The remuneration report must be approved by the board, and presented to and approved by ordinary resolution by the shareholders at the AGM. If the remuneration policy is not approved, it must be presented at the next AGM, or a shareholder's meeting called for this purpose, until it has been approved. Any changes to the remuneration policy may be implemented upon obtaining shareholder approval by ordinary resolution. Where the implementation report is not approved by ordinary resolution, the remuneration or directors' committee must, at the next AGM, explain how the shareholders' concerns have been taken into account, and the non-executive directors on the committee may continue to serve as directors, but may not serve on the remuneration committee for three years after such non-approval.	Clarity is required on the various voting requirements in respect of (i) the remuneration policy (ii) the remuneration report and (iii) the implementation report. In particular, section 30A(5) stipulates that voting on the remuneration report constitutes voting on the remuneration policy and implementation report, whereas section 30A(6) stipulates that the implementation report and remuneration policy must be construed as separate documents with separate voting requirements. In addition, it is unclear whether a company can continue to operate under a remuneration policy that has not achieved a majority vote at the AGM (or any subsequent meeting where the policy is required to be put forward). Section 30(7) only provides that the remuneration policy must be presented again at the next AGM. The intention in respect of when shareholders are required to vote, and on what they are required to vote on, need to be clarified. Sections 30A(5) and 30A(6) should be amended to ensure consistency. The required amendment will depend on the intention of the legislature in this regard, however, we believe that it is more prudent that the documents should be construed separately and be voted on separately. Section 30(7) needs to be amended to clarify whether the company can operate in terms of a remuneration policy that is not approved by ordinary resolution. However, we strongly recommend (and put forward to the committee) that this vote be treated as an advisory vote rather than a binding vote (as is the case in a number of other jurisdictions).
33: Annual Return	Currently, all companies who are required to have their accounts audited in terms of section 30(2) (including private companies who have elected to have their accounts audited) are required to submit a copy of their AFS with their annual return. The amendment proposes that a company must include in their return a copy of its latest AFS, which have been approved by the board of that public, state-owned, profit or non-profit company with a PI Score which exceeds the limits set out in section 30(2) or the regulations contemplated in section 30(7).	This amendment should lighten the administrative burden of small private companies.

38A: Validation of irregular creation, allotment or issuing of shares	Currently no provision is made in the Act for a court to make an order validating the creation, allotment or issues of shares (which have been otherwise inconsistently created or issued in terms of the Act). The insertion of section 38A empowers a court to now make an order validating the creation, allotment or issue of shares or confirm the terms of their creation and impose conditions it deems fit.	We believe this is a positive amendment and empowering the court in this regard provides another avenue for shareholders (or other parties who hold an interest in the company) from taking action to rectify shares that have been invalidly created or issued.
40: Consideration for Shares	Currently, where a company receives consideration for shares whose value can only be realised after the issue of such shares, the shares must be transferred to a third party to be held in trust, and later transferred to the subscriber in terms of a trust agreement. The amendment to section 40(5) replaces the reference to "trust" with "stakeholder" and the reference to "held in trust" to "held in terms of a stakeholder agreement". The Amendments clarify that a stakeholder means a trusted third party who has no interest in the company or the subscribing party.	This is a welcome amendment and the replacement of the reference to "trust" with "stakeholder" provides certainty as to the manner in which this section can be used (i.e. without having to register a trust at the Master's Office).
45: Financial assistance	Currently, section 45 applies to a holding company granting financial assistance to its subsidiary. The amendments provide a carve out in this regard, such that a company is now permitted to provide financial assistance to its subsidiary without having to comply with the provisions of section 45.	From a practical perspective we believe this amendment will result in the easier conduct of business inter-group. Where shareholders still believe this protection should be in place inter-group, shareholder approval can still be required in terms of a reserved matter.
48: Company or subsidiary acquiring company's shares	Currently, a company is required to obtain approval in the form of a special resolution by the shareholders of the company where it will acquire a number of its own shares from a director, prescribed officer, or a party related to either of them, and such repurchase is also subject to the provisions of section 114 and 115 where the transaction involves the acquisition of more than 5% of the issued shares of that particular class. The amendments replace section 48(8) in its entirety. The proposed replaced section 48(8) requires a special resolution of the shareholders where (a) any shares are to be acquired from a director, a prescribed officer or a person related to a director or prescribed officer or (b) any other repurchase of shares, save where the repurchase is done (i) by way of a pro rata offer to all shareholders or (ii) is effected on a recognised stock exchange. The reference to the application of s 114 and s 115 in respect of repurchases in excess of 5% has been removed.	We believe this is a positive amendment to the Act as it again creates certainty that where a repurchase is not affected by way of a scheme of arrangement, section 114 and section 115 will not be applicable and there is no obligation to obtain an independent expert report. We believe that the carve-outs to the special resolution of shareholders are appropriate and that the legislature should consider including a third carve-out, such that where all shareholders consent to the repurchase no resolution will be required. This will further reduce the administrative burden of implementing a repurchase where all shareholders are in favour thereof.

61: Shareholders meetings	The amendments extend the minimum business conduct requirements at an AGM of a public company to include, in addition to presenting the director's report, AFS and the audit committee report, the presentation of the social and ethics committee report and the remuneration report. In addition, the appointment of the social and ethics committee must also be put forward at the AGM.	We believe this amendment is in line with market practice and that the majority of public companies already include these aspects in their AGM's.
72: Board committees	Currently, a company may apply to the Companies Tribunal for an exemption from the requirement to appoint a social and ethics committee. The Tribunal must grant such exemption if it is satisfied that the company is required by law, and has complied with such requirement, to have in place a formal structure similar to a social and ethics committee, or if it is not reasonably necessary for that company to appoint such social and ethics committee. The amendments now require that such a company must first publish its intention to apply for such exemption prior to doing so. The amendments further prescribe rules on a company's social and ethics committee by the inclusion of new sections 72(6A), (6B), (7A). (8A), (9A), (10A), and (10B), which in summary, provide that: (a) a company is not required to appoint such committee where they are the subsidiary of a company with an existing committee, or where they have been exempted from this requirement; (b) the Minister must prescribe the minimum qualifications, skills and experience of members; (c) the Committee must be constituted by at least 3 members; (d) the Committee must be constituted within 12 months after the effective date where the company exists as at the effective date, or after the rejection of the company's application for exemption of such requirement. Where the company does not exist as at the effective date, the Committee must be constituted within 12 months after the date of incorporation (in the case of a public company or SOC), or after the date the company meets the criteria determined in section 72(4)(a) (in the case of any other company); (e) the Committee must be elected at each AGM of a public company or SOC, or annually for any other company; (f) a vacancy on the Committee must be filled within 40 days after such vacancy arises; and (g) the Committee must prepare a report for the shareholders for each AGM (in the case of a public company or SOC), or annually at a shareholders meeting, or with a resolution in terms of section 60(1) (in the case of any other company).	Clarity is sought on the requirement for a company to publish its intention to apply for an exemption to appoint a social and ethics committee. No context is provided as to what this publication entails, the timing of this and the consequences if not completed. We have suggested that amendments to the Regulations alongside these amendments will need to be made dealing with (i) where the intention to lodge an application for exemption must be published (ii) the consequences of not publishing and (iii) any applicable timing.

118: Application of this Part, Part C and Takeover Regulations	Currently, Part B, Part C and the Takeover Regulations apply only to private companies if a percentage of issued securities of that company greater than 10% have been transferred within the 2 years preceding such transfer, or where the MOI expressly provides for such application. The amendments provide that these sections will now only apply to a private company with 10 or more shareholders with a direct or indirect shareholding in the company, and which meets the annual turnover or asset value threshold determined in terms of section 118(2), unless exempted by the Takeover Regulations Panel ('TRP') in terms of section 119(6). In addition, the amendments a provide that the threshold contemplated above must be determined by the Minister in relation to the annual turnover or asset value of the company in South Africa, in general, or in relation to specific industries.	Unfortunately, to date, we have not insight into what has been proposed in respect of the annual turnover thresholds in this section. This will need to be better understood before valuable comment can be made on this amendment. In addition, the inclusion of the word "indirect" as it relates to the number of shareholders of a company broadens the scope of application for this section (and the Takeover Regulations), such that more companies will now form part of the class of regulated companies. We need to understand from the legislature why they elected in include reference to "indirect" and why the number of shareholders was decided to be pegged at "10".

Section	Effect of proposed amendment as per Second Amendment Bill	Comments on proposed amendment
77: Liability of directors and prescribed officers	Currently, a director's, or prescribed officer's, liability for loss, damages or costs prescribes 3 years after the act or omission giving rise to such liability. Under the amendments, this time-bar may be extended provided a court, on good cause shown, extends the liability period.	We believe this is an important amendment and the Court should be empowered in this regard.
162: Application to declare director delinquent or under probation	Currently, application may be made to declare a person delinquent if that person was a director of the company within the 24 months preceding the application. Under the amendments, this time period has been extended to 60 months, and, pursuant to the new section 162(2A)(b), may be extended by a court on good cause shown.	The extension of the time period from 24 months to 60 months brings the Companies Act in line with international trends.