COMMENTS BY THE LAW SOCIETY OF SOUTH AFRICA (LSSA) AND THE LAW SOCIETY OF THE NORTHERN PROVINCES (LSNP) WITH REGARD TO THE COMPANIES AMENDMENT BILL (B40-2010)

The LSSA's Company Matters Committee and the LSNP's Company Committee jointly submit the comments below. It should be noted that the committees decided not to give detailed comment on the entire Bill but have instead concentrated on what are considered to be key issues which are important to be dealt with in, or as part of, the Bill (because some of the comments relate to amendment to the Companies Act, 2008 which have not yet been covered in the Bill but, in the view of the committees, should have been).

The committees' proposed amendments are as follows:

Ad 1 Section 22(1) of Act 71 of 2008

"A company must not-

(a) carry on its business recklessly, with gross negligence, with intent to defraud any person or for any fraudulent purpose; or

(b) *trade under insolvent circumstances."*

The intention behind subsection (b) is unclear. If this provision is intended to mean nothing more than not being able to comply with the liquidity requirements (i.e. being able to pay debts as they fall due), the subsection is superfluous and should be

deleted, as such conduct is already covered by subsection (a). If it is intended to be the introduction of a new requirement relating to solvency rather than liquidity (and it is unclear why such a new requirement is needed as it is not a requirement under the Companies Act, 1973 and this has not caused any problems that the committees are aware of), this needs to be spelt out clearly so that companies are able to plan for the new requirement, as this will have far reaching consequences and may require extensive modification of behaviour by companies.

Ad 2 Section 10 of Amendment Bill: Amendment of Section 15 of Act 71 of 2008

We do not agree that reference to *special conditions* in subsection 15(b) should be deleted and be replaced with *restrictive and procedural* requirements. Subsection (b) goes to the heart of Section 15. The purpose of this section is to allow for an effective method of having a ringfenced company, despite the repeal of the constructive notice doctrine. This requires any one doing business with the company to be apprised of any restrictive conditions which achieve the ring fencing. Constructive knowledge of the procedural requirements required for the amendment of any particular provision of the Memorandum of Incorporation is irrelevant, does not achieve the desired result and will frustrate putting ring fenced companies in place.

Ad 3 Section 72(4) of Act 71 of 2008

The authority of the Minister to require implementation of a social and ethics committee should be deferred to 2012, to afford the same lead-in time as would have been the case had the Act come into operation in 2010.

Ad 4 Sections 112 and 115 of Act 71 of 2008

Sections 112 and 115 of the Companies Act require a special resolution where a company *disposes of all or the greater part of its assets or undertaking.*

Although case law exists regarding the interpretation of the word "dispose" in relation to Section 228 of the Companies Act, 61 of 1973 - *Standard Bank of South Africa Ltd v Hunkydory Investments 188 (Pty) Limited and Others, 15427/08 (2009) ZAWCHC 81 (1 June 2009) –* (albeit a judgment by a single judge which might be overturned by a higher court in due course) it is uncertain as to whether the Courts will come to the same conclusion with regard to the interpretation of Sections 112 and 115 of Act 71 of 2008.

We are therefore of the view that this uncertainty can be resolved by excluding the passing of mortgage bonds and notarial bonds or any other security interest from the ambit of Sections 112 and 115 of the Companies Act.

Ad 5 Section 118(1)(c)(i) of Act 71 of 2008

We are of the view that the test is flawed in that it fails to take into account the number of shareholders of a company, which it should.

Ad 6 Section 164 of Act 71 of 2008

The introduction of shareholders' appraisal rights has very far-reaching ramifications. In particular, appraisal rights can be triggered by amendments to a company's constitution. In view of the fact that the majority of companies are likely to change their constitutions during the 2 year moratorium allowed (particularly those companies which currently have shareholders' agreements which prevail as between the parties over the articles) it can be expected that many companies changing their constitutions will not be aware of or overlook the appraisal rights and thus inadvertently trigger them. We suggest that the introduction of the appraisal right be deferred until the end of the 2 year moratorium.

Ad 7 Section 118 of Amendment Bill: Amendment of item 7(6) of Schedule 5 to Act 71 of 2008

Provision should be made that any notices given, resolutions passed or approvals granted prior to the effective date will be valid and the provisions of Act 71 of 2008 should not apply thereto, provided that the subject matter is implemented within 6 months of the effective date.

Ad 8 Section 225 of Act 71 of 2008

The President should have the right to bring the Act into operation either *in toto* or in parts at different times, i.e. that different dates may be fixed in respect of different sections to accommodate the deferral of the appraisal right and any other deferrals which may prove necessary.