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The reform of corporate law in South Africa

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***I.C.C.L.R. 411** Following a 30-year period of relatively little change to company legislation in South Africa, a comprehensive review of South African company law has finally been undertaken by the South African Department of Trade and Industry ("DTI"). The first stage of the review culminated in the release of a policy paper in June 2004, entitled *South African Company Law for the 21st Century: Guidelines for Corporate Law Reform*¹ ("the Policy Paper"), which sets out the framework and guiding principles of the new Companies Act. The aims of the review are to ensure that the regulatory framework within which enterprises operate promotes entrepreneurship, economic growth, investment and international competitiveness, coupled with efficiency, adaptability and good corporate governance. Emphasis is placed on the recognition of the unique South African context in which the company legislation will operate, and the strides that have been made in South Africa since the advent of democracy in 1994 in the social, economic and political spheres. The review extends to the legislation and common law relating to companies and close corporations, as well as to non-profit organisations and co-operatives; partnership law is sadly not included.

It is beyond argument that there is a dire need for reform. Apart from the consideration that the business environment has changed fundamentally--as evidenced by such factors as the greater mobility of international capital, the rise in international trade and foreign investment, the massive corporate failures and the new constitutional dispensation in South Africa as reflected in recently promulgated legislation such as the Broad-Based Black Economic Empowerment Act 2003, the Competition Act 1998 and labour and environmental legislation-- there is also a pressing need for the modernisation of South African company law, to purge it of archaic and outdated concepts so as to keep pace with both modern South African and international business practices. It has been found that the current company law regime in South Africa hampers the efficient formation and running of enterprises in that it is unnecessarily formalistic, excessively regulatory and burdensome. The rules relating to capital are in desperate need of review, particularly the retention of the outdated and artificial concept of par value shares. There is currently no clarity or certainty regarding the duties of directors and corporate governance, and it has been found that the reliance on criminal sanctions for contraventions of the Companies Act has resulted, ironically, in the effective immunity of directors from liability. Focus has also honed in on the need for greater transparency and access to information by shareholders, as well as other stakeholders. These and other areas of reform are considered below.

The key question: in whose interest should the corporation be run?

The key fundamental question at the core of every company law reform process, including that in the United Kingdom, is in whose interest the corporation should be run. While it is commonly held that directors ought to exercise their powers for the benefit of the corporation as a whole, there is considerable debate as to what constitutes "the benefit of the corporation". The Policy Paper proposes that this phrase entails that South African company law takes into account the interests of both shareholders as well as stakeholders, who comprise the community in which the company operates, its customers, employees, suppliers and the environment. It is proposed that directors should consider not only the economic, but also the social and environmental factors. This is in line with the "Triple Bottom Line Approach" advocated in the King Report on Corporate Governance for South Africa 2002 ("King II").² The approach of the Policy ***I.C.C.L.R. 412** Paper, in our view, goes beyond the "enlightened shareholder value approach", which has been adopted in the UK,³ the laws of which jurisdiction South African company law has always followed very closely. The enlightened shareholder value approach aims to ensure productive relationships with stakeholders, and to have regard to the longer term (as opposed to the immediate return) and to wider factors such as employees, the environment, suppliers and customers, but always with shareholders' interests retaining primacy. The South African approach appears to go a step further than this, in that the

Policy Paper proposes that the interests of shareholders must be “balanced” with those of other stakeholders when appropriate, and that a company's pursuit of economic objectives should be “constrained” by social and environmental objectives. It also suggests that the interests of other stakeholders are not invariably subordinate to the primary goal of directors to act in the best interests of the shareholders. That being said, the South African approach is patently not a pure “pluralist” approach (that is, an approach which permits or requires directors to balance shareholders' and stakeholders' interests, and gives independent value to the interests of other stakeholders which are not subordinated to those of shareholders). Our interpretation is that the Policy Paper proposes a model⁴ which lies somewhere between pluralism and the enlightened shareholder value approach. We suggest that such a model would be suitably tailored to the unique South African context and the principles enshrined in the South African Constitution,⁵ which includes a Bill of Rights that entrenches socio-economic rights and operates horizontally in certain circumstances.

Turning to the difficulty of the manner in which effect is to be given to the rights of stakeholders, a logically appealing solution has been proposed. It is suggested in the Policy Paper that, instead of protecting the interests of stakeholders through the Companies Act, their interests would best be advanced by separate legislation, which it is hoped would be likely to prevent the multiplicity of litigation that could arise if enforcement rights were to be contained in the Companies Act itself. It is noteworthy that the statutes protecting the rights of stakeholders could apply also to foreign companies that operate through South African branches. Examples of separate legislation that may be relied on for the protection of stakeholders' interests are the Black Economic Empowerment Act 2003, access to information legislation, labour laws and environmental laws.

Guiding principles and framework

Having dealt with the basic model of the new Companies Act, we now turn to a brief discussion of the guiding and fundamental policy principles which are to form the basis of the new Companies Act. The Policy Paper states that the new Act must be simple and accessible, both with regard to language and drafting style, as well as the procedures it lays down. Secondly, the Act must be comprehensive, incorporating all relevant legislation relating to enterprises in one document. It is also required to be facilitative, enabling and flexible, to avoid burdening companies with unnecessary rules--this would enable business persons to structure their companies and carry on business in the manner they find to be most appropriate. At the same time however, businesses will not be regulated according to the “lowest common denominator” or the path of least resistance; additional rules for various forms of enterprises will be provided by way of regulations, codes and default rules, which would introduce certainty. We support this proposal, first, because it is far easier to amend delegated legislation than primary legislation, in instances where amendments are required to keep up with changing businesses practices, and also because it would prevent the new Companies Act from being peppered with technical provisions that may be confusing to the layperson.

The importance of transparency and accountability in company law are strongly emphasised in the Policy Paper, as well as good corporate governance, all of which would serve to enhance communication between the owners and the controllers of companies, and would promote investor confidence. The guiding principles suggest that the new Act be harmonised, as far as is appropriate, with the company laws of other jurisdictions, and in particular, of South Africa's main trading partners. In the light of the increasing international operation of companies and international investment by investors, the resulting benefits would be the reduction of costs and the increase in certainty of the law for both foreign companies and foreign investors, as well as for South African companies that are engaged in international trade and investment. Some of the areas of primary focus in which these guiding principles are to operate are considered below.

***I.C.C.L.R. 413 Company formation**

The initial recommendation of the DTI, as put forward in the Policy Paper, is that the distinction between the different business entities (close corporations, private companies and public companies) ought to be abolished; instead, only one business vehicle with separate legal personality and limited liability would be recognised in South Africa. Happily, following pressure from several business organisations, it has recently been publicly announced that the close corporation is to be retained.⁶

The highly successful close corporation was introduced by the Close Corporations Act 1984, to enable small unsophisticated businesses to function with the benefit of separate legal personality and

limited liability. It bears the advantages of requiring significantly fewer lodgments of documents at the Companies Office, resulting in cheaper and easier registration, and an accounting requirement instead of the usual and more costly auditing requirement for public and private companies. The abolition of the close corporation would undoubtedly have had serious consequences for small businesses and, inevitably, the unemployment rate in South Africa, since small businesses, as is wellknown, play an important and significant role in ensuring economic growth, reducing unemployment and eliminating poverty. Indeed, the close corporation has proved to be so popular in South Africa that, according to the Institute of Certified Public Accountants of South Africa, there are currently approximately 880,000 actively registered close corporations in South Africa in comparison to some 300,000 private companies and a mere 6,000 public companies. We suggest, however, that if the structure of close corporations is to be retained in South Africa, the Close Corporations Act 1984 has to be reviewed and further simplified.

The DTI's proposal of adopting an integrated approach with the abandonment of the distinction between public companies and private companies may simplify company law. While some jurisdictions have chosen to retain the basic distinction between public and private companies, others have abandoned it. If it is abandoned in the new South African Companies Act, the Act will presumably incorporate additional requirements for those companies whose constitutions permit the offering of shares to the public. Other factors, such as the number of members and turnover would also be taken into consideration. The Policy Paper proposes that the constitution of the business vehicle should provide only for certain basic and fundamental mandatory rules, while shareholders may if they so prefer create additional optional rules. Shareholders would have the option of opting out of some of the mandatory rules provided that this is approved by 90 per cent of the shareholders.

This sort of flexibility is to be welcomed, as it acknowledges that many procedures and safeguards suitable for large companies are unnecessary and inappropriate for smaller companies, in which there is no separation of ownership and control. We respectfully suggest that the drafters should carefully consider which rules would best be mandatory but subject to an opt-out provision, as opposed to voluntary on an opt-in basis. This will be particularly relevant to smaller companies. Opt-in rules may be more enabling, as it may be easier to opt-in than to opt-out. There also is a fine line between mandatory rules and enabling rules; the more elaborate (or difficult) the opt-out procedure, the closer the rule becomes to a mandatory one.⁷ In this regard, the Policy Paper proposes that annual general meetings ("AGMs") should remain compulsory but be subject to an opt-out option exercisable by a majority of 90 per cent of the shareholders. It is submitted that as there will no longer be a distinction between public and private companies and as many companies are small entities with no significant separation between ownership and control, it would perhaps be more advisable to turn the mandatory requirement of an AGM into a voluntary rule which smaller entities may opt into, as initially proposed by the Company Law Review Steering Group in the UK.⁸ One of the objects of the Policy Paper is to be enabling rather than restrictive, but legislating the need for a 90 per cent majority vote in order to opt-out of AGMs conflicts with this underlying theme.

The Policy Paper further suggests that the formation of companies would be automated and be achieved through electronic filings, as far as possible. Legislation has already been enacted to allow companies to lodge their articles of association and memoranda of association electronically.⁹ The number of filings required of companies will consequently be reduced under the new Companies Act. Experience has shown that the huge number of filings currently required has resulted in massive backlogs at the Companies Offices as well as the filing of outdated information which, for this reason, business persons rarely rely on. In particular, as is the recommendation of the Department of Trade and Industry in the UK,¹⁰ companies would be required to file only one single constitution as opposed to the present requirement of articles of ***I.C.C.L.R. 414** association together with a memorandum of association. The cumbersome formalities for preincorporation contracts are also likely to be reviewed.

With regard to foreign companies that establish businesses in South Africa, the Policy Paper recommends that a simple process be adopted to allow such companies to be registered in South Africa, while simultaneously providing for legal recourse in cases of misconduct and winding-up, particularly with respect to liability for debts, the duties of foreign directors and inter-group transactions. The Policy Paper states that one way in which to achieve this is to recognise the formation of companies and the governance requirements of certain jurisdictions by means of a system of mutual reciprocity or accreditation.

Corporate finance

Shares and share issuance

It is proposed in the Policy Paper that South African companies be permitted maximum flexibility in creating financing mechanisms and financial instruments in order to facilitate the raising of capital. Concurrently, however, it is emphasised that the issue of shares must be accompanied by maximum disclosure to the investing public and adequate vetting of prospectuses, in line with the guiding principle of transparency and accountability.

Significantly, it has been recognised that the distinction between no par value shares and par value shares is outdated, and that the par value of shares is detached from their economic value, and should accordingly be abandoned.¹¹ In our view this would be most commendable. It would also bring South African law in line with other jurisdictions such as the US, Australia, New Zealand and Canada. While the company law of the UK (on which South African company law is based and from which it is historically derived) still retains the concept of par value, this is only because of the restrictions of the European Directives.¹² South Africa is, in fact, the only jurisdiction to have introduced (in 1973) no par value shares without abolishing par value shares. The preservation of both has unnecessarily complicated South African corporate law, without any real corresponding advantages.

Other important corporate finance matters under consideration are whether the board of directors should be empowered to issue shares, whether pre-emption rights should be optional rather than mandatory, especially in smaller companies where pre-emption rights protect the dilution of shareholders' rights, and whether, in the interests of transparency, nominee shareholdings should be abolished. Presently, in order for the board of directors to issue shares, the authorisation (either general or specific) of the shareholders of a company is required.¹³ The reason for empowering the board to issue shares is that it would enable South African companies to compete for capital in global markets more effectively, and would amount to standardisation with the present powers of the board to raise debt finance.

Capital maintenance

The Policy Paper points out that two primary international models of capital maintenance exist: namely, that of a capital maintenance requirement with initial paid up capital and the US-style "solvency liquidity test". South Africa has adopted a middle path, with elements of both models. The Policy Paper favours the US-style approach.

It is correct to say that South African capital maintenance rules are unnecessarily complex and that many of the rules have outlived their usefulness. According to the capital maintenance concept, the issued share capital of a company is seen as a guarantee or permanent fund intended for the payment of the claims of the creditors of a company. As a consequence, the issued share capital of a company may not be reduced, nor may it be returned to shareholders, except where the Companies Act or the common law authorises it.¹⁴ In some respects South African company law still clings to the outdated concept of capital maintenance, by, for instance, prohibiting the issuing of par value shares at a discount unless stringent requirements are met¹⁵ and prohibiting the payment of interest on shares out of share capital unless certain requirements are satisfied and approvals are obtained.¹⁶ Yet paradoxically, in other ***I.C.C.L.R. 415** respects¹⁷ it simply abandons the capital maintenance rule and replaces it with the more modern twin tests of "liquidity" and "solvency".¹⁸

It may not necessarily be the best approach for South African law to abandon all existing principles related to capital maintenance, and to simply adopt the US approach to creditor protection where much reliance is placed on creditor protection through contractual negotiations. Such an approach fails to take into account the unique South African circumstances.

If the capital maintenance concept were to be abolished in South African company law it does not follow, as is commonly thought, that the prohibition of financial assistance by a company for the purchase or subscription of its shares, contained in s.38 of the Companies Act 1973, would be abolished too. Section 38 raises issues and concerns that have little to do with the capital maintenance rule--its object is the protection of creditors and minority shareholders. We respectfully submit that s.38 must be preserved, but that the section ought to be relaxed and made subject to, *inter alia*, liquidity and solvency requirements and other effective safeguards against abuse.

Corporate governance

In reforming the corporate governance requirements in South African company law, the Policy Paper has identified three areas of focus: protection of shareholders and investors; directors and the structure of the board of directors; and disclosure and reporting. The Policy Paper emphasises that it has always been a fundamental goal of company law to protect investors in companies. Investors broadly comprise equity investors, employees and creditors. While employees' rights are protected in labour law and large creditors are increasingly relying on contract law for protection, equity investors are most vulnerable because they are exposed to the greatest risk. The Policy Paper thus suggests that a primary goal of company law must be to protect shareholders, whose inalienable rights must include the right to information, the right to vote, the right to call a meeting and the right to elect the directors of the company.

A fiercely debated issue is whether the present unitary board structure should be retained in South African company law, instead of adopting a European-style two-tier board, consisting of a managing or executive board and a supervisory or non-executive board, which would allow for stakeholder representation on the board. Two-tier boards are mandatory in Germany, Austria and the Netherlands. The suggestion in the Policy Paper is that the unitary board structure be retained, but that optional stakeholder representation on the unitary board is considered. It is also proposed to examine in greater detail the Swedish model of a unitary board with stakeholder representation.

We support the retention of a unitary board structure. As stated in King II, given the positive interaction and diversity of views that take place between individuals of different skills, experience and background, a unitary board structure with executive and non-executive directors interacting in a working group is the most appropriate structure for South African companies.¹⁹ Moreover, a twotier board structure would delay decision making. Problems encountered in Germany with the twotier board system are that it suffers from its large size, there is an inadequacy of information flow, there are infrequent meetings and the structure of the board committees is under-developed.²⁰ Issues which may be at play in considering stakeholder representation on a unitary board are confidentiality (as directors may not wish to share information with employees or other stakeholders) and the imposition of fiduciary duties on stakeholder directors.

Statutory standard for directors' conduct

In South African law, as in English law, the legal principles governing directors' duties are found in the common law, stretching as far back as the early eighteenth century. There is as always little consensus on the exact content of the fiduciary duties of directors which exist in the common law, which is compounded by the fact that there are conflicting cases. As a result, many South African directors do not fully understand their obligations under the law.²¹ Following the English law approach, the **I.C.C.L.R. 416* Policy Paper consequently proposes that a statutory standard for directors' conduct ought to be adopted, which would set out the duties of directors and the standard of directors' performance. The Policy Paper cautions, however, that the benefits of such a statutory standard would have to be weighed up against the constraints it would place on the development of the common law, as it may reduce flexibility. Furthermore, the challenge of reducing a body of law to one accurate statement would quite clearly be a formidable one.

The Policy Paper suggests that a statutory standard could involve the fiduciary duties of directors, a duty of fair dealing, the duty to ensure reasonable care and skill and an overriding primary duty to act in the interests of the company. The interests of the company would presumably be interpreted according to the interpretation (discussed above) of the fundamental question, "in whose interest should the corporation be run". The statutory standard is likely to also incorporate the directors' duty to disclose to the entity any business or corporate opportunity that comes to them if they have a reasonable belief that the entity would be interested in it, as well as the duty to disclose relevant material information not known to the other directors.

An alternative approach to adopting a statutory standard for directors' duties is for directors' duties to be simply left to self-regulation. We are of the view that directors' duties should not be left to self-regulation as this is an area of fundamental importance and enforcement may not be as effective were it to be left to self-regulation. While it is a valid argument that codification, resulting in detailed rules, and coupled with strict sanctions, may not always result in the optimal balance between the two opposing factors of managerial freedom and investor protection (which balance is characteristic of the favourable corporate environment),²² we suggest that in the unique South African context a degree of state intervention is required to bring about effective corporate governance controls. A statutory codification of directors' duties in South African law would make it clear not only to directors

themselves, but also to third parties, what is expected of directors, and what remedies are available for breaches of these duties. As Lord Herschell noted in *Bank of England v Vagliano Brothers*²³ the benefit of a codifying statute is that there is no longer a need to “[roam] over a vast number of authorities in order to discover what the law [is], extracting it by a minute critical examination of the prior decisions”. Moreover, since directors of smaller companies often do not have ready access to legal advice, a codification of directors' duties would be an important source of information and clarification for them.²⁴ No distinction should be made between executive and non-executive directors in the area of fiduciary duties. This view is reinforced by Goldstone J.A. in *Howard v Herrigel*²⁵ : “In my opinion it is unhelpful and even misleading to classify directors as ‘executive’ or ‘non-executive’ for purposes of ascertaining their duties to the company or when any specific or affirmative action is required of them ... At common law, once a person accepts an appointment as a director, he becomes a fiduciary in relation to the company ...”

We are further of the view that an exhaustive codification of directors' duties, as proposed in the UK, rather than a partial codification as adopted in Australia and Canada,²⁶ would be better suited to the South African context. The advantage of a partial codification is that it tends to strike a good balance between adaptability (in the development of the common law on directors' duties) and certainty. This has been shown by the Canadian experience, where the setting out of the main duties in statute by means of general principles has allowed the codified duties to continue to be developed by the courts,²⁷ and has allowed scope for the law to respond to changing business circumstances, and so to continue to evolve.²⁸ But, in the unique South African context, with its relatively low level of corporate litigation, it is our view that an exhaustive codification would be the better choice, as long as it is carefully drafted and incorporates a high level of generality within the codification in order to facilitate judicial creativity and development (as is proposed in the UK). As regards the remedies for a breach of directors' fiduciary duties, these are expected to be the usual common law remedies of restitution, disgorgement of ill-gotten gains and where appropriate, compensatory damages; but in cases of fraud and dishonesty, criminal sanctions could well apply.

Indemnification of directors against liability

Section 247 of the Companies Act 1973, dealing, *inter alia*, with the indemnification of directors ***I.C.C.L.R. 417** against liability is likely to be revised, because based on its wording, it is doubtful whether it permits a company to take out professional indemnity insurance which protects the *director* from liability for breach of duty or trust.

The Policy Paper furthermore proposes that the disqualification of directors ought to be clearly outlined, and should at least include unrehabilitated insolvents and persons with certain categories of convictions. The English Disqualification Act 1986 will be examined in greater detail for guidance on this area of reform. An amendment²⁹ to the Companies Act 1973 has recently come into force which seeks to expand the circumstances under which directors would be disqualified from being directors of companies. The amendments are far-reaching in that they authorise the Registrar of Companies to keep a register of persons who have been disqualified to act as directors. The register is to be open to inspection by members of the company and by the public.

Disclosure and reporting

Disclosure of information and optimum transparency are highlighted in the Policy Paper with regard not only to shareholders but also to other stakeholders, such as employees and creditors. Disclosure will extend to financial information as well as the extent of the company's compliance with public interest legislation, such as the Black Economic Empowerment Act 2003 and environmental and labour regulation. This is known as Triple Bottom Line Accounting as explained above.³⁰

Triple Bottom Accounting will accord with the chosen model of company law in that it takes into account both the interests of shareholders as well as other stakeholders. It may be compared to the Operating and Financial Review (“OFR”) required of UK-quoted companies, in terms of which UK-quoted companies must publish, as part of their annual report, an assessment of the performance and future plans and prospects of the business, including where relevant, its relationships with employees and others, and its impact on the community and environment, as a means of equipping interested parties with more information on which to assess the corporate performance.³¹ Apart from the UK, other jurisdictions do not appear to have adopted such wide reporting obligations, although Triple Bottom Line Accounting certainly accords with the increasing international interest in corporate

social and environmental reporting. Although the social and environmental disclosures in Triple Bottom Line Accounting do not place an obligation on companies to in fact comply with public interest legislation, they are certainly likely to have public interest effects, in that dialogue is promoted and the performance of companies in the social and environmental spheres is more exposed to public scrutiny.

Details of directors' remuneration and senior managers' remuneration and details of bonuses and distributions made to such persons would now be required to be disclosed in the annual financial statements of a company. To ensure the accuracy of this information, the Policy Paper proposes that statutory accounting and auditing standards be set out in company law byway of regulation. The Policy Paper proposes furthermore, that, in order to promote and foster informed and accurate comment by the press, consideration ought to be given to subjecting public announcements and information given to the financial press by officials of companies to the same rules that govern the truth and accuracy of information furnished in a prospectus.

Other areas of reform

The concept of a merger in the true sense is proposed to be introduced. While in South Africa the current mergers and acquisitions provisions do not contain mechanisms to combine companies, the Policy Paper proposes a new type of merger whereby it will be possible to absorb one company into another or two entities into a new entity. The assets and liabilities of the merged company/companies would cease to exist and would be transferred to the surviving entity or the new entity, as the case may be. This is certainly to be welcomed. It would enhance efficiency and modernise South African law to bring it more in line with other jurisdictions.

In the area of insolvency, attention will be focused on the role of liquidators, the process of winding-up and the creation of a new and much needed system of corporate rescue. The current Companies Act 1973 creates a system of judicial management which is rarely used. To bring South African law up to date with modern developments in comparable jurisdictions, a system of corporate rescue appropriate to the needs of a modern South African economy will be designed.

Administration and enforcement is an area much in need of attention. The Policy Paper points out how experience has shown that the current methods of enforcement of company law are inherently flawed. The key to ensuring effective redress, according to the Policy Paper, is the decriminalisation of much of company law. In its place, it is suggested that a combination of civil, criminal and administrative remedies be introduced for contraventions of the new Companies Act. The Policy Paper asserts that if the burden of enforcement were ***I.C.C.L.R. 418** to be shifted to shareholders and the liquidator, enforcement would be unlikely to become any more effective, since shareholder and liquidator enforcement depend on the resources available to shareholders and the company respectively. It is accordingly proposed that an independent and suitably empowered body be established to enforce the new Companies Act. The new institutional framework will comprise the Companies and Intellectual Property Commission (which will be responsible for company registration, information dissemination, the education and raising of awareness, and the monitoring and enforcement of company law), a Companies Tribunal, an Arbitration Council and an Advisory Panel.

We are in agreement with the proposal to decriminalise much of South African company law. While the advantage of criminal sanctions is that they generally result in higher levels of compliance and promote investor confidence, this has proved not to be the case in South Africa, perhaps due to a lack of credible enforcement which results in creating a culture of non-compliance.³² The disadvantage, however, of criminal sanctions is that directors may be less willing to take healthy risks. Indeed, in Australia and Singapore, criminal sanctions do not attach to breaches of general duties of directors as this is viewed as interference by public authorities in the private affairs of companies.³³ In our view the proposed combination of civil, criminal and administrative remedies is likely to suit the modern South African context quite appropriately.

There is presently a substantial overlap between company law and competition law, particularly in the area of mergers and takeovers, and consideration will be given to merging the Companies Tribunal with the Competition Tribunal. The role of the Securities Regulatory Panel ("SRP") may also be added to the merged body. This is to be encouraged, as a takeover which constitutes an affected transaction under the Companies Act, and which is therefore subject to the SRP Code, may also amount to a notifiable merger, which is required to be notified to the competition authorities. By incorporating the SRP into the Competition Tribunal, a more efficient system for the regulation of mergers and

takeovers may be created, with more efficient time periods for the requisite approvals of the different regulatory authorities and any conflicts in approaches would be eliminated.

Conclusion

Over the last 30 years only piecemeal amendments to the South African Companies Act 1973 have been introduced. The changes proposed in the Policy Paper with a view to revising the Companies Act would result in a substantial reworking of company law in South Africa. This however remains to be seen when the first draft of the new Companies Act, expected shortly, is circulated. For the most part, the proposals are not radically innovative when compared to developments that have already taken place in other common law jurisdictions such as Australia, New Zealand and the UK. To a large extent South Africa is still catching up. The new Companies Act will undoubtedly modernise the law. Proposals which are some what innovative and unique, are that one form of company is proposed, with the consequent abolition of the distinction between public and private companies. The concept of Triple Bottom Line Accounting, although comparable with the UK's OFR, does not appear to have a counterpart in other similar jurisdictions. We would welcome this development, as being in line with the South African Constitution. Directors' duties are proposed to be codified by statute, and the codification is likely to be, as in the UK, fairly comprehensive. The harmonisation of South African corporate law with the corporate laws of South Africa's main trading partners is to be lauded, as a means of simplifying foreign investment and making South African companies more competitive internationally. The review of South African company law has thus far made rapid and admirable progress. The monumental task of drafting an entirely new Companies Act is expected to commence shortly.

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1. General Notice 1183, Government Gazette Number 26493 of 23 June 2004, accessible at www.info.gov.za/notices/2004/26493/.
2. "Triple bottom line" was defined by the UK-based organisation Sustainability as follows: "At its broadest, the term is used to capture the whole set of values, issues and processes that companies must address in order to minimise any harm resulting from their activities and to create economic, social and environmental value. This involves being clear about the company's purpose and taking into consideration the needs of all the company's stakeholders--shareowners, customers, employees, business partners, governments, local communities and the public" (King Report on Corporate Governance for South Africa 2002, s.4, Ch.1, para.4).
3. See *Modern Law for Competitive Economy: the Strategic Framework*, London, DTI, 1999; and *Modernizing Company Law*, London, DTI White Paper, July 2002, Cm. 5553.
4. The model states that "a company should have as its objective the conduct of business activities with a view to enhancing the economic success of the corporation, taking into account, as appropriate, the legitimate interests of other stakeholder constituencies".
5. Act 108 of 1996.
6. *Business Day*, May 30, 2005.
7. See Ellis Ferran, "Company Law Reform in the UK" at <http://ssrn.com/abstract=294508> pp.33-35.
8. See *Modern Company Law for a Competitive Economy: The Final Report*, London, DTI, 2001. However, the *Company Law Reform*, London, DTI, White Paper, March 2005, p.31 now proposes that private companies will not be required to hold AGMs.
9. The Companies Amendment Act 36 of 2001.
10. See *Company Law Reform*, n.8 above, p.56.
11. The Policy Paper, *op. cit.*, n.1, para.2.2.3.

12. Ferran, n.7 above, p.5.
13. Companies Act 1973, s.221.
14. See FHI Cassim and Rehana Cassim, "The Capital Maintenance Concept and Share Repurchases in South African Law" (2004) 15 I.C.C.L.R. 188.
15. Companies Act 1973, s.81, requires the following conditions to be complied with if par value shares are to be issued at a discount: the issue must be authorised by a special resolution of the company specifying the maximum rate of the discount at which the shares are to be issued; not less than one year must at the date of issue have elapsed since the date on which the company became entitled to commence business or the date of the first issue of the class of shares; the issue must be sanctioned by the court, and the shares to be issued at a discount must be issued within one month after the date on which the issue is sanctioned by the court or within any extended time period as the court may allow.
16. Companies Act 1973, s.79, requires the following requirements to be met where interest on shares is paid out of share capital: the payment must be authorised by the articles of association of the company or by a special resolution; the rate of interest may not exceed 6 per cent per annum; and the approval of the Minister of Industries, Commerce and Tourism must be obtained.
17. For example, s.90 of the Companies Act 1973 permits a company to simply make a payment, including dividend payments, whether out of capital or profits, to its shareholders provided that this is authorised by its articles of association and it satisfies the tests of liquidity and solvency.
18. The liquidity and solvency test states that a company may not make any payment to its shareholders if there are reasonable grounds for believing that the company is, or would after the payment be, unable to pay its debts as they become due in the ordinary course of business ("liquidity test") or the consolidated assets of the company fairly valued would after the payment be less than the consolidated liabilities of the company ("solvency test").
19. King Report on Corporate Governance for South Africa 2002, Code of Corporate Practices and Conduct, para.2.1.2.
20. Geoffrey Owen, Tom Kirchmaier and Jeremy Grant, "Corporate Governance in the US and Europe: Where are we Now?" (March 31, 2005). Report on the Conference organised by the London School of Economics and New York University, held in London on November 4 and 5, 2004, p.5.
21. *Report on South African Companies Act No.61 of 1973 and Related Legislation*, American Bar Association Section of Business Law, Committee on Corporate Laws, December 2001 at www.sn.apc.org/usaidsa/usaidsa/corporate.pdf, p.20.
22. See Ferran, n.7 above, p.3.
23. [1891-4] All E.R. Rep. 93, HL at 113G-H.
24. See "*Company Directors: Regulating Conflicts of Interest and Formulating a Statement of Duties*", the Law Commission and the Scottish Law Commission, September 1999, p.37, para.2.40.
25. (1991) (2) SA 660 (A) at 678B-C.
26. Ferran, n.7 above, p.20.
27. "*Company Directors: Regulating Conflicts of Interest and Formulating a Statement of Duties*" n.24 above, p.52, para.4.22.
28. As Hoffmann L.J. stated in *Bishopsgate Investment Management Ltd (In Liquidation) v Maxwell (No. 2)* [1993] B.C.L.C. 1282 at 1285: "In the older cases the duty of a director to participate in the management of a company is stated in very undemanding terms. The law may be evolving in response to changes in public attitudes to corporate governance, as shown by the enactment of the provisions consolidated in the Company Directors Disqualification Act 1986".
29. The Companies Amendment Act 20 of 2004.
30. See n.2, above.
31. See *Company Law Reform, op. cit.*, n.8, p.10.
32. American Bar Association, n.21 above, p.9.
33. Ferran, n.7 above, p.35.