

Circular No. 4

June 2011

## **THE NEW COMPANIES ACT : INTERCOMPANY LOANS AND SURETYSHIPS**

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In Companies Act Circular Number 1, we pointed out that remuneration for directors for services as directors may only be paid in accordance with a special resolution approved by the shareholders within the previous two years. We also pointed out that companies may not make loans to directors unless:

- the loan has been approved by a special resolution adopted within the previous two years;
- the company satisfies the solvency and the liquidity tests; and
- the terms under which the loan are given are fair and reasonable to the company.

In this circular we draw attention to new provisions of the Companies Act No. 71 of 2008 (the **New Companies Act**)(not contained in the Companies Act No. 61 of 1973) which state that the Board of Directors of a company may not authorise the company to provide direct or indirect financial assistance (including through the provision of suretyships) to any company or corporation which is related or inter-related to the company unless the financial assistance has been approved by a special resolution adopted within the previous two years and certain other conditions have been met.

## **PROCEDURES TO BE FOLLOWED BEFORE LOANS, SURETYSHIPS OR OTHER FINANCIAL ASSISTANCE MAY BE GRANTED TO A RELATED OR GROUP COMPANY**

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Section 45 of the New Companies Act regulates the provision of financial assistance by a company to related companies or corporations.

Financial assistance includes lending money, guaranteeing a loan or other obligation and securing any debt or obligation.

Before a company may grant financial assistance to another company or corporation which is related to it, the provision of such assistance must be approved by a special resolution adopted by the shareholders within the previous two years. The approval may either be for the specific recipient or generally for a category of potential recipients (for example, the companies or corporations which are related or inter-related to the company).

In addition, the Board of the company must be satisfied that immediately after providing the financial assistance the company will satisfy the solvency and liquidity test set out in the New Companies Act<sup>1</sup> and the terms under which the financial assistance is proposed to be given are fair and reasonable to the company.

Companies within a group structure will need to pass a special resolution authorising the provision of financial assistance to other companies within the group. In addition, the terms of intercompany loans and guarantees will need to be scrutinized so as to ensure that they are fair and reasonable to the company providing the assistance.

### **FURTHER ADVICE**

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Should you require advice or assistance on the New Companies Act, please contact Michael Jackson (031 – 536 8512 [mjackson@coxeats.co.za](mailto:mjackson@coxeats.co.za)); Keren Oliver (031 - 536 8518 [koliver@coxeats.co.za](mailto:koliver@coxeats.co.za)); Themba Zikhali (031 – 536 8529 [tzikhali@coxeats.co.za](mailto:tzikhali@coxeats.co.za)); or Carol McDonald (031 – 536 8529 [cmcdonald@coxeats.co.za](mailto:cmcdonald@coxeats.co.za)).

<sup>1</sup> To be discussed in a future Companies Act Circular

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