COX | YEATS
attorneys

Commercial Law Team

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Our Cox Yeats Commercial Team is committed to keeping you informed on pertinent legal issues, as well as developments within our firm.

COMPANIES AMENDMENT BILL

Our current Companies Act came into force in 2011. It repealed the 1973 Act which in turn repealed the 1926 Act.

A specialist committee on Company Law was established in 2011 which advises the Minister of Trade & Industry on changes to Companies Law and Policy. This committee has identified changes to the 2011 Act which are contained in the Bill.

The Bill was published for comment on 1 October 2021 and comment must be made by 1 November 2021.

The explanatory memorandum of the Bill points out two important matters of company law reform which the Committee is considering but which has not been included in the Bill. These are worker representation on company boards and the extension of directors' duties in favour of a multiplicity of stakeholders. These issues we are told will be dealt with in a further Bill to be introduced later this year after proper consultation.

Most of the changes brought about by the Bill are to be welcomed and correct problems which have occurred in practice or reduce unnecessary regulation. Fundamental changes are brought about through greater access to company records, a new register of the true owner of shares and the obligation to disclose more fully the remuneration paid to top executives.

Set out below are the salient features of the Bill.

1. **Date that an amendment to the MOI takes effect**

   Section 16(9)(b) of the Companies Act (the **Act**) provides that an amendment to an MOI takes effect on the date when the notice of amendment is filed. In practice, this provision has been problematic if the amendment was rejected by the Commission.

   The Bill now stipulates that an amendment takes effect 10 business days after receipt of the notice of amendment by the Commission, unless endorsed or rejected prior to the expiry of the 10-business day period. The Bill therefore allows the Commission 10 business days to consider whether the amendment should be accepted or rejected.

2. **Access to company records and the shareholder register**

   Under the Act, a shareholder has a right to inspect and copy the company's MOI and amendments thereto, records of the company's directors, reports to annual meetings, the

annual financial statements, the notices and minutes of annual meetings and the security register of the company.

A non-shareholder, including any member of the public, is entitled to inspect or copy the security register of a profit company.

The Bill requires a company now to keep a register of the holders of a beneficial interest in shares or of the true owner of shares. This is dealt with more fully below. The annual financial statements must also contain enhanced details of the remuneration of directors. The reports to annual meetings must contain the remuneration and implementation report.

The Bill now also provides that members of the public may access the information previously made available to shareholders save for a small company. The exclusion contained in the Bill applies to a company where:

2.1 its annual financial statements are internally prepared with a public interest score of less than 100; or

2.2 its annual financial statements are independently prepared with a public interest score of less than 350.

In respect of these companies, there is no right to inspect the share register or the register of beneficial interest in shares.

What remains unclear is who makes a final decision as to the public interest score of a company. It is an offence for a company, director or prescribed officer not to take reasonable steps to ensure that the company complies with the requirements of these sections.

3. **<u>True owner of shares</u>**

The Bill introduces a new definition of "*true owner*". A true owner is a natural person, who is considered to be the ultimate and true owner of the relevant shares. It is the last person in the chain of beneficial holders. The explanatory memorandum to the Bill states that the Act seeks to promote transparency and high standards of Corporate Governance as well as to recognize the role of enterprises within the social and economic life of the nation.

It is therefore important that the true owner of shares in a company is identified. The amendments to Section 56 of the Act contained in the Bill place an obligation on companies to require from the registered shareholder the identity of persons who hold a beneficial interest, to strengthen provisions requiring that companies establish and maintain a register of owners of beneficial interest, and to require companies to publish in their audited financial statements details of all persons who, alone or in aggregate, hold a beneficial interest amounting to 5% or more of the total number of shares in that class.

All companies who are obliged to have their annual financial statements audited must include in their financial statements, details of those persons who hold 5% or more of the shares of each class issued by the company.

Of course, it is often impossible to determine the natural person who ultimately owns, or controls shares.

Discretionary trusts often result in shares being held by a class or group of persons.

Private equity arrangements often provide that, shares are held by a general partner on behalf of limited or *en commandite* partners, who remain undisclosed or secret. In these circumstances, a company is not able to identify the true or underlying owner of shares.

Attempts under the Bill to pierce through these provisions is probably naïve.

Will these statements be audited? It is difficult to imagine how an auditor will be able to verify or audit a register of the beneficial owner of shares.

4. **Remuneration Policy and Remuneration Reports**

The Bill seeks to strengthen disclosure on executive remuneration. It is felt that a system of requiring disclosure reduces dissatisfaction of excessive remuneration and is effective in preventing the boards of companies from awarding excessive remuneration for the fear of adverse reputational consequences.

The Bill states that every public company or state-owned company must prepare and present a remuneration policy for directors and prescribed officers and this policy must be approved by ordinary resolution at an annual general meeting.

The remuneration policy must be passed at an annual general meeting every three years or whenever there is any material change to the policy.

A remuneration report deals with the remuneration policy and the implementation report contains details of remuneration and benefits received by each director. The implementation report must include details of the remuneration received by the employee with the highest total remuneration and the remuneration of the employee with the lowest total remuneration.

The report must also show the average remuneration of all employees, the median remuneration of all employees and the remuneration gap reflecting the ratio of the total remuneration of the top 5% highest paid employees and the remuneration of the bottom 5% lowest paid employees.

The remuneration report must be approved by the board of the company and be presented to the shareholders at the annual general meeting where it must be approved by the shareholders by ordinary resolution.

Where the remuneration policy is not approved by ordinary resolution, it must be presented at the next annual general meeting of the shareholders held for this purpose until approved.

Where the implementation report is not approved by ordinary resolution, then the remuneration committee of the board shall, at the next annual general meeting, present an explanation providing details in which the shareholders' concerns have been taken into account and the non-executive directors on that committee shall be required to stand down for re-election every year of such rejection of the implementation report.

Clause 5 of the Bill states that the directors' remuneration report or policy does not need to be audited.

5. **Annual Returns**

Clause 8 to the Bill stipulates that companies with a public interest score that exceeds the limit set out in the Act, must file with their annual returns, a copy of the company's latest financial statements. In addition to this, the company must file the company's security register and a copy of the register of the disclosure of beneficial interest, as required in terms of Section 56. The Commission must then make the annual return available electronically to any person in the prescribed manner.

6. **Validation of an irregular creation or allotment or issuing of shares**

Clause 9 of the Bill provides that where a company purports to create, allot or issue shares and the creation, allotment or issue is otherwise invalid, a court may, on receipt of an

application by the Company or by any person who holds an interest in the company, after being satisfied that it is just and equitable to do so, make an order validating the creation, allotment or issue.

This amendment is to be welcomed because it enables errors to be rectified.

7. **Issue of partly paid shares**

Section 40 of the Act allowed a company to issue shares which were not fully paid for. In that case, the shares could be issued immediately but transferred to a third party to be held in trust and only later transferred to the subscribing party in accordance with the trust agreement.

Clause 10 of the Bill clarifies these provisions by stipulating that the shares may be transferred to a stakeholder in terms of a stakeholder agreement and later transferred to the subscribing party in accordance with the stakeholder agreement.

A stakeholder is defined to be a trusted third party who has no interest in the company or the subscribing party and who may be an attorney, notary public or escrow agent, and a stakeholder agreement is defined to be a contract between the stakeholder and the company.

These provisions are to be welcomed because they clarify what, up to now, has been a rather unclear position.

8. **Financial assistance by a holding company to a subsidiary**

Section 45 of the Act provides that the provision of financial assistance by a company must, in most cases, be approved by special resolution after the board has passed the solvency and liquidity test. Clause 11 of the Bill states that the provisions of this section shall not apply to the giving of financial assistance by a company to, or for the benefit, of its subsidiaries. This is in recognition of the fact that the protections contained in Section 45 are not required for the provision of financial assistance by a holding company to its subsidiary.

9. **Share buy-backs and special resolutions**

Section 48 of the Act required a company to pass a special resolution before implementing a share buy-back if a share buy-back was made by way of an offer pro-rata to all shareholders.

Clause 12 of the Bill stipulates that a special resolution will not be required in these circumstances.

Again, this removes unnecessary compliance burdens.

10. **Social and ethics committee reports and remuneration reports**

Section 61 of the Act is to be amplified by providing for a public company to present to its annual general meeting a social and ethics committee report and a remuneration report and for the appointment at the meeting of the social and ethics committee.

11. **Regulated company and the Take Over Regulations**

Section 118 of the Act stipulated that if 10% of the issued share capital of a private company were transferred within a 24-month period, then this is a regulated company to which the Take Over provisions applied. These provisions resulted in unnecessary burdens for relatively simple share transactions.

Clause 18 of the Bill is to be welcomed because it reduces the ambit of the jurisdiction of the Take Over Regulation Panel over private companies and simple share transfers. For the Take Over Regulation Panel to have jurisdiction to a share transfer, the private company must now have 10 or more shareholders and meet or exceed the financial threshold or annual turnover or asset value determined by the Minister in consultation with the Take Over Regulation Panel. The Panel is also conferred the discretion to exempt any particular transaction affecting a private company.

12. **BEE Commission**

Section 195 of the Act provides that the Companies Tribunal may adjudicate in relation to any application that may be made to it in terms of the Act or assist in the resolution of disputes. Clause 25 of the Bill provides for an amplification of these powers. It proposes that the Tribunal may conciliate, mediate, arbitrate or adjudicate on any administrative matter affecting any person as may be referred to it by the B-BBEE Commission in terms of the Broad-Based Black Economic Empowerment Act.

13. **Conclusion**

The 2021 Bill is the first major review of the Act since its introduction in 2011. Comment on the Bill must be submitted by 1 November 2021.

Most of the proposed changes contained in the Bill are to be welcomed and, in most cases, reduce unnecessary regulatory requirements.

The proposed enhanced disclosure of company information, restricted initially to large companies, however, provides a fundamental shift. The concept of enhanced disclosure and transparency to achieve change, as opposed to regulation itself, is a welcome step.

On the other hand, this must be measured against the right of privacy which may be claimed by companies or individuals. The right to privacy is countered by the contention that large companies play a societal role and therefore need to be properly accountable for their conduct and actions.

At this point, the focus is on the ownership of equities and the remuneration payable to directors compared to the remuneration payable to unskilled workers. The same arguments could be raised in regard to the environmental role of a company and the extent to which it is environmentally responsible.

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