



DISCUSSION PAPER 144

STATUTORY LAW REVISION

(LEGISLATION ADMINISTERED BY THE DEPARTMENT OF TRADE AND INDUSTRY)

PROJECT 25

OCTOBER 2016

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Introduction

The South African Law Reform Commission was established by the South African Law Reform Commission Act, 1973 (Act 19 of 1973).

The members of the Commission are –

The Honourable Mr Justice Jody Kollapen (Chairperson)
 Professor Vinodh Jaichand (Member)
 Advocate Mahlape Sello (Member)
 Mr Irvin Lawrence (Member)
 Ms Thina Siwendu (Member)
 Professor Marita Carnelley (Member)
 Professor Annet Oguttu (Member)

The Secretary is Mr Nelson Matibe. The project leader responsible for this investigation is Ms Thina Siwendu. The researcher assigned to this investigation is Ms Maureen Moloji.

On 30 July 2008, Ms MS Mabandla, the Minister of Justice and Constitutional Development, appointed the following advisory committee members who assisted the SALRC to develop the consultation paper namely:

Prof Tshepo Mongalo (University of Cape Town)
 Mr Mandla Mnisi (University of Johannesburg)
 Ms Anne Stern (University of the Witwatersrand)
 Mr Joseph Modise (University of North-West)
 Adv Kennedy Mojela (University of Limpopo)
 Prof Angela Itzikowitz (University of the Witwatersrand)
 Prof Govindjee (Nelson Mandela Metropolitan University)
 Prof Jean Christoph Sonnekus (University of Johannesburg)
 Prof Melanie Roestoff (University of Pretoria)
 Prof Michele Havenga (University of South Africa)
 Prof Farouk Cassim (University of the Witwatersrand)
 Prof Engela Schlemmer (University of South Africa)
 Prof Piet Deport (University of Pretoria)

Prof Elizabeth Snyman-Van Deventer

Correspondence should be addressed to:

Ms Maureen Moloï

South African Law Reform Commission

Private Bag X668

Pretoria 0001

Telephone: (012) 622 6330

Fax: (012) 622 6362

E-mail: gmoloi@justice.gov.za

Website: <http://www.doj.gov.za/salrc/index.htm>

Preface

This discussion paper has been prepared to elicit responses from the Department of Trade and Industry (DTI) on the preliminary findings and proposals contained in this discussion paper. The SALRC has liaised with the DTI in the phases of this investigation leading to the development of the consultation paper and acknowledges the valuable assistance it received, particularly from officials in the Legal Service section. The discussion paper was developed to serve as a basis for the SALRC's further deliberations in the development of a report. The discussion paper contains the SALRC's preliminary proposals. The views, conclusions and proposals that follow in this discussion paper must not be regarded as the SALRC's final views or final recommendations. The discussion paper (which includes draft legislation) is published in full so as to provide persons and bodies wishing to comment with sufficient background information to enable them to place focused submissions before the SALRC.

The SALRC will assume that respondents agree to the SALRC quoting from or referring to comments and attributing comments to respondents, unless representations are marked confidential. Respondents should be aware that the SALRC may in any event be required to release information contained in representations under the Promotion of Access to Information Act of 2000. Respondents are requested to submit written comments and representations to the SALRC by 28 February 2017 at the address appearing on the previous page. Comments can be sent by e-mail or by post.

This discussion paper is also available on the Internet at <http://salawreform.justice.gov.za/dpapers.htm>

Any enquiries should be addressed to the researcher allocated to the project, Ms Maureen Moloi. Contact particulars appear on the previous page.

Preliminary recommendations and questions for comments

1. The SALRC has been mandated with the task of revising the South African statute book with a view to identifying and recommending for repeal or amendment legislation or provisions in legislation that are inconsistent with the equality clause in the discussion paper, redundant or obsolete. Pursuant to this mandate, the SALRC has established that there are 2800 Acts in the statute book. The SALRC identified 226 statutes that are administered by the DTI (see Annexure B). In February 2010 the administration of the Competition Act 89 of 1998 was transferred to the Department of Economic Development.¹ On 15 July 2014 the President issued a Proclamation² which transferred the administration and powers and functions entrusted by the specified legislation and all amendments thereto, to the specified Cabinet member. Trade and Industry is one of the affected Ministries and four Acts with their amendment Acts were transferred to the Minister of Small Business Development. The administration of Section 2A of the Small Business Development Act 112 of 1981, the Close Corporations Act 69 of 1984, National Small Enterprise Act 102 of 1996 and Co-operatives Act 14 of 2005 were transferred to the Minister of Small Business Development.

2. After its analysis of these statutes, the SALRC proposes that:

- (i) The following 19 Acts set out in Schedule 1 of the proposed Trade and Industry Related Matters Repeal and Amendment Bill (“the proposed Bill”), contained in Annexure A, be repealed in whole for the reasons set out in Chapter 2 of this discussion paper:
 - Merchandise Marks Amendment 3 of 1946
 - Industrial Development Amendment Act 40 of 1951
 - Unauthorised Use of Emblems Act 37 of 1961
 - Export Credit Re-insurance Amendment Act 66 of 1961

¹ Proclamation 6 of 2010 Transfer of Administration and Powers and Functions Entrusted by Legislation to Certain Cabinet Members in Terms of Section 97 of the Constitution. (Government Gazette No. 33003).

² Proclamation 24 of 2014: Transfer of Administration and Powers and Functions Entrusted by Legislation to Certain Cabinet Members in Terms of Section 97 of the Constitution (Government Gazette No. 37839).

- Export Credit Re-insurance Amendment Act 88 of 1962
 - Industrial Development Amendment Act 89 of 1965
 - Industrial Development Amendment Act 96 of 1980
 - The Credit Agreements Amendment Act 9 of 1985,
 - Temporary Removal of Restrictions on Economic Activities Act 87 of 1986
 - Credit Agreements Amendment Act 53 of 1987
 - Temporary Removal of Restrictions on Economic Activities Amendment Act 72 of 1987
 - Temporary Removal of Restrictions on Economic Activities Amendment Act 67 of 1988
 - Usury Amendment Act 100 of 1988
 - Usury Amendment Act 67 of 1990,
 - Usury Amendment Act 30 of 1993,
 - Credit Agreements Amendment Act 79 of 1995
 - Usury Amendment Act 81 of 1995
 - Usury Amendment Act 10 of 2003
- (ii) the Acts set out in Schedule 2 of the proposed Bill be repealed to the extent set out in column 2 and for the reasons mentioned in Chapter 2 of this discussion paper;
- (iii) the provisions of Acts set out in Schedule 3 of the proposed Bill be amended to the extent set out in that Schedule, for the reasons set out in Chapter 2 of this discussion paper.

3. Furthermore, it is possible that some of the statutes recommended for repeal are still useful, and should thus not be repealed. Moreover, it is also possible that there are statutes or provisions that are not identified for repeal in this discussion paper but are of no practical utility and could be repealed. These should be identified and brought to the attention of the SALRC.

INDEX

Introduction	iii
Preface	iv
Preliminary recommendations and questions for comment	v
Chapter 1	
Project 25: Statutory Law Revision	1
A. Introduction	1
1. The object of the South African Law Reform Commission	1
2. History of investigation	1
B. What is statutory law revision?	2
C. The initial investigation	6
D. Scope of the project	7
E. Consultation with the Department of Trade and Industry	9
Chapter 2	11
Evaluation of Statutes Administered by the Department of Trade and Industry	
A. Introduction	11
B. Evaluation of Legislation	11
Theme 1: Companies and Business Enterprises	12
(a) Industrial Development Act 22 of 1940	12
(b) Industrial Development Amendment Act 27 of 1942	12
(c) Industrial Development Amendment Act 40 of 1951	12
(d) Industrial Development Amendment Act 67 of 1961	13
(e) Industrial Development Amendment Act 52 of 1964	13
(f) Industrial Development Amendment Act 89 of 1965	13
(g) Industrial Development Amendment Act 45 of 1966	13
(h) Industrial Development Amendment Act 47 of 1975	14
(i) Industrial Development Amendment Act 96 of 1980	14
(j) Industrial Development Amendment Act 53 of 1984	15
(k) Industrial Development Amendment Act 9 of 1995	15
(l) Industrial Development Amendment Act 49 of 2001	15
(m) Companies Act 61 of 1973	15
(n) Companies Amendment Acts	16
(o) Companies Act 71 of 2008	17
(p) Companies Amendment Act 3 of 2011	29

(q)	Corporate Laws Amendment Act 39 of 2002	29
(r)	Corporate Laws Amendment Act 24 of 2006	30
(s)	The Rationalisation of Corporate Laws Act 45 of 1996	30

Theme 2: International Trade 31

(a)	Export Credit & Foreign Investments re-insurance Act 78 of 1957	31
(b)	Export Credit re-insurance Amendment Act 66 of 1961	31
(c)	Export Credit re-insurance Amendment Act 88 of 1962	31
(d)	Export Credit re-insurance Amendment Act 75 of 1971	32
(e)	Export Credit & Foreign Investments re-insurance Amendment Act 27 of 1988	32
(f)	Export Credit and Foreign Investments re-insurance Amendment Act 9 of 2001	32
(g)	Export Credit & Foreign Investments Insurance Amendment Act 34 of 2002	33
(h)	Protection of Business Act 99 of 1978	33
(i)	Protection of Business Amendment Act 114 of 1979	34
(j)	Protection of Business Amendment Act 71 of 1984	34
(k)	Protection of Business Amendment Act 87 of 1987	34
(l)	Convention on Agency in the International Sale of Goods Act 4 of 1986	35
(m)	Temporary Removal of Restrictions on Economic Activities Act 87 of 1986	35
(n)	International Trade Administration Act 71 of 2002	36

Theme 3: Property

(a)	Share Blocks Control Act 59 of 1980	38
(b)	Share Blocks Control Amendment act 33 of 1982	39
(c)	Share Blocks Control Amendment Act 15 of 1984	39
(d)	Share Blocks Control Amendment Act 78 of 1985	40
(e)	Share Blocks Control Amendment Act 26 of 1988	40
(f)	Property Time Sharing Control Act 75 of 1983	40
(g)	Housing Development Schemes for Retired Persons Act 65 of 1988	41
(h)	Alienation of Land Act 68 of 1981	42

Theme 4: Intellectual Property 44

(a)	Merchandise Marks Act 17 of 1941	44
(b)	Merchandise Marks Amendment 3 of 1946	44
(c)	Merchandise Marks Amendment 26 of 1951	44
(d)	Merchandise Marks Amendment 47 of 1954	45
(e)	Merchandise Marks Amendment Act 55 of 1967	45
(f)	Merchandise Marks Amendment 54 of 1987	45

(g)	Merchandise Marks Amendment Act 50 of 2001	45
(h)	Merchandise Marks Amendment 61 of 2002	46
(i)	Unauthorised Use of Emblems Act 37 of 1961	46
(j)	Performers Protection Act 11 of 1967	46
(k)	Performers Protection Amendment Act 8 of 2002	47
(l)	Registration of Copyright in Cinematograph Films Act 62 of 1977	47
(m)	Patents Act 57 of 1978	48
(n)	Copyright Act 98 of 1978	49
(o)	Trade Marks Act 194 of 1993	50
(p)	Designs Act 195 of 1993	51
(q)	Intellectual Property Laws Rationalisation Act 107 of 1996	51
(r)	Intellectual Property Laws Amendment Act 38 of 1997	52
(s)	Counterfeit Goods Act 37 of 1997	53
(t)	Counterfeit Goods Amendment Act 25 of 2001	54
(u)	Intellectual Property Laws Amendment Act 28 of 2013	54
Theme 5: Credit agreement & Usury		55
(a)	National Credit Act 34 of 2005	55
Theme 6: Trade practices		59
(a)	Manufacturing Development Act 187 of 1993	59
(b)	Measurement Units and Measurement Standards Act 18 of 2006	59
(c)	Accreditation for Conformity Assessment, Calibration and Good Laboratory Practice Act 19 of 2006	60
Theme 7: Consumer Protection		60
(a)	Legal Metrology Act 9 of 2014	
(b)	National Building Regulations and Building Standards Act 103 of 1977	60
(c)	Lotteries Act 57 of 1997	61
(d)	Lotteries Amendment Act 10 of 2000	62
(e)	Lotteries Amendment Act 46 of 2001	62
(f)	Lotteries Amendment Act 32 of 2013	62
(g)	National Gambling Act 7 of 2004	63
(h)	National Gambling Amendment Act 36 of 1999	63
(i)	The National Regulator for Compulsory Specifications Act 5 of 2008	64

Theme 8 Miscellaneous Acts	65
(a) Sugar Act 9 of 1978	65
(b) Sugar Amendment Act 9 of 1984	65
(c) Sugar Amendment Act 69 of 1987	65
(d) Sugar Amendment Act 71 of 1992	66
(e) Abolition of the Fuel Research Institute Act 30 of 1983	66
(f) Space Affairs Act 84 of 1993	68
(g) Space Affairs Amendment Act 64 of 1995	69
(h) Non-Proliferation of Weapons of Mass Destruction Act 87 of 1993	69
(i) Non-Proliferation of Weapons of Mass Destruction Amendment Act 50 of 1995	70
(j) Non-Proliferation of Weapons of Mass Destruction Amendment Act 59 of 1996	70
(k) National Empowerment Fund Act 105 of 1998	71
(l) Broad-based Black Economic Empowerment Act 53 of 2003	72
(m) Broad-based Black Economic Empowerment Amendment Act 46 of 2013	72
(n) Liquor Act 59 of 2003	72
(o) Standards Act 8 of 2008	73
C. Rationalisation of Acts	73
Annexure A: Trade and Related Matters Repeal and Amendment Bill	75
Annexure B: Statutes Administered by the Department of Trade and Industry	97

CHAPTER 1

BACKGROUND AND SCOPE OF PROJECT 25

A Introduction

1 The objects of the South African Law Reform Commission

1.1 The objects of the SA Law Reform Commission (SALRC) are set out in the South African Law Reform Commission Act 19 of 1973, as follows: to do research with reference to all branches of the law of the Republic, and to study and to investigate all such branches of the law in order to make recommendations for the development, improvement, modernization or reform thereof, including:

- (a) the repeal of obsolete or unnecessary provisions;
- (b) the removal of anomalies;
- (c) the bringing about of uniformity in the law in force in the various parts of the Republic; and
- (d) the consolidation or codification of any branch of the law.

1.2 Thus the SALRC is an advisory statutory body, whose aim is the renewal and improvement of the law of South Africa on a continuous basis.

2 History of the investigation

1.3 Shortly after its establishment in 1973, the SALRC (which was then the SALC) began revising all pre-Union legislation, as part of its Project 7. This investigation resulted in the repeal of approximately 1 200 laws, ordinances, and proclamations of the former colonies and republics. In 1981 the SALRC finalised a report on the repeal of post-Union statutes as part of its Project 25 on statute law, which aims to establish a simplified, coherent, and generally accessible statute book. This report resulted in Parliament adopting the Repeal of Laws Act 94 of 1981, which repealed approximately 790 post-Union statutes.

1.4 Immediately after the advent of constitutional democracy in South Africa in 1994, the legislation enacted prior to that year remained in force. However, many pre-1994 provisions do not comply with the country's new Constitution. This discrepancy is exacerbated by the fact that some of the older provisions were enacted to promote and sustain the policy of apartheid.

1.5 In 2003, Cabinet approved that the Minister of Justice and Constitutional Development should coordinate and mandate the SALRC to review provisions in the legislative framework that would result in discrimination as defined by section 9 of the Constitution. Section 9 prohibits unfair discrimination on the basis of race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, or birth.

1.6 In 2004, the SALRC included in its law reform programme an investigation on statutory law, with the aim of revising all statutes from 1910 to date. Whereas previous investigations had focused on identifying obsolete and redundant provisions for repeal, this investigation would emphasize compliance with the Constitution. Redundant and obsolete provisions that are identified during this investigation are also recommended for repeal, but the constitutional inquiry has focused mainly on identifying statutory provisions that blatantly violate the provisions of section 9 (the Equality Clause) of the Constitution.

1.7 A 2004 provisional audit by the SALRC of national legislation that has remained on the statute book since 1910 established that roughly 2 800 individual statutes existed at that time. These comprised principal Acts, amendment Acts, private Acts, additional or supplementary Acts, and partially repealed Acts. A substantial number of Acts on the statute book no longer serve any useful purpose and many others have retained unconstitutional provisions. This situation has already resulted in expensive and sometimes protracted litigation.

B WHAT IS STATUTORY LAW REVISION?

1.8 Statutory law revision ordinarily focuses on the identification and repeal of statutes that are no longer useful in practice. As the Law Reform Commission for England and Wales explains, the purpose of statute revision is to modernise and simplify statutes that need updating, and to reduce the size of the statute book to the benefit of legal professionals and other people who use it.³ Revision lessens the chance of people being misled by redundant laws that still appear in the statute book and seem to be relevant or “live” law. If statutory

³ See the *Background Notes on Statute Law Repeals* compiled by the Law Commission for England and Wales, par 1 accessed from http://lawcommission.justice.gov.uk/docs/background_notes.pdf on 28 May 2008 (hereinafter referred to as Law Commission for England and Wales *Background Notes on Statute Law Repeals*).

provisions appear in the statute book and are referred to in legal textbooks, readers may reasonably assume they still serve a purpose.

1.9 As is the case in other jurisdictions (and will be evident in this review), once legislation is deemed no longer to apply, the question arises whether it should remain in the statute book or be repealed.⁴ Usually such legislation no longer has any legal effect and is considered obsolete, redundant, or spent. A statutory provision may be identified for repeal because the grounds for which it was passed have lapsed or is presently remedied by another measure or provision.

1.10 In the context of this investigation, the statutory law revision primarily targets statutory provisions that are obviously at odds with the Constitution, particularly section 9.

1.11 The Law Commission for England and Wales lists the following guidelines for identifying statutory provisions that are candidates for repeal:⁵

- (a) references to bodies, organisations, etc. that have been dissolved or wound up or which have otherwise ceased to serve any purpose;
- (b) references to issues that are no longer relevant as a result of changes in social or economic conditions (e.g. legislation about tithes or tin mines);
- (c) references to Acts that have been superseded by more modern (or EU) legislation or by international Convention;
- (d) references to statutory provisions (i.e. sections, schedules, orders, etc.) that have been repealed;
- (e) repealing provisions e.g. "Section 33 is repealed/shall cease to have effect";
- (f) commencement provisions once the whole of an Act is in force;
- (g) transitional or savings provisions that are spent;
- (h) provisions that are self-evidently spent - e.g. a one-off statutory obligation to do something becomes spent once the required act has duly been done;
- (i) powers that have never been exercised over a period of many years or where any previous exercise is now spent.

1.12 The Law Commission of India notes that in England the terms "expired", "spent", "repealed in general terms", "virtually repealed", "superseded", and "obsolete" were defined in memoranda to Statute Law Revision Bills as follows:⁶

⁴ See Law Commission for England and Wales *Background Notes on Statute Law Repeals*, par 6.

⁵ See Law Commission for England and Wales *Background Notes on Statute Law Repeals*, par 7.

- Expired – that is, enactments which having been originally limited to endure only for a specified period by a distinct provision, have not been either perpetuated or kept in force by continuance, or which have merely had as their object the continuance of previous temporary enactments for periods now gone by effluxion of time
- Spent – that is, enactments spent or exhausted in operation by the accomplishment of the purposes for which they were passed, either at the moment of their first taking effect or on the happening of some event or on the doing of some act authorised or required
- Repealed in general terms – that is, repealed by the operation of an enactment expressed only in general terms, as distinguished from an enactment specifying the Acts which it is to operate
- Virtually repealed – where an earlier enactment is inconsistent with, or is rendered nugatory by, a later one
- Superseded – where a later enactment effects the same purposes as an earlier one by repetition of its terms or otherwise
- Obsolete – where the state of things contemplated by the enactment has ceased to exist, or the enactment is of such a nature as to be no longer capable of being put in force, regard being had to the alteration of political or social circumstances.

1.13 Statutory provisions usually become redundant as time passes.⁷ Generally, the redundancy of legislation is not signaled by a single occurrence; rather, legislation is simply overtaken by social and economic changes. Inevitably some provisions fade away more quickly than others. Relatively short-lived provisions include commencement and transitional provisions and those that confer powers to be exercised during the period between the passing of a law and its implementation (in some jurisdictions known as “pump-priming” provisions). Provisions that provide for delegated legislation-making powers might also become unnecessary over time, or a committee or board established by a statute might no longer be required.

1.14 Substantial revision of statutory law is possible in South Africa because of the general savings provisions of section 12(2) of the South African Interpretation Act. The

⁶ Law Commission of India *Ninety-Sixth Report on Repeal of Certain Obsolete Central Acts* March 1984; p 3 of Chapter 2 (p 6 of 21) accessed from <http://lawcommissionofindia.nic.in/51-100/Report96.pdf> on 28 May 2008.

⁷ See Law Commission for England and Wales *Background Notes on Statute Law Repeals*, par 9 and 10.

South African Interpretation Act 33 of 1957⁸ mirrors section 16(1) of the Interpretation Act of 1978 of England and Wales.⁹ Section 12(2) of the South African Interpretation Act provides that where a law repeals any other law, then unless the contrary intention appears, the repeal shall not:

- (a) revive anything not in force or existing at the time at which the repeal takes effect; or
- (b) affect the previous operation of any law so repealed or anything duly done or suffered under the law so repealed; or
- (c) affect any right, privilege, obligation or liability acquired, accrued or incurred under any law so repealed; or
- (d) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any law so repealed; or
- (e) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, forfeiture or punishment as is in this subsection mentioned,

and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing law had not been passed.

1.15 The methodology adopted in this investigation is to review the statute book by department. The SALRC identifies a department, reviews the national legislation administered by that department for constitutionality and redundancy, sets out the preliminary findings and proposals in a consultation paper, and consults with that department to verify the SALRC's preliminary findings and proposals. The next step that the SALRC undertakes is the development of a discussion paper in respect of the legislation of each department, and upon its approval by the Commission, the paper is published for general information and comments. Finally, the SALRC develops a report in respect of each department that reflects the comments on the discussion paper and contains a draft Bill proposing amending legislation.

⁸ With the exception of few minor changes, the South African Interpretation Act 5 of 1910 repeated the provisions of the United Kingdom Interpretation Act of 1889 (Interpretation Act 1889 (UK) 52 & 53 Vict c 63).

⁹ See Law Commission for England and Wales *Background Notes on Statute Law Repeals the Background*, par 8.

C THE INITIAL INVESTIGATION

1.16 In the early 2000s, the SALRC and the German Agency for Technical Cooperation commissioned the Centre for Applied Legal Studies at the University of the Witwatersrand to conduct a preliminary study on law reform. The study examined the feasibility, scope, and operational structure of a revision of the South African statute book for constitutionality, redundancy, and obsolescence. The Centre for Applied Legal Studies pursued four main avenues of research in this study, which was conducted in 2001 and the findings of which were submitted to the SALRC in April 2001.¹⁰ These four steps are outlined here.

1. A series of interviews was conducted with key role-players drawn from the three governmental tiers, Chapter 9 institutions, the legal profession, academia, and civil society. These interviews revealed a high level of support for a law reform project.
2. All Constitutional Court judgments up to 2001 were analysed. The results were compiled as schedules summarising the nature and outcome of these cases, and the statutes impugned. The three most problematic categories of legislative provisions were identified, and the Constitutional Court's jurisprudence in each category was analysed. The three most problematic categories were reverse onus provisions, discriminatory provisions, and provisions that infringe on the separation of powers. Guidelines summarising the Constitutional Court's jurisprudence were compiled for each category.
3. Sixteen randomly-selected national statutes were tested against the guidelines. The results were compared with the results of a control audit that tested the same statutes against the entire Bill of Rights, excluding socio-economic rights. Comparison of the outcomes showed that a targeted revision of the statute book in accordance with the guidelines had produced highly effective results.
4. A survey of law reform in five other countries (United Kingdom, Germany, Norway, Switzerland, and France) was conducted. Apart from France, all these countries had conducted or were conducting statutory revision exercises. The motivation for the revision and the outcomes of the exercises differed by country.

¹⁰ "Feasibility and Implementation Study on the Revision of the Statute Book" prepared by the Law and Transformation Programme of the Centre for Applied Legal Studies of the University of the Witwatersrand April 2001. Available upon request from pvanwyk@justice.gov.za.

1.17 The SALRC finalised the following reports, proposing reform of discriminatory areas of the law or the repeal of specific discriminatory provisions:

- (a) the Recognition of Customary Marriages (August 1998);
- (b) the Review of the Marriage Act 25 of 1961 (May 2001);
- (c) the Application of the Bill of Rights to Criminal Procedure, Criminal Law, the Law of Evidence and Sentencing (May 2001);
- (d) Traditional Courts (January 2003);
- (e) the Recognition of Muslim marriages (July 2003);
- (f) the Repeal of the Black Administration Act 38 of 1927 (March 2004);
- (g) Customary Law of Succession (March 2004); and
- (h) Domestic Partnerships (March 2006).

D SCOPE OF THE PROJECT

1.18 The constitutional validity aspect of this project focuses on statutes or provisions in statutes that are clearly inconsistent with the right to equality entrenched in section 9 of the Constitution. In practical terms, this leg of the investigation is limited to statutes or provisions in statutes that –

- differentiate between people or categories of people in a manner that is not rationally connected to a legitimate government purpose; or
- unfairly discriminate against people or categories of people on one or more grounds listed in section 9(3) of the Constitution; or
- unfairly discriminate on grounds which impair, or have the potential to impair, a person's fundamental dignity as a human being.

1.19 Consequently, a law or a provision in a law which appears on the face of it to be neutral and non-discriminatory, but which has or could have discriminatory effect or consequences, has been left to the judicial process. This investigation focuses on the constitutionality of provisions in statutes of South African law, with special attention paid to consonance with section 9 of the Constitution. The investigation also attends to obsolescence or redundancy of provisions. In 2003, Cabinet directed that the highest priority be given to reviewing provisions that would result in discrimination as defined in section 9 of the Constitution, which prohibits unfair discrimination on the basis of race, gender, sex, pregnancy, marital status, ethnic and social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language, or birth. The SALRC agreed that the project

should proceed by scrutinising and revising national legislation that discriminates unfairly.¹¹ However, as explained in the preceding sections of this chapter, even the section 9 inquiry was limited, because it dealt primarily with statutory provisions that were blatantly in conflict with section 9 of the Constitution. This delimitation arose mainly from considerations of time and capacity. Nonetheless, during the investigation certain other anomalies and obvious inconsistencies with the Constitution were identified. The SALRC has made recommendations on how to address these issues.

1.20 The Commission has approved the following finalised reports as part of Project 25:

- (a) Legislation administered by the Department of Transport, in October 2009;
- (b) Legislation administered by the Department of Labour, in October 2011;
- (c) Legislation administered by National Treasury (non-tax legislation), in October 2011;
- (d) Legislation administered by the Department of Energy, in October 2011;
- (e) Legislation administered by the Department of Mineral Resources, in December 2011;
- (f) : Legislation administered by the Department of Public Works, in December 2011;
- (g) Legislation administered by the Department of Rural Development and Land Reform, in December 2011;
- (h) Legislation administered by the Department of Human Settlements, in December 2011;
- (i) Legislation administered by the Department of Defence, in July 2014;
- (j) Legislation administered by the Department of International Relations and Cooperation, in December 2014;
- (k) Legislation administered by the Department of Cooperative Governance Traditional Affairs, in June 2015;
- (l) Legislation administered by the Department of Tourism, in June 2015;
- (m) Legislation administered by Departments of Basic Education and Higher Education and Training, August 2015

¹¹ Cathi Albertyn prepared a 'Summary of Equality jurisprudence and Guidelines for assessing the SA Statute Book for Constitutionality against section 9 of the 1996 Constitution', specifically for the SALRC in February 2006 available upon request from pvanwyk@justice.gov.za.

E CONSULTATION WITH STAKEHOLDERS

1.21 In 2004, Cabinet endorsed the proposal that government departments should be asked to participate in and contribute to this investigation. In certain instances, legal researchers cannot decide whether to recommend a provision for repeal unless they have access to factual information that might be considered “inside” knowledge – of the type usually accessible only within a specific department or organisation. Examples include savings or transitional provisions that are instituted to preserve the status quo until an office-holder ceases to hold office or until a loan has been repaid. In such cases, the consultation paper drafted by the SALRC invited the department or organisation being consulted to supply the necessary information. The aim of the publication of discussion papers in this investigation is likewise to determine whether departments and stakeholders agree with and support the proposed findings and the proposals for legislative amendment or repeal. The SALRC relies on the assistance of departments and stakeholders. This process should ensure that all relevant provisions are identified during this review, and are dealt with responsively and without creating unintended negative consequences.

1.22 The methodology adopted in this investigation is to review the statute book by department. The SALRC identifies a department, reviews the national legislation administered by that department for constitutionality and redundancy, sets out the preliminary findings and proposals in a consultation paper, and consults with that department to verify the SALRC’s preliminary findings and proposals. The next step the SALRC undertakes is the development of a discussion paper in respect of legislation of each department, and upon its approval by the SALRC, the paper is published for general information and comment. Finally, the SALRC develops a report in respect of each department, which reflects the comments submitted on the discussion paper. The report also contains a draft Bill that proposes amending legislation.

On 1 June 2010 the SALRC submitted its consultation paper containing the SALRC’s preliminary findings and proposals to the Department of Trade and Industry (DTI) for its consideration and requested the DTI to confirm whether it supported the provisionally proposed repeals and amendments. The Department of Trade and Industry was granted additional extension for comments on the consultation paper until 30 November 2012. On 23 November 2012 the responsible DTI official informed the researcher that the process may be taken forward subject to the changes suggested by him, as no line manager at DTI had

expressed any reservations in respect of the consultation paper and proposed draft Bill. The SALRC then commenced developing its draft discussion paper which reflected the comments it received from the DTI. Because the investigation could not proceed towards the finalisation of a discussion paper for some time, the draft discussion paper previously prepared was updated and expanded after the 2014 national elections, in view of the transfer of Cabinet responsibilities.¹²

1.23 The SALRC also acknowledges the valuable assistance it received from Mr Johan Strydom at the Office of the Director: Legislation Trade and Industry during all phases of this review.

¹² The Commission resumed its work in September 2013, after the terms of office of the previous Commission had expired at the end of 2011 and new members were appointed to the Commission in August 2013.

Chapter 2

Evaluation of legislation administered by the Department of Trade and Industry

A Introduction

2.1 The Commission identified 226 pieces of legislation as being statutes that are administered by the Department of Trade and Industry. The Commission has prepared a draft Bill entitled the Trade and Related Matters Repeal and Amendment which, if enacted, will repeal legislation administered by the Department of Trade and Industry and which is considered redundant, obsolete, or inconsistent with section 9 of the Constitution (the equality provision). The Schedule to the draft Bill contains various statutes identified by the Commission as possible candidates for repeal or amendment. This Chapter contains reasons why these statutes may be repealed or amended.

B. Evaluation of Legislation

2.2 The review of the statutes administered by the Department of Trade and Industry in this paper does not deal with the statutes in a chronological order as *per* the number and year of each Act, but according to identified themes. The SALRC considers that this approach enhances the clarity of the provisional proposals made. The advisory committee identified the following eight themes in relation to the trade and industry related legislation reviewed by the committee:

Theme 1: Companies and business enterprises

Theme 2: International trade

Theme 3: Credit agreements and usury

Theme 4: Intellectual property

Theme 5: Property

Theme 6: Trade practices

Theme 7: Consumer protection

Theme 8: Miscellaneous.

Theme 1: Companies and Business Enterprises

(a) Industrial Development Act 22 of 1940

2.3 The object of the Industrial Development Act 22 of 1940 is to set up a corporation whose purpose is to promote the establishment of new industries and industrial undertakings. Its purpose is also to develop existing industries and to provide for matters connected therewith. The Act sets up the Industrial Development Corporation of South Africa with the aim of facilitating, guiding, assisting and promoting the financing of new industries and industrial undertakings. It aims also at promoting the economic empowerment of historically disadvantaged persons, communities and to promote employment-creating activities particularly in underdeveloped areas.

2.4 The Act is neither obsolete nor redundant and no provisions that infringe the equality provisions of the Constitution were identified. The SALRC therefore proposes that the Industrial Development Act of 1940 should be retained on the statute book.

(b) Industrial Development Amendment Act 27 of 1942

2.5 The Industrial Development Amendment Act 27 of 1942 amended the Industrial Development Act 22 of 1940. It dealt with information that has to be furnished to the Minister and to Parliament by the corporation. The SALRC proposes that the Industrial Development Amendment Act of 1942 be retained on the statute book for purposes of legal certainty.

(c) Industrial Development Amendment Act 40 of 1951

2.6 The purpose of the Industrial Development Amendment Act 40 of 1951 is to amend the Industrial Development Act 22 of 1940 and to insert section 5bis in the latter Act. Section 5bis was substituted by section 1 of the Industrial Development Amendment Act 89 of 1965 and amended by section 22 of Act 94 of 1974 and by section 2 of Act 47 of 1975. This section was repealed by section 3(1) of Act 21 of 1980 which in turn was repealed by the Finance Act 120 of 1991. The Industrial Development Amendment Act of 1951 has no independent surviving provisions therefore the SALRC recommends that it be removed from the statute book.

(d) Industrial Development Amendment Act 67 of 1961

2.7 The Industrial Development Amendment Act of 1975 amended the Industrial Development Act 22 of 1940. This Amendment Act amends the powers of the corporation relating to control of immovable or movable property of any sorts. The SALRC considers that the Industrial Development Amendment Act of 1961 continues to serve a purpose to ensure legal certainty and proposes that the Amendment Act be retained on the statute book.

(e) Industrial Development Amendment Act 52 of 1964

2.8 The Industrial Development Amendment Act 52 of 1964 amended the Industrial Development Act of 1940. The Industrial Development Amendment Act consists of eight sections and it effected important amendments to the Industrial Development Act of 1940. It dealt with the constitution of the corporation, powers of the corporation to procure the registration of the corporation in other countries, appointment of managing directors and meetings of shareholders. The SALRC considers that the Industrial Development Amendment Act of 1964 continues to serve a purpose to ensure legal certainty and proposes that the Amendment Act be retained on the statute book.

(f) Industrial Development Amendment Act 89 of 1965

2.9 The Industrial Development Amendment Act of 1965 amended section 5*bis* of the Industrial Development Act of 1940. This section was repealed by section 3(1) of the Finance Act 21 of 1980 which was subsequently repealed by section 19 of the Finance Act 120 of 1991. As the Amendment Act has no substantive surviving provision, the SALRC recommends that it be repealed.

(g) Industrial Development Amendment Act 45 of 1966

2.10 The purpose of the Industrial Development Amendment Act 45 of 1966 was to alter the sub-division, in terms of section 12 of the Industrial Development Act of 1940, of the shares of the Industrial Development Corporation of South Africa, Limited. The SALRC considers that the Industrial Development Amendment Act of 1966 continues to serve a purpose to ensure legal certainty and proposes that the Amendment Act be retained on the statute book.

(h) Industrial Development Amendment Act 47 of 1975

2.11 The Industrial Development Amendment Act of 1975 amended sections 4 and *5bis* of the Industrial Development Act of 1940. To further empower the Industrial Development Corporation of South Africa, Limited, to indemnify companies or other persons in respect of certain costs and losses in terms of section 4(e). The Corporation's powers in terms of section 4 subsist to date. Section *5bis* on the other hand authorized the Minister of Economic Affairs to guarantee certain loans negotiated by wholly owned subsidiaries of the said Industrial Development Corporation; to increase the amount of loans which may be so guaranteed as well as to authorize the said Minister to indemnify the said Industrial Development Corporation or the said wholly owned subsidiaries against certain liabilities, losses or damages. The SALRC considers that the Industrial Development Amendment Act of 1975 continues to serve a purpose to ensure legal certainty and proposes that the Amendment Act be retained on the statute book.

(i) Industrial Development Amendment Act 96 of 1980

2.12 The Industrial Development Amendment Act of 1980 amended the Industrial Development Act of 1940 by inserting section *5quat* in the latter Act. Section *5quat* was repealed by section 4 of the Industrial Development Amendment Act 49 of 2001. As the Industrial Development Amendment Act of 1980 has no substantive surviving provision, the SALRC recommends that it be repealed.

(j) Industrial Development Amendment Act 53 of 1984

2.13 The Industrial Development Amendment Act of 1984 amended the Industrial Development Act, 1940, so as to amend the definition of 'Minister'; and to empower the Industrial Development Corporation of South Africa, Limited, to lend or advance money to certain persons, to furnish certain guarantees and, with the concurrence of the Minister to enter into certain agreements with the governments of certain states. The SALRC proposes that the Amendment Act needs to be retained on the statute book for purposes of legal certainty

(k) Industrial Development Amendment Act 9 of 1995

2.14 The Industrial Development Amendment Act 9 of 1995 amended the Industrial Development Act 22 of 1940 in order to adjust a definition of 'Minister' and to repeal obsolete provisions. It also increased the maximum number of directors of the Industrial Development Corporation of South Africa, Limited. The Amendment Act also deals with the powers of the corporation relating to providing technical and other assistance and expert and specialized advice, information and guidance. This Amendment Act still serves a purpose to ensure legal certainty. Therefore the SALRC proposes that the Amendment Act needs to be retained on the statute book for purposes of legal certainty

(l) Industrial Development Amendment Act 49 of 2001

2.15 The Industrial Development Amendment Act of 2001 amended the Industrial Development Act 22 of 1940, amended the Industrial Development Act of 1940 and to adjust and add to the objects and powers of the Industrial Development Corporation of South Africa, Limited. It further extended the activities of the corporation beyond the borders of the Republic for the benefit of the Southern African region specifically and the rest of Africa generally and to empower the managing director to delegate his or her powers to other structures of the corporation. It also repealed obsolete provisions in the principal Act. Section 6 of the Industrial Development Amendment Act of 2001 provided that the words 'he', 'him' and 'chairman' wherever in the Act they occur are to be substituted with the words 'he or she', 'him or her', 'his or her' and 'chairperson' for 'chairman'. This Amendment Act still serves a purpose to ensure legal certainty. Therefore the SALRC proposes that the Amendment Act needs to be retained on the statute book for purposes of legal certainty.

(m) Companies Act 61 of 1973

2.16 The object of the Companies Act 61 of 1973 is to consolidate and amend the law relating to Companies, and to provide for matters incidental thereto. When the Companies Act 71 of 2008 came into force on May 2011, it repealed the provisions of the Companies Act 61 of 1973 except for specific sections of the Companies Act of 1973 that would for a limited period continue to apply as transitional measures. Of precise importance is Schedule 5 of the Companies Act 2008 relating to the winding-up of companies and the essential distinction between solvent companies and insolvent companies. Item 9(1)-(2) of Schedule 5 provides that despite the repeal of the Companies Act 1973, certain specified provisions of chapter 14 of that Act (Act 71 of 1973) which deals with the winding-up of companies, both

solvent and insolvent) continue to apply, except in relation to solvent companies. In other words, chapter 14 of the Companies Act 1973 continues to apply in relation to the winding up of insolvent companies. This will be the position until the Minister of Trade and Industry publishes a notice that cancels the application of the 1973 Act in the Government Gazette. No date has been determined to effect the interim or transitional operation of item 9 of Schedule 5.

(n) The Companies Amendment Acts

2.17 The Companies Act 61 of 1973 has been amended up to 2006 before it was repealed by section 224(1) of the Companies Act 71 of 2008. For this reason the amendment Acts became obsolete on 11 May 2011 when the Companies Act of 2008 came into effect. These amendment Acts¹³ are still on the statute book and the SALRC proposes that these be removed from the statute book.

¹³ They are the Companies Amendment Act of 76 of 1974; the Companies Amendment Act 111 of 1976; the Companies Amendment Act 64 of 1977; the Companies Amendment Act 59 of 1978 (Act 59 of 1978); the Companies Amendment Act of 1979 (Act 115 of 1979); the Companies Amendment Act of 1980 (Act 84 of 1980); the Companies Amendment Act of 1981 (Act 83 of 1981); the Companies Amendment Act of 1982 (Act 29 of 1982); the Companies Amendment Act of 1984 (Act 70 of 1984); the Companies Amendment Act of 1985 (Act 29 of 1985); the Companies Amendment Act of 1986 (Act 31 of 1986); the Companies Amendment Act of 1988 (Act 63 of 1988); the Companies Amendment Act of 1989 (Act 78 of 1989); the Companies Amendment Act of 1990 (Act 18 of 1990); the Companies Second Amendment Act of 1974 (Act 69 of 1990); the Companies Amendment Act of 1992 (Act 82 of 1992); the Companies Amendment Act of 1998 (Act 35 of 1998); the Companies Second Amendment Act of 1998 (Act 60 of 1998); the Companies Third Amendment Act of 1998 (Act 125 of 1998); the Companies Amendment Act of 1999 (Act 37 of 1999); the Companies Amendment Act of 2001 (Act 35 of 2001); the Corporate Laws Amendment Act of 2002 (Act 39 of 2002); the Companies Amendment Act of 2004 (Act 20 of 1974) and the Corporate Laws Amendment Act of 2006 (Act 24 of 2006).

(o) Companies Act 71 of 2008

2.18 The purpose of the Companies Act 71 of 2008 (the 2008 new Act) is to provide for the incorporation, registration, organisation and management of companies, the capitalisation of profit companies, and the registration of offices of foreign companies carrying on business within the Republic; to define the relationships between companies and their respective shareholders or members and directors; to provide for equitable and efficient amalgamations, mergers and takeovers of companies; to provide for efficient rescue of financially distressed companies; to provide appropriate legal redress for investors and third parties with respect to companies; to establish a Companies and Intellectual Property Commission and a Takeover Regulation Panel to administer the requirements of the Act with respect to companies, to establish a Companies Tribunal to facilitate alternative dispute resolution and to review decisions of the Commission; to establish a Financial Reporting Standards Council to advise on requirements for financial record-keeping and reporting by companies; to repeal the Companies Act 61 of 1973, and make amendments to the Close Corporations Act 69 of 1984, as necessary to provide for a consistent and harmonious regime of business incorporation and regulation.

2.19 The Companies Act of 2008 is the most important company law development since 1973. This Act has been brought into line with the Bill of Rights. One of its stated purposes is to promote compliance with the Bill of Rights.¹⁴ Before the Companies Act of 2008 was put into operation practitioners and academics noted that there were a number of errors which would result in inconsistencies and ambiguity which needed to be corrected. These errors were almost addressed in the Companies Amendment Act 3 of 2011.¹⁵

2.20 Amongst the most significant changes in the 2008 Act is that close corporations will cease to exist as new forms of enterprise. Despite the fact that existing close corporations can retain their status, no new close corporations will be registered after 1 May 2011, which is the date of coming into operation of the Companies Act of 2008. New types of companies under the 2008 Act include the Non Profit Company (NPC), the "RF" company and the State Owned Company (SOC).

¹⁴ Section 7(a) of the Companies Act of 2008.

¹⁵ Discussed hereunder at paragraph (p) page 29.

2.21 Since the Companies Act of 2008 came into force on 1 May 2011, legal practitioners have grappled with a number of issues brought about by this legislation even though we are almost five years into the new company law regime. The issues that are discussed hereunder fall outside the ambit of the mandate of the SALRC in relation to Project 25. There are a number of anomalies and lacunae that while on the face of it fall outside the narrow constitutional review have huge implications for trade and industry. As one academic pointed out that it will require some naivety, bias or ignorance to be blind to the many failures of the new Act (meaning the Companies Act of 2008).¹⁶ These anomalies and lacunae are brought to the attention of the DTI for purposes of sharing the common issues which arose in practice and to request the DTI to resolve or call on practitioners to assist with finding answers to the following issues:

(i) *Definition of "file"*

2.22 Section 1 of the Companies Act of 2008 defines "file" as "to deliver a document to the Commission in the manner and form, if any, prescribed for that document". The term "deliver" is not defined in the Companies Act of 2008, but regulation 7(2)¹⁷ provides that: "a document delivered by a method listed in the second column of Table CR 3 must be regarded as having been delivered to the intended recipient.¹⁸ A notice or document to be delivered for any purpose contemplated in the Act or these regulations may be delivered in any manner set out in this Table. Subject to regulation 7 (2)(b), a document delivered by a method listed in the second column of this Table will be deemed to have been delivered to the intended recipient on the date and at the time shown opposite that method, in the third column of that Table.

2.23 The concept of "filing", as prescribed by the Companies Act of 2008, is a critical one as it applies to section 16 of the Companies Act of 2008. Section 16 deals with the amendment of the company's Memorandum of Incorporation (MOI) and sub-section (9)(b) thereof provides that-

- (9) An amendment to a company's Memorandum of Incorporation takes effect—
 (a).....
 (b) in any other case, on the later of—

¹⁶ Philip Sutherland in *The state of company law in South Africa* STELL LR 2012 (1) 158.

¹⁷ Companies Regulations, 2011 (*Government Gazette* No. 34239) GNR.351 of 26 April 2011:

¹⁸ Annexure 3 Table CR 3- Methods and Times for Delivery of Documents (in terms of Regulation 7).

- (i) the date on, and time at, which the Notice of Amendment is filed; or
- (ii) the date, if any, set out in the Notice of Amendment.

2.24 In other words the amendment of a MOI will take effect either on the date and time on which the Notice of Amendment is “filed” or on the date set out in the Notice of Amendment, whichever date occurs last.

2.25 Section 16(9)(a) provides that

An amendment to a company’s Memorandum of Incorporation takes effect—
 (a) in the case of an amendment that changes the name of the company, on the date set out in the amended registration certificate issued by the Commission in terms of subsection (8), read with section 14 (1) (b) (iii); or

2.26 The implication of this is that in the case of an amendment that changes the name of the company, the amendment will take effect on the date set out in the amended registration certificate. The date on which the amendment takes effect is important because section 19(6) of the Act provides that:

(6) If a profit company amends its Memorandum of Incorporation in such a manner that it no longer meets the criteria for its particular category of profit company, the company must also amend its name at the same time by altering the ending expression as appropriate to reflect the category of profit company into which it now falls.

2.27 The company’s previous MOI, in the pre-amendment form, will have no force or effect with respect to any right, cause of action or matter occurring or arising after the date on which the amendment took effect. It is therefore conceivable that there may be situations where it will become important to determine when exactly the amendment took effect.

2.28 Practitioners have asked a question as to which date is exactly the date of “filing”.¹⁹ Yaniv Kleitman²⁰ enquires as to when “filing” occurs under the new Companies Act. According to him one would think that such a basic issue would be as clear as possible, but unfortunately it is not and it has a number of practical implications – think of all those conditions precedent contained in transaction documents which require that the MOI of a

¹⁹ Werksmans Attorneys, per P le Roux, when they requested CIPC to provide them with a non-binding opinion in terms of section 188(2) of the Companies Act of 2008.

²⁰ Yaniv Kleitman “Life under the Companies Act Part 2” Without Prejudice October 2013 page 24.

particular company be "filed". When is that condition precedent fulfilled? At what point are shares duly created so that they can be issued?²¹

2.29 It must be remembered that a large number of MOIs have a provision that specifies that the "MOI takes effect, in terms of section 16(9)(b)(i) of the Act (meaning the 2008 Companies Act), on the date of filing".

2.30 The Companies and Intellectual Property Commission (CIPC) released a non-binding opinion (Non-Binding Opinion)²² on 2 November 2011, relating to the interpretation of section 16(9) of the Companies Act of 2008. In the Non-Binding Opinion, CIPC sets out the meaning of "filing" and extends the definition of the term from how it is currently defined in the Companies Act. In terms of the CIPC's non-binding opinion, issued (in terms of section 188(2)(b) of Companies Act of 2008) on 2 December 2011, the mere delivery of the MOI does not constitute proper "filing" in terms of section 16(9) of the Companies Act of 2008. According to the non-binding opinion of the CIPC, because the CIPC also has to verify certain information contained in the Notice of Amendment that accompanies the amended MOI, it is also necessary that the Notice of Amendment be "accepted"²³ by CIPC before the amendment can take effect.

2.31 To support its view, the CIPC states that the CIPC is entitled to accept/reject the filing of a document in a number of situations, for example where the prescribed fee has not been paid or where the information on the form is incomplete and/or incorrect. Accordingly, if "filing" was viewed as a mere delivery of the amended MOI, it would mean that even the MOIs with these defects are deemed to be properly "filed".

2.32 Kleitman²⁴ is of the view that until the matter has been decided by the courts, the position with regards to the timing of a "*filing*" under the new Companies Act seems to be the same, in effect, as with "*registration*" under the previous Companies Act.

²¹ Footnote 19 above.

²² The Non-Binding Opinion: Subject: Interpretation of section 16(9) of the Companies Act of 2008, in relation to the date on which an amendment of a memorandum of incorporation of a company takes effect and the meaning of "filing".

²³ The acceptance approach mentioned in Kate Teubner in *That Word "Filing" Without Prejudice*.

²⁴ Yaniv Kleitman "Life under the Companies Act Part 2" Without Prejudice October 2013 page 25.

2.33 The SALRC is of the opinion that uncertainties on basic matters such as the definition of “filing” in the Companies Act of 2008 create obstructions in the application of this Act. It is therefore recommended that the Companies Act of 2008 be amended to define the word “file” clearly to remove the uncertainty that is caused in practice by the present definition.

(ii) *Definition of “prescribed officer”*

2.34 Section 1 defines “prescribed officer” as “a person who, within a company, performs any function that has been designated by the Minister in terms of section 66 (10)”. Regulation 38 of the Companies Act,²⁵ describes a “prescribed officer” in the following terms:

"Despite not being a director of a particular company, a person is a 'prescribed officer' of the company for all purposes of the Act if that person—

- (a) exercises general executive control over and management of the whole, or a significant portion, of the business and activities of the company; or
- (b) regularly participates to a material degree in the exercise of general executive control over and management of the whole, or a significant portion, of the business and activities of the company."

2.35 From the definition in Regulation 38 above prescribed officers are thus generally limited to a company’s chief executive officer or the chief executive officer of a division of the company’s business which comprises “a significant portion” of all the company’s businesses. It does not include Chief Information Officer or Chief Financial Officer or Exco members.

2.36 This term is new and unique to South African company law, and it has also been defined in very vague and general terms. Unfortunately the Minister did not designate any functions in ordinary sense when he exercised his powers under section 66(10) of the Companies Act of 2008.

2.37 The Act contains numerous references to the “prescribed officer” and in the majority of instances accords the prescribed officer the same or similar duties and responsibilities as a director. This is particularly significant in light of the following sections:

- (a) Section 20: Validity of company actions.

²⁵ *Companies Regulations, 2011* published in GNR.351 of 26 April 2011: *Government Gazette* No. 34239.

- (b) Section 69: Ineligibility and disqualification of persons to be director or prescribed officer
- (c) Section 75: Director's personal financial interests
- (d) Section 76: Standards of directors' conduct
- (e) Section 77: relates to the liability of directors and prescribed officers
- (f) Section 78: dealing with indemnification and directors' insurance

2.38 The prescribed officer is subject to precisely the same standards of conduct and is exposed to the same liability as a director, not only for non-compliance with the requirements of the Act, but for any breaches of fiduciary duty or the failure to act with due care and skill in the best interests of the company. However, the prescribed officer does not have all of the rights of directors, for example, the right to receive notice of board meetings, or voting rights at a committee of the board.

2.39 It will be up to the South African courts to determine the nature, degree and amount of participation or control required to term a person a "*prescribed officer*" for purposes of the Act. The current lack of case law dealing with this matter further complicates the process of identifying prescribed officers, although this is likely to change as it will be a contentious issue that is likely to feature prominently in many cases related to the Act.

2.40 Some practitioners are of the view that prescribed officers are thus generally limited to a company's chief executive officer or the chief executive officer of a division of the company's business which comprises "a significant portion" of all the company's businesses. It does not include CEO's or CFO or Exco members.²⁶

2.41 The uncertainty generated by the definition means that companies are going to have to adopt a practical approach to identifying prescribed officers. Unfortunately they are going to have to do this largely unaided by any legal precedent or authority. The SALRC recommends that the term "prescribed officer" be defined clearly in the Companies Act of 2008 so as to avoid ambiguity.

²⁶ Ewald van Heerden who is a partner at global audit, tax and advisory firm, Mazars in an article titled "Managers could be subject to the same fiduciary responsibilities as directors"; Cathy Idensohn "The Meaning Of 'Prescribed Officers' Under The Companies Act 71 Of 2008" (2012) 129 SALJ; Van Erck Are Senior Managerial Employees Prescribed Officers in Terms of the Companies Act 71 of 2008 and are They Treated the Same as Executive Directors? TSAR 2012.

(iii) “Piercing of the corporate veil of a company”

2.42 A crucial issue which also falls outside the ambit of this review is the “piercing of the corporate veil of a company” which is encompassed in section 20(9) of the Companies Act 2008 which provides as follows:

20(9) If, on application by an interested person or in any proceedings in which a company is involved, a court finds that the incorporation of the company, any use of the company, or any act by or on behalf of the company, constitutes an unconscionable abuse of the juristic personality of the company as a separate entity, the court may-

- (a) declare that the company is to be deemed not to be a juristic person in respect of any right, obligation or liability of the company or of a shareholder of the company or, in the case of a non-profit company, a member of the company, or of another person specified in the declaration; and
- (b) make any further order the court considers appropriate to give effect to a declaration contemplated in paragraph (a).

2.43 This section embodies a statutory provision in the Companies Act of 2008 that gives courts a general discretion to ‘pierce the corporate veil’ for the first time in the history of South African company law. There are uncertainties that relates to the interpretation, the scope and ambit of this section. Practitioners are still waiting to see how the courts interpret section 20(9), specifically the meaning that will be assigned to the term ‘unconscionable abuse’ of the juristic personality of the company as a separate entity and the term ‘interested person’. The term ‘unconscionable abuse’ is not defined and section 20(9) does not provide any guidance as to what is ‘unconscionable abuse’. The section allows any ‘interested person’ to apply to court requesting the court to deem a company not to be a juristic person; still, the section does not give guidance as to who the ‘interested person’ is. One other question that is asked is whether section 20(9) will override the common law principle of piercing the corporate veil. Section 20(9) creates uncertainty and this must be remedied. Although this is outside its current mandate the SALRC wishes to bring this to the attention of the DTI.

2.44 In the recent case of *Ex parte Gore NO and Other NNO*²⁷ (in their capacities as the liquidators of 41 companies) comprising King Financial Holdings Ltd (in liquidation) and its subsidiaries the Western Cape High Court handed down the first judgment on section 20(9) of the Act. This judgment gives valuable insight into the interpretation of section 20(9) of the Act. The basis for the application was the allegation that the relevant business of the

²⁷ *Ex parte Gore NO and Other NNO* 2013 (2) SA 437 (WC)

group was conducted through the holding company with little or no regard to the distinction between that company's legal personality and that of its subsidiaries - relief in terms of section 20(9) may be granted on application by any "interested person", or in any proceedings in which a company is involved. The issue in *Gore* was whether the court should pierce the corporate veil in a group of companies.

2.45 How did the court interpret 'unconscionable abuse'? The court stated that the words 'unconscionable abuse' are less extreme than the words 'gross abuse', which are used in section 65 of the Close Corporations Act 69 of 1984 in a similarly worded provision to section 20(9) of the Companies Act of 2008. The court asserted that the words 'unconscionable abuse of the juristic personality of a company' used in section 20(9) assume conduct in relation to the formation and use of companies that is diverse enough to cover all the descriptive terms such as 'sham', 'device', 'stratagem', and conceivably much more. The court stated that this indicates that the remedy may be used whenever the illegitimate use of the concept of juristic personality adversely affects a third party in a way that reasonably should not be countenanced.²⁸

2.46 The other question raised above is whether section 20(9) of the Act overrides the common law instances of piercing the corporate veil. It was contended that section 20(9) did not override the common law instances of piercing the corporate veil, and that the principles developed at common law with regard to piercing the corporate veil would serve as useful guidelines in interpreting section 20(9) of the Act. The court held that it is appropriate to regard section 20(9) as supplemental to the common law, rather than substitutive.²⁹

2.47 The court stated in *Gore* that no mystique attaches to the meaning of the term 'interested person'. The standing of any person to seek a remedy in terms of section 20(9) of the Act should be determined on the basis of well-established principles and, if the facts implicate a right in the Bill of Rights, section 38 (enforcement of rights) of the Constitution.³⁰ The court found that the liquidators had a direct and sufficient interest in the relief sought so as to qualify as 'interested persons'.

²⁸ At paragraph 34.

²⁹ At paragraph 34.

³⁰ At paragraph 35

2.48 Since the Companies Act does not have a clear meaning of what constitutes ‘unconscionable abuse’, the courts will have to apply the use of the common law and other cases decided prior to the enactment of the Companies Act on the subject of piercing the veil. This is quite important as the previous case law has proven to cast the net wide enough in showing the extent to which the courts may use the remedy of lifting the corporate veil and also offering alternative remedies prior to using the remedy of lifting the corporate veil such as suing an individual for the wrong perpetrated or joining another party to the court proceedings.³¹

2.49 The SALRC therefore recommends that the Companies Act be amended to fully define the term “unconscionable abuse”.

(iv) Lacuna in section 23

2.50 There is a lacuna in section 23 of the Companies Act of 2008 which provides for registration of external companies and registered office. The section does not provide for deregistration of external companies as the 1973 Companies Act did in section 332. The 2008 Act has reduced an entire chapter dealing with external companies to a single provision (section 23). The definition of “company” does not include an external company. Therefore the SALRC recommends that provision should be made for deregistration of an external company in the 2008 Act.

(v) No sole shareholder provided in section 51(1)(b)

2.51 In terms of section 51(1)(b) of the Companies Act of 2008 a certificate evidencing any certificated securities of a company must be signed by two persons authorised by the company’s board. What is required in terms of this section can be a problem for the sole shareholder and director company, which usually includes the shelf company providers. If the company has a sole director and no other officers, it should be provided that a single signatory on a share certificate is sufficient, being that of the sole director. The SALRC recommends that this section must be amended to provide for a situation where the company has a sole shareholder or director.

³¹ Hulse-Reutter v Godde 2001 (4) SA 1336 (SCA) see D Davis et al Companies and other Business Structures in South Africa 2nd edition (Oxford Press Southern Africa) see page 26.

(vi) *Contradiction in section 62(1)*

2.52 Section 62(1) of the Companies Act of 2008 provides that the company *must* (our emphasis) deliver a notice of each shareholders meeting in the prescribed manner and form to all of the shareholders of the company as of the record date for the meeting. Regulation 36(2)³² prescribes that form CoR 36.2 be used. Form CoR 36.2 states that the use of the form is "voluntary".³³ This contradicts the obligatory section 62(1). The SALRC recommends that section 62(1) be amended by removing the words "and form" from the section. The contradiction will not exist after the removal of these words.

(vii) *Amalgamation or merger*

2.53 The Companies Act of 2008 has introduced a US-style³⁴ "amalgamation or merger" transactions in terms of sections 113 and 116 in addition to the traditional mechanism of obtaining control of a company. Yaniv Kletman³⁵ points out that these provisions fundamentally allow companies to "fuse" into each other, with their respective assets and liabilities automatically, and by operation of law, transferred and assigned into a merged or amalgamated company.

2.54 Section 1 of the Companies Act of 2008 defines an "amalgamation or merger" as:

A transaction, or series of transactions, pursuant to an agreement between two or more companies, resulting in—

(a) the formation of one or more new companies, which together hold all of the assets and liabilities that were held by any of the amalgamating or merging companies immediately before the implementation of the agreement, and the dissolution of each of the amalgamating or merging companies; or

³² Regulation 36(2) A company may notify each person who holds any securities of the company for any purpose contemplated in sections 39, 45 (5), 56 (5), 60, or 62 (1), by delivering a completed Form CoR 36.2 to each registered security holder, except to the extent that the requirements of a central securities depository provide otherwise.

³³ Bullet number 2 of Form CoR 36.2 states that 'the use of this form is voluntary. If this form is used it is not necessary to file the copy with the Commission'.

³⁴ This new feature in our company law was adopted primarily from the United State and Canada see Cassim et al *Contemporary Company Law* 676-715; Yaniv Kleitman, "Giving us an American headache : Company law" Without Prejudice 2013 p20-21

³⁵ "Giving us an American headache : Company law" Without Prejudice 2013 p20-21

(b) the survival of at least one of the amalgamating or merging companies, with or without the formation of one or more new companies, and the vesting in the surviving company or companies, together with such new company or companies, of all of the assets and liabilities that were held by any of the amalgamating or merging companies immediately before the implementation of the agreement”

2.55 For amalgamations and mergers, questions arise as to the interpretation of the word "creditors" in section 116. After a resolution approving a merger has been adopted by each company that is a party to the merger agreement, section 116 requires that each of the merging companies must cause a notice of the merger to be given in the prescribed manner and form to every known creditor of that company.³⁶ Within fifteen business days after delivery of a notice, a creditor may seek leave to apply to a court for a review of the merger, but only on the grounds that the creditor will be materially prejudiced by the transaction. The Companies Act of 2008 or the Companies Regulations do not define the word “creditor”.

2.56 It is important to note that during the drafting stages of the Companies Amendment Act, there was an attempt to define the word "creditor". In the Companies Amendment Bill of 2010 [Bill 40-2010],³⁷ the definition that was proposed was "a person to whom a company is or may become obligated in terms of any liability or other obligation that would be required to be considered by the company if it were applying the solvency and liquidity test set out in section 4". In turn, the same Bill proposed to define "liability" as "an existing obligation of an entity arising from past events, the settlement of which is expected to result in an outflow from the entity of resources embodying economic benefits". Both definitions however were ultimately abandoned.

2.57 What then did the legislature mean in section 116 when it referred to “every known creditor of that company”? Is "creditor" to be interpreted in the widest sense? It is very important to establish who the creditors are that must get the notice, and who can exercise these rights. Davids, Norwitz and Yuill note that it is not clear therefore, whether it would apply only narrowly to financial creditors, or whether it can be interpreted more broadly to include all contractual counterparties or even creditors who may not have formal contracts with the merging companies such as employees and delict victims. What about contingent

³⁶ Section 116(1)(a)

³⁷ As introduced in the National Assembly (proposed section 75); explanatory summary of. Bill published in Government Gazette No. 33695 of 27 October 2010). GN 1014 GG 33695 of 27-10-2010

creditors, who, notwithstanding the fact that their claim has not yet concretised, may nevertheless be potentially materially prejudiced by a merger?³⁸

2.58 The following dictionary definitions of “creditor” are offered: “a person who gives credit for money or goods; a person to whom a debt or money is owing”³⁹ and “a person or entity with a definite claim against another, especially a claim that is capable of adjustment and liquidation”.⁴⁰

2.59 The merger provisions override the common law requirements for a delegation of an obligation, thereby depriving a person with a claim against the original obligor, of the right to veto the transfer of an obligation when the obligor is substituted. Instead of this common law protection, the Companies Act confers the right on “all known creditors” to receive notice and invoke a court remedy.⁴¹ Johan Latzky⁴² pronounces that there thus appears to be no basis for a conclusion that the legislature intended to extend this right only to parties with claims sounding in money, while depriving those with claims for the performance of services or other obligations of their protection at common law, without also providing them with the statutory substitute. It is arguable therefore that all parties with contractual claims against a merging company should be treated as “creditors” entitled to be given notice in terms of section 116(1) of the Companies Act, even if their claims do not sound in money.⁴³ These could be parties to contracts creating reciprocal rights and obligations of various kinds, for example for the provision of services. There could be large numbers of them, which may make it impossible to give notice to them in conventional fashion. In these cases, consideration can be given to applying to the Tribunal or the High Court for an order of substituted service.⁴⁴

³⁸ Davids *et al* “A Microscopic Analysis of the New Merger and Amalgamation Provisions in the Companies Act 71 of 2008” in *Modern Company Law for a Competitive South African Economy* 337

³⁹ Oxford Advanced Learner’s Dictionary 2004

⁴⁰ BA Garner (ed) *Black’s Law Dictionary* 8 ed (2004)

⁴¹ MF Cassim “The Introduction of the Statutory Merger in South African Corporate Law: Majority Rule Offset by the Appraisal Right: Part I” (2008) 20 *SA Merc LJ* 1.

⁴² J Latsky “The fundamental transactions under the Companies Act: A report back from practice after the first few years *Stell LR* 2014(2) 374.

⁴³ See footnote 41.

⁴⁴ See footnote 41.

2.60 Although Davids *et al*⁴⁵ point out that taking all factors into account and even though there will undoubtedly be some ‘kinks’ to work out, it seems to us that the legislature has achieved its goal of creating a more efficient, flexible and potentially less expensive legislative M&A environment, whilst maintaining adequate protection for shareholders and creditors, they feel that the real test, however, will be in practice.

2.61 The SALRC recognizes that this defect might be clarified through regulation,⁴⁶ by any luck, or by the courts in time. The SALRC recommends that for the sake of clarity the word “creditor” in section 116 be defined in the Companies Act of 2008.

(p) Companies Amendment Act 3 of 2011

2.62 The purpose of the Companies Amendment Act 3 of 2011 is to amend the Companies Act of 2008, so as to effect certain legal-technical and grammatical amendments in order to ensure the proper application and administration of the principal Act subsequent to its commencement; to correct certain errors resulting in inconsistency and ambiguity in the principal Act; to establish a proper foundation for certain necessary regulations; to continue the mechanisms established under section 335 of the Companies Act of 1973, which allow for the transfer of registration of foreign companies to the jurisdiction of the Republic; to further provide for companies trading under insolvent circumstances; to extend the grounds for disqualification as a director; to provide for the terms of office of members of the Companies Tribunal. In short the Act corrected errors, legal and technical issues and grammatical mistakes in the Companies Act of 2008.

2.63 None of the changes are inconsistent with the provisions of section 9 of the Constitution. The Companies Amendment Act of 2011 will ensure legal certainty. It is therefore proposed that the amendment Act be retained in the statute book.

(q) Corporate Laws Amendment Act 39 of 2002

2.64 The Corporate Laws Amendment Act 39 of 2002 amended both the Companies Act of 1973 and the Close Corporation of 1984. The aspect of concern was the unsatisfactory compliance with the requirements of the Companies Act and the Close

⁴⁵ Davids *et al Modern Company Law for a Competitive South African Economy* 371.

⁴⁶ Opinions or Directives of the Intellectual Property Commission.

Corporations Act regarding disclosure of certain information. The world trend is to require annual returns to be lodged by all corporate entities to confirm or indicate changes in particulars in respect of the particular entity. The introduction of an annual return was greatly beneficial to the integrity of the South African registry's data base on registered companies and close corporations. The latter aspect is of utmost importance for the South African legal system, creditors and investors. The SALRC considers that the Corporate Laws Amendment Act 39 of 2002 continues to serve a purpose to ensure legal certainty. The SALRC therefore proposes that the Corporate Laws Amendment Act 39 of 2002 should be retained on the statute book.

(r) Corporate Laws Amendment Act 24 of 2006

2.65 Corporate Laws Amendment Act 24 of 2006 amended both the Companies Act of 1973 and the Close Corporations Act of 1984. These amendments effected a lot of changes to both Acts before the completion of the corporate law reform and are kept in the Companies Act of 2008. The amendments that need to be mentioned are the ones on the Close Corporation Act which included the following:

- Provision for electronic signatures on documents;
- To provide for electronic disclosure of information in respect of companies and close corporations;
- To provide for alternative and cost-effective ways of publishing notices of incorporation of new companies and close corporations, name changes, registration of defensive names, notices relating to deregistration and the dissolution of companies and close corporations;
- Act, and provide arrangements whereby close corporations can convert into companies.

2.66 This amendment Act is neither obsolete nor redundant and no provisions that infringe the equality provisions of the Constitution were identified. The SALRC proposes that it should be retained on the statute book.

(s) The Rationalisation of Corporate Laws Act 45 of 1996

2.67 The Rationalisation of Corporate Laws Act 25 of 1996 came into effect on 4 October 1996. Its object is to provide that certain corporate laws should apply throughout the

Republic; it also repealed certain other corporate laws and provides for the retrospective incorporation of certain putative close corporations.

2.68 This Act is neither obsolete nor redundant and no provisions that infringe the equality provisions of the Constitution were identified. The SALRC proposes that it should be retained on the statute book.

Theme 2: International trade

(a) Export Credit and Foreign Investments Re-insurance Act 78 of 1957

2.69 The purpose of the Export Credit and Foreign Investments Insurance Act 78 of 1957 is to promote trade with countries outside the Republic by providing for the re-insurance with the Government of the Republic of insurance contracts in connection with export transactions, investments and loans or similar facilities connected with such transactions and to provide for matters connected therewith.

2.70 This Act is neither obsolete nor redundant and no provisions that infringe the equality provisions of the Constitution were identified. The SALRC proposes that it should be retained on the statute book.

(b) Export Credit Re-insurance Amendment Act 66 of 1961

2.71 The purpose of Export Credit Re-insurance Amendment Act of 1961 is to amend the Export Credit Re-insurance Act of 1957. This Amendment Act has no independent surviving provisions and the SALRC proposes that it be repealed.

(c) Export Credit Re-insurance Amendment Act 88 of 1962

2.72 The purpose of this Act is to amend the Export Credit Re-insurance Act of 1957 by substituting the word "Union" with the word "Republic". This Amendment Act has no independent surviving provisions and the SALRC proposes that it be repealed.

(d) Export Credit Re-insurance Amendment Act 75 of 1971

2.73 The purpose of this Act is to amend the Export Credit Re-insurance Act of 1957 in regard to the application thereof; to provide for the amendment of contracts of insurance re-insured under that Act; to validate certain payments from the Export Credit Re-insurance Fund and to provide for incidental matters.

2.74 None of the changes are inconsistent with section 9 of Constitution. The Export Credit Re-insurance Amendment Act of 1971 will ensure legal certainty. It is therefore proposed that the amendment Act be retained on the statute book.

(e) Export Credit and Foreign Investments Re-insurance Amendment Act 27 of 1988

2.75 The purpose of this Act is to amend the Export Credit and Foreign Investments Re-Insurance Act of 1957, so as to substitute the definition of Minister; to extend the provision for the re-insurance with the Government of the Republic of insurance contracts relating to the furnishing of guarantees to banking or financial institutions in respect of certain loans negotiated in connection with certain trading transactions; and to substitute certain out-dated expressions; and to provide for incidental matters.

2.76 This amendment Act is neither obsolete nor redundant and no provisions that infringe the equality provisions of the Constitution were identified. The SALRC proposes that it should be retained on the statute book.

(f) Export Credit and Foreign Investments Re-insurance Amendment Act 9 of 2001

2.77 The purpose of this amendment Act is to amend the Export Credit and Foreign Investments Re-insurance Act of 1957, so as to define an expression and to amend or delete certain definitions; to empower the Minister to enter into an agreement with a registered insurer, to be known as the Export Credit Agency, with the object of insuring certain contracts on behalf of Government; to empower the Agency to establish a Reserve Fund; to enable the Agency to make investments; to repeal certain obsolete provisions; and to make provision for transitional arrangements; and to provide for matters connected therewith.

2.78 None of the changes are inconsistent with section 9 of Constitution. The Export Credit Re-insurance Amendment Act of 2001 will ensure legal certainty. It is therefore proposed that the amendment Act be retained.

(g) Export Credit and Foreign Investments Insurance Amendment Act 34 of 2002

2.79 The purpose of the amendment Act is to amend the Export Credit and Foreign Investments Insurance Act 78 of 1957 so as to define certain expressions and to delete certain definitions, to set out more clearly the percentage of a loss which is covered by an indemnity under a contract of insurance, to repeal an obsolete provision and to substitute certain obsolete and gender sensitive words and expressions and to provide for matters incidental thereto.

2.80 This amendment Act is neither obsolete nor redundant and no provisions that infringe the equality provisions of the Constitution were identified. The SALRC proposes that it should be retained on the statute book.

(h) Protection of Businesses Act 99 of 1978

2.81 The purpose of the Protection of Businesses Act 99 of 1978 is to restrict the enforcement in the Republic of certain foreign judgments, orders, directions, arbitration awards and letters of request, and also to prohibit the furnishing of information relating to businesses in compliance with foreign orders, directions or letters of request, and to provide for matters connected therewith.

2.82 The SALRC reviewed the Protection of Businesses Act as part of its investigation into Consolidated Legislation Pertaining to International Co-Operation in Civil Matters (Project 121). The SALRC's 2006 report on this investigation sets out the SALRC's recommendations for law reform regarding international co-operation in civil matters. The report deals in Chapter 5 with this Act. The scope of that review differed from the narrow scope of this review. The DOJCD is presently considering the report.

2.83 This Act is neither obsolete nor redundant and no provisions that infringe the equality provisions of the Constitution were identified. The SALRC proposes that it should be retained on the statute book.

(i) Protection of Businesses Amendment Act 114 of 1979

2.84 The purpose of the amendment Act is to amend the Protection of Businesses Act 114 of 1978, so as to extend the restriction on the enforcement of certain foreign judgments, orders, directions, arbitration awards and letters of request. The provisions of this Act are neither unconstitutional nor discriminatory and the SALRC does not recommend repeal of this Act.

(j) Protection of Businesses Amendment Act 71 of 1984

2.85 The purpose of this Act is to amend the Protection of Businesses Act 99 of 1978, so as to prohibit the recognition or enforcement in the Republic of judgments of courts outside the Republic which direct the payment of multiple or punitive damages; and to make provision for the recovery of certain amounts paid by way of multiple or punitive damages in compliance with judgments delivered in courts outside the Republic; and to provide for incidental matters. The provisions of this Act are neither unconstitutional nor discriminatory and the SALRC does not recommend repeal of this Act.

(k) Protection of Businesses Amendment Act 87 of 1987

2.86 The purpose of this Act is to amend the Protection of Businesses Act 99 of 1978, so as to extend the prohibition of the enforcement of foreign judgments, orders, directions, arbitration awards and letters of requests to interrogatories, commissions rogatoire and other requests; to extend the prohibition of the furnishing of any information relating to any business carried on in or outside the Republic; to extend the said prohibitions by including therein a reference to any act or transaction which is connected with the mining of any matter or material; to prohibit the recognition or enforcement of certain foreign judgments, arbitration awards and related orders and directions, relating to any liability arising out of the bodily injury or death of any person resulting directly or indirectly from the consumption or use of, or the exposure to, any natural resource of the Republic, unless the same liability would have arisen under the law of the Republic; to lay down what conduct on the part of a person against whom a foreign judgment was given shall for the purposes of the enforcement or recognition of that judgment in the Republic, not be regarded as a submission to the jurisdiction of the foreign court or as the conferment upon such court of jurisdiction in respect of such person; and to provide that a foreign judgment in relation to

certain acts or transactions shall in certain circumstances be a defence to an action brought in a court in the Republic; and to provide for matters connected therewith.

2.87 This Act is neither obsolete nor redundant and no provisions that infringe the equality provisions of the Constitution were identified. The SALRC proposes that it should be retained on the statute book.

(l) Convention on Agency in the International Sale of Goods Act 4 of 1986

2.88 The Convention on Agency in the International Sale of Goods Act of 1986 provides for the application of the Convention on Agency in the International Sale of Goods and for incidental matters connected therewith.

2.89 Section 2(2) and (3) are not in accordance with the wording of section 231 of the Constitution and should be amended to reflect the changes brought about by the Constitution. Section 231 of the Constitution provides that an international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, and if such an agreement is of a technical, administrative or executive nature, or an agreement which does not require either ratification, or accession, binds the Republic without the approval of the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.

2.90 Reference to the “different Houses of Parliament” in sections 3(3) and (4) of the Convention on Agency in the International Sale of Goods Act of 1986 is out-dated and should be replaced with “National Assembly and the National Council of Provinces”.

2.91 The SALRC proposes that the Convention on Agency in the International Sale of Goods Act 4 of 1986 should be retained on the statute book.

(m) Temporary Removal of Restrictions on Economic Activities Act 87 of 1986

2.92 The Temporary Removal of Restrictions on Economic Activities Act 87 of 1986 empowered the President to suspend temporarily laws or conditions there under with regard to certain undertakings, industries, trades or occupations, or to grant temporary exemptions, if circumstances exist so that the application of those laws or conditions unduly impede

economic progress or the creation of job opportunities and to provide for matters connected therewith.

2.93 Section 4(1) of this Act, provides for the duration of the Act and saving. Temporary Removal of Restrictions on Economic Activities Act 87 of 1986 ceased to have effect on 31 March 1994. Section 4(2) provides that notwithstanding the provisions of subsection (1) any proclamation issued under section 1 shall continue to be of force until it is amended, withdrawn or partially withdrawn by the State President by proclamation in the Gazette: Provided that any proclamation with regard to the suspension of or exemption from the provisions of an Act of Parliament, and of any other law relating to a matter mentioned in Part II of the Schedule, shall only be amended, withdrawn or partially withdrawn on the advice of a standing committee of Parliament to which the amendment or withdrawal in question has been referred. Proclamations issued under this Act remains valid unless withdrawn by the State President.

2.94 Since the Temporary Removal of Restrictions on Economic Activities Act 87 of 1986 has ceased to exist, it is recommended that it be removed from the statute book. Similarly the Temporary Removal of Restrictions on Economic Activities Amendment Act 72 of 1987 and the Temporary Removal of Restrictions on Economic Activities Amendment Act 67 of 1988 have, as a result of the principal Act ceasing to exist, become obsolete. The SALRC proposes that these amendment Acts be also removed from the statute book.

(n) International Trade Administration Act 71 of 2002

2.95 The object of this Act is to establish the International Trade Administration Commission (ITAC), to provide for the functions of the Commission and for the regulation of its procedures, to provide for the implementation of certain aspects of the Southern African Customs Union (SACU) Agreement in the Republic, to provide, within the framework of the SACU Agreement, for continued control of import and export of goods and amendment of customs duties; and to provide for matters connected therewith.

2.96 Various sections of the International Trade Administration Act are to come into effect only when the Southern African Customs Union Agreement becomes law in the Republic, which has yet to occur. Until then, item 2(1) of Schedule 2 (Transitional Provisions) requires ITAC to investigate applications made to it as if the Board on Tariffs and Trade Act is still in existence. The SALRC proposes that those sections that are still to come into effect should be put into operation.

2.97 The Republic signed and ratified the Treaty Establishing the World Trade Organisation and its Covered Agreements but these agreements have never been incorporated into South African law by enactment into legislation. Due to the importance of South Africa's international obligations in terms of these agreements which have to be complied with in our domestic legislation (and regulations) dealing with inter alia dumping, safeguards, etc. all aspects that are covered by the ITA Act, it is recommended that the abovementioned treaties be incorporated into South African domestic law.

Theme 3: Property

(i) Share Blocks

(a) *Share Blocks Control Act 59 of 1980*

2.98 The purpose of the Share Blocks Control Act 59 of 1980 is to control the operation of share block schemes; and to provide for matters connected therewith.

2.99 Section 1 refers to a banking institution registered under the Banks Act 23 of 1965 which has been repealed by section 95 of the Banks Act 94 of 1990. It also refers to a “building society” as a permanent building society registered under the Building Societies Act 24 of 1965 which has been repealed by section 95 of Mutual Banks Act 124 of 1993. It is recommended that the outdated references to repealed Acts be rectified.

2.100 Section 1 also defines the Minister to mean the Minister of Commerce and Consumer affairs. The provision should be amended to refer to the Minister as the Minister of Trade and Industry. “Sectional Titles Act” means the Sectional Titles Act 66 of 1971. The Sectional Titles Act 66 of 1971 has been repealed by section 59 of the Sectional Titles Act 95 of 1986. It is recommended that the outdated references in this paragraph be rectified.

2.101 Section 5 still refers to the Architects’ Act 35 of 1970 which has been repealed by section 43 of Architectural Profession Act 44 of 2000. An out-dated reference is also made to the Land Surveyors’ Registration Act 14 of 1950 which has been repealed by section 41 of the Professional and Technical Surveyors’ Act 40 of 1984. It is recommended that the out-dated references be rectified. Section 5A refers to the Insurance Act 27 of 1943 which was repealed by section 1 of the Taxation Laws Amendment Act 30 of 2002. It is recommended that the outdated reference in section 5A be rectified.

2.102 Section 8B of the Share Blocks Control Act of 1980 still refers to the Sectional Titles Act 66 of 1971. The Sectional Titles Act of 1971 has been repealed by section 59 of Act 95 of 1986. Reference is also made to the Banks Act 23 of 1965, the Mutual Building Societies Act 24 of 1965 and the Insurance Act 27 of 1943. The Banks Act of 1965 and the Mutual Building Societies Act of 1965 have been repealed by section 94 of the Banks Act 94 of 1990 and section 95 of the Mutual Banks Act 124 of 1993, respectively. The Insurance Act

27 of 1943 on the other hand was repealed by section 1 of the Taxation Laws Amendment Act 30 of 2002. It is recommended that the outdated reference to these Acts be rectified.

2.103 Sections 11B of the Share Blocks Control Act of 1980 still refers to the Rent Control Act 80 of 1976 which has been repealed by section 18 of the Rental Housing Act 50 of 1999. It is recommended that the outdated reference be rectified.

(b) *Share Blocks Control Amendment Act 33 of 1982*

2.104 The purpose of this Act is to amend the Share Blocks Control Act of 1980, so as to restrict the receipt of any consideration in respect of shares in any company which is to be formed for the purpose of operating a share block scheme; and to provide for incidental matters.

2.105 The provisions of this Act are neither unconstitutional nor discriminatory and the SALRC proposes that the Share Blocks Control Amendment Act of 1982 be retained on the statute book for purposes of legal certainty.

(c) *Share Blocks Control Amendment Act 15 of 1984*

2.106 To amend the Share Blocks Control Act of 1980, so as to authorize the Registrar of Companies to extend the period within which certain reports are to be transmitted to him. It should be emphasised that the long title of the Act refers to the Registrar of companies as him, whereas any person can hold that post.

2.107 The provisions of this Act are neither unconstitutional nor discriminatory and the SALRC proposes that the Share Blocks Control Amendment Act of 1984 be retained on the statute book for purposes of legal certainty.

(d) *Share Blocks Control Amendment Act 78 of 1985*

2.108 The purpose of this Act is to amend the provisions of the Share Blocks Control Act of 1980, so as to provide for the furnishing by share block companies of information regarding share block schemes to certain lessees; and to regulate the sale of shares conferring a right to or an interest in the use of immovable property occupied by certain lessees; and to provide for matters connected therewith.

2.109 The provisions of this Act are neither unconstitutional nor discriminatory and the SALRC proposes that the Share Blocks Control Amendment Act of 1985 be retained on the statute book for purposes of legal certainty.

(e) *Share Blocks Control Amendment Act 26 of 1988*

2.110 The purpose of this Act is to amend the Share Blocks Control Act of 1980, so as to provide that the consent of the Minister of Agriculture shall be obtained for the operation of share block schemes on agricultural land; to regulate the duties of a share block developer in connection with the opening of a sectional title register; to further regulate the sale of shares conferring a right to or an interest in the use of immovable property occupied by certain lessees; and to further regulate the liability for damages in case of a failure to insure the immovable property of a share block company; and to provide for matters connected therewith.

2.111 The provisions of this Act are neither unconstitutional nor discriminatory and the SALRC proposes that the Share Blocks Control Amendment Act of 1988 be retained on the statute book for purposes of legal certainty.

(ii) *Timeshares*

(f) *Property Time Sharing Control Act 75 of 1983*

2.112 The purpose the Property Time-sharing Control Act 75 of 1983 is to regulate the alienation of time-sharing interests pursuant to property time-schemes; and to provide for matters connected therewith.

2.113 In terms of section 1 of the Property Time Sharing Control Act of 1983 “architect” means an architect as defined in section 1 of the Architects Act 35 of 1970. The Architects Act 35 of 1970 has been repealed by section 43 of the Architectural Profession Act 44 of 2000. . It is recommended that the outdated reference be rectified.

2.114 The term ‘Insolvent’ is defined in Act 75 of 1983 as any person whose estate is dealt with in terms of the Agricultural Credit Act of 1966. The Agricultural Credit Act of 1966 has been repealed by the Agricultural Debt Management Act 45 of 2001 which was in turn repealed in its entirety by section 1 of the Agricultural Debt Management Repeal Act 15 of 2008. It is recommended that the outdated reference be rectified.

2.115 Section 1 of the Property Time Sharing Control Act 75 of 1983 defines a Minister as the "Minister of Commerce and Industries". Such definition must be amended to refer to the Minister as the "Minister of Trade and Industry". In the definition of "property time-sharing scheme" reference is made to section 1 of the Sectional Titles Act 66 of 1971 which has been repealed by section 59 of Sectional Titles Act 95 of 1986. It is recommended that the outdated reference be rectified.

2.116 Section 4(f) refers to Participation Bonds Act 55 of 1981 which has been repealed by section 117 of the Collective Investment Schemes Control Act 45 of 2002. It is recommended that the outdated reference be rectified.

2.117 Section 7(3)(b) refers to Banks Act 23 of 1965 which has been repealed by section 95 of the Banks Act 94 of 1990. Reference is made to a building society registered otherwise than provisionally under the Building Societies Act 24 of 1965 which has been repealed by section 95 of Mutual Banks Act 124 of 1993. Mention is also made of a registered insurer as defined in section 1 of the Insurance Act 27 1943 which has also been repealed by section 1 of the Taxation Laws Amendment Act 30 of 2002. It is recommended that the outdated reference be corrected.

2.118 The provisions of this Act are neither unconstitutional nor discriminatory and the SALRC proposes that the Property Time-sharing Control Act 75 of 1983 be retained on the statute book for purposes of legal certainty.

(iii) Retired Housing

(g) Housing Development Schemes for Retired Persons Act 65 of 1988

2.119 The purpose of this Act is to regulate the alienation of certain interests in housing development schemes for retired persons; and to provide for matters connected therewith.

2.120 No provisions that infringe section 9 of the Constitution were identified in this Act. The SALRC therefore proposes that the Housing Development Scheme for Retired Persons Act 65 of 1988 be retained on the statute book.

(iv) Alienation

(h) *Alienation of Land Act 68 of 1981*

2.121 The purpose of the Alienation of Land Act 68 of 1981 is to regulate the alienation of land in certain circumstances and to provide for matters connected therewith.

2.122 In section 1 reference is still made to the Agricultural Credit Act 28 of 1966. The Agricultural Management Act of 1966 was repealed by section 10 of the Agricultural Debt Management Act 45 of 2001 which was subsequently repealed in its entirety by section 1 of the Agricultural Debt Management Repeal Act 15 of 2008. Also in section 1 mention is made of the Rural Coloured Areas Act 24 of 1963 which was repealed by section 56 of Abolition of Racially Based Land Measures Act 108 of 1991. Reference is also made to the Development Trust and Land Act 18 of 1936 which was repealed by section 11 of the Abolition of Racially Based Land Measures Act 108 of 1991. The outdated Republic of South Africa Constitution Act 32 of 1961 still appears under section 1 of Act 68 of 1981. The Republic of South Africa Act of 1961 has been repealed by Schedule 7 of Act 200 of 1993 which was subsequently repealed by section 242 of the Constitution. The Sectional Titles Act 66 of 1971 referred to in the provisions of section 1 of the Alienation of Land Act of 1981 was repealed by section 59 of the Sectional Titles Act 95 of 1986. It is recommended that reference to the outdated Acts in section 1 of the Alienation of Land Act 68 of 1981 be rectified.

2.123 The Housing Act 4 of 1966 referred to in section 4 of the Alienation of Land Act of 1981 was repealed by section 20 of the Housing Act 107 of 1997. The SALRC proposes that section 4 of the Alienation of Land Act of 1981 be amended so that it makes reference to the the Housing Act 107 of 1997.

2.124 The Building Societies Act 24 of 1965 referred to in section 9 the Alienation of Land Act of 1981 was repealed by section 95 of the Mutual Banks Act 124 of 1993. The SALRC proposes that section 9 of the Alienation of Land Act of 1981 be amended so that it makes reference to the Mutual Banks Act 124 of 1993.

2.125 No provisions that infringe section 9 of the Constitution were identified in this Act. The SALRC therefore proposes that the Alienation of Land Act 68 of 1981 be retained on the statute book.

Theme 4: Intellectual Property

(a) Merchandise Marks Act 17 of 1941

2.126 The Merchandise Marks Act makes provision for the marketing of merchandise and coverings in or with which merchandise is sold, and both prohibits and protects the use of certain trade descriptions, trademarks, words and emblems in connection with business. It also provides for the use of indications of origin to be added to imported goods and governs the powers of inspectors, permitting them to enter and seize articles bearing false trade descriptions and /or altered trademarks.

2.127 Whereas sections 3 and 15 of the Merchandise Marks Act of 17 of 1941 refer to the Minister as 'he' or 'she', the following sections refer only to the Minister etc. as 'he': section 10(1), section 11(1), section 11 (2), section 12(3), (4), (5), section 13, section 15(2) and section 20(2). The SALRC recommends that the gender in these sections be corrected.

2.128 In the context of the current review the provisions of the Act, other than for those sections specified above, are neither unconstitutional nor discriminatory and comply with the Constitution. The Act ought therefore not to be repealed.

(b) Merchandise Marks Amendment 3 of 1946

2.129 The purpose of the Merchandise Marks Amendment Act of 1946 is to amend the section 10 of Merchandise Marks Act 17 of 1941. Section 10n has been amended by section 2 of the Merchandise Marks Amendment Act Act 26 of 1951 and repealed by section 121 (2) (a) the Consumer Protection Act 68 of 2008. The Merchandise Marks Amendment Act of 1946 has no surviving independent provisions and the SALRC recommends that it be repealed.

(c) Merchandise Marks Amendment Act 26 of 1951

2.130 The Merchandise Marks Amendment Act of 1951 also amends the repealed section 10 of the Merchandise Marks Act of 1941, which was repealed repealed by section 121 (2)(a) the Consumer Protection Act 68 of 2008. The Merchandise Marks Amendment Act of 1951 has no surviving independent provisions and the SALRC recommends that it be repealed.

(d) Merchandise Marks Amendment Act 47 of 1954

2.131 The purpose of the Merchandise Marks Amendment Act of 1954 is to amend the Merchandise Marks Act of 1941. This Act has no surviving independent provisions and the SALRC recommends that it be repealed.

(e) Merchandise Marks Amendment Act 55 of 1967

2.132 The purpose of the Merchandise Marks Amendment Act of 1967 to amend the provisions of the Merchandise Marks Act, 1941, relating to the unauthorized use of certain emblems, the prohibition relating to the sale of bottles marked with the owner's name and the application of the said Act. No provisions, which infringe section 9 of the Constitution, have been identified in this Act. It is proposed that for legal certainty the Amendment Act be retained in the statute book.

(f) Merchandise Marks Amendment Act 54 of 1987

2.133 The purpose of the Merchandise Marks Amendment Act of 1987 to amend the Merchandise Marks Act, 1941, so as to substitute the definition of "Minister"; to abolish certain acts which constitute offences; and to substitute or delete certain obsolete references therein; and to make provision for matters connected therewith. It is proposed that for legal certainty the Amendment Act be retained.

(g) Merchandise Marks Amendment Act 50 of 2001

2.134 The purpose of the Merchandise Marks Amendment Act of 1987 is to amend the Merchandise Marks Act, 1941, so as to define an expression and to amend certain definitions; to make further provision regarding the application of trade descriptions to goods and the alteration of trademarks; to clarify the scope of the Act in its application to trademarks; and to prohibit the unauthorized use of the national flags, armorial bearings and other official signs of Convention countries; and to provide for matters connected therewith. It is proposed that for legal certainty the Amendment Act be retained.

(h) Merchandise Marks Amendment Act 61 of 2002

2.135 The purpose of the Merchandise Marks Amendment Act of 1987 is to amend the Merchandise Marks Act, 1941, so as to define “event” and “protected event”; to prohibit the abuse of a trade mark in relation to an event; and to provide for matters connected therewith. It is proposed that for legal certainty the Amendment Act be retained.

(i) Unauthorised Use of Emblems Act 37 of 1961

2.136 This Act provides for the continued operation of certain laws relating to the use of certain emblems and representations and aims at extending the scope of such laws.

2.137 The Act is founded on the Republic of South Africa Constitution Act of 1961, which Act has been repealed by the Constitution of the Republic of South Africa, 1993 which was subsequently repealed by the Constitution. The SALRC recommends that the Unauthorised Use of Emblems Act of 1961 be repealed as it is obsolete.

(j) Performers Protection Act 11 of 1967

2.138 This Act seeks to provide protection to the performers of literary and artistic works. It sets out the nature and term of the protection, provides for exceptions from the protection afforded, and specifies offences and the penalties to be applied.

2.139 Although the Performers Protection Act 11 of 1967 is gender sensitive in section 5(2), the following sections refer only to ‘he’: sections 8(2)(e), 9(1)(c), 12(2)(a) and 13. It is recommended that these sections should be amended to be gender-inclusive.

2.140 Section 6 of the Performers Act 11 of 1967 refers to the Copyright Act 63 of 1965 which has been repealed by the Copyright Act 98 of 1978. It is recommended that the outdated reference be rectified.

2.141 All the Intellectual Property Acts were rationalised in 1996 in terms of the Intellectual Property Laws Rationalisation Act 107 of 1996 except the Performers Act 11 of 1967. The implication of this is that the original Act as inherited by the former Republics of

Transkei,⁴⁷ Bophuthatswana,⁴⁸ Venda,⁴⁹ and Ciskei⁵⁰ applies in these former territories without the amendment that was done in 2002.⁵¹ The SALRC recommends that this Act be extended throughout the Republic and the inherited Acts be repealed in these former republics.

(k) Performers' Protection Amendment Act 8 of 2002

2.142 The purpose of this Act is to amend the Performers' Protection Act, 1967, so as to define an expression and to amend a definition; and to make new provision for restrictions on the use of performances; and to provide for matters connected therewith. None of provisions, which infringe section 9 of the Constitution, have been identified in this Act. The SALRC proposes that the Act be retained in the statute book.

(l) Registration of Copyright in Cinematograph Films Act 62 of 1977

2.143 This Act provides for the registration of copyright in cinematograph films and the procedural and administrative matters connected therewith.

2.144 The Registration of Copyright in Cinematograph Films Act 62 of 1977 is gender insensitive throughout and it is recommended that this be corrected. The Minister is defined in the Act as the Minister of Economic Affairs. The SALRC recommends that this be amended to read the Minister of Trade and Industry.

2.145 The High Court and its divisions are still referred to as the Supreme Court in this Act. This occurs in sections 12(4), 25(1), 25(2), 28, 33(2), 33(4)(a), 33(4)(b) and 33(5). The SALR recommends that these sections should accordingly be amended.

⁴⁷ Section 60 of the Republic of Transkei Constitution Act 19 of 1976

⁴⁸ Section 93(1) of the Republic of Bophuthatswana Constitution Act 18 Of 1977

⁴⁹ Republic of Venda Constitution Act 9 of 1979

⁵⁰ Republic of Ciskei Constitution Act 20 of 1982

⁵¹ Schedule 6 item 2 of the Constitution.

2.146 Sections 19 and 21 of the Act refer to the Copyright Act 63 of 1965 which was repealed by the Copyright Act 98 of 1978. These sections should be amended to refer to the latter Act.

2.147 The situation discussed under paragraph 2.141 at page 46 applies to the Registration of Copyright in Cinematograph Films Act 62 of 1977. The Act must also be rationalised.

2.148 In the context of the current review, the provisions of the Act, other than for those sections specified above, are neither unconstitutional nor discriminatory. The Act ought therefore not to be repealed.

(m) Patents Act 57 of 1978

2.149 This Act provides for the registration and granting of patents for inventions and for matters connected therewith.

2.150 The Minister is defined in the Patents Act 57 of 1978 as the Minister of Economic Affairs and the SALRC recommends that this be amended to read as the Minister of Trade and Industry.

2.151 Whereas sections such as section 24(9), 26(a),30(3)(b), 43(4)(d), 45(1),56(4)(a) etc refer to the Minister/Registrar/applicant as 'he' or 'she', the following sections refer only to the masculine and the SALRC recommends that it should accordingly be amended: sections 12(2), 15(1)(b), 16(1), 17(1) and (2), 18(2) and (3), 19(1), 20(1) and (3), 21(2), 22(1) and (2), 23(1), (2), (3) and (5), 24(1) and (4), 27(1), 28(1), 29(1),(3), and (4), 30(4) and (6), 31(4), 36(1) and (2), 37(1), 38(2), 39(1), 41, 42(3), 45(2), 47(2), 48(1) and (3), 49(2),(3) and (7), 50(3),(4), (5) and (6), 51(1) and (10), 53(2), (3), (4) and (5), 54(2) and (4), 55, 56(2), (4) and (13), 59(2), 60(1), 61(1) and (3), 63, 64(1), 65(5), 66(1), (2), (4) and (5), 67(3), 68, 70(1) and (2), 74(2), 75, 77, 79(1) and (6), 80(1) and (3), 84,85(2), (3) and (4), 89 and 90(1) and (2).

2.152 The High Court and its divisions are still referred to as the Supreme Court. This occurs in the definition of 'court' and in sections 8, 9, 15(2), 17(1) and (3), 19(1), (2) and (3) and 76(2). The SALRC recommends that these sections should accordingly be amended to refer to the High Court.

2.153 In the context of the current review the provisions of the Act, other than for those sections specified above and its Amendment Acts, the Patents Amendment Act 14 of 1979, Patents Amendment Act 67 of 1983, Patents Amendment Act 44 of 1986, Patents Amendment Act 2001, and Patents Amendment Act 58 of 2002, were found to be neither unconstitutional nor discriminatory. The Acts ought therefore not to be repealed.

(n) Copyright Act 98 of 1978

2.154 The Copyright Act 98 of 1978 seeks to regulate copyright, specifying the works eligible for copyright protection. It sets out the nature of copyright and provides protection to the authors of literary, musical and artistic works and to cinematograph films, sound recording, broadcasts, programme-carrying signals, published editions and computer programmes. It also details the nature and term of the protection afforded to each category of works, provides for exceptions from the protection afforded, and specifies offences and the penalties to be applied.

2.155 Certain anomalies appear in the Act: Paragraphs (a) and (b) of the definition of 'author' should be amended to refer to natural persons because the term of the copyright in the works in question is determined by the lifetime of the author. A juristic person cannot have lifetime in this context. Section 9A(1) should be made subject to section 9 as section 9 creates a right of prohibition, whereas section 9A(1) creates a compulsory licence. The two sections are irreconcilable in the current version.

2.156 The High Court and its divisions are still referred to as the Supreme Court. This occurs in sections 29(1)(c), 36 and 40. The SALRC recommends that these sections should accordingly be amended to refer to the High Court.

2.157 The Act is generally gender sensitive except in sections 14, 19, 20, 21, 22, 23, 26, 27, 28, 31, 32, 33 and 45. The SALRC recommends that these provisions be amended to include the female gender.

2.158 In the context of the current review the provisions of the Act, other than for those sections specified above, and its Amendment Acts, namely the Copyright Amendment Act 56 of 1980, Copyright Amendment Act 66 of 1983, Copyright Amendment Act 52 of 1984, Copyright Amendment Act 39 of 1986, Copyright Amendment Act 13 of 1988, Copyright Amendment Act 61 of 1989, Copyright Amendment Act 125 of 1992, Copyright Amendment

Act 9 of 2002 do not contain redundant, obsolete or unconstitutional provisions and should not be repealed.

(o) Trade Marks Act 194 of 1993

2.159 The Trade Marks Act 194 of 1993 provides for the registration of trademarks, certification trademarks, well known marks and collective trademarks. It specifies what is registerable and what is not, and provides protection to the proprietors of registered trademarks and permitted users. It details the term of the protection afforded, sets out what is permitted use and the offences and the penalties to be applied in respect of unauthorised use of trademarks. It also provides for matters incidental to the registration of trade marks.

2.160 There has been no attempt to make the Trade Marks Act 194 of 1993 gender sensitive. The following sections and regulations refer only to the masculine gender: the definition of 'proprietor', sections 6(2) and (3), 8, 10(4), 12 14(1), 15, 16(2, (3), (4) and (5), 18, 20(2), 23(1) and (2), 24(1) and (3), 25(1), 26(4), 27(1), 29(1), 30(5), 34(2) and (5), 36(1) and (2), 37(3), 38(4) and (5), 39(5), 40(1), 44, 45(1) and (4), 46(1), 47, 50(1), 52(2), 55, 56, 59(1) and (2), 63(3) and (5), 68; regulations 1(4), 6(5), (6) and (7), 8(1) and (2), 9(1), (2) and (3), 10(2), 11(2), 13(4), 15(3) and (5), 19(2) and (3), 26, 27, 28, 30(1), 31-35, 37, 38(1), 43(1), 44(2) and (3), 45, 47, 51, 52(2), 56(3) and (4), 57(4) 58(1). It is recommended that they be amended to be gender-inclusive.

2.161 Section 6(3) of the Act refers to The Judges Remuneration and Conditions of Employment Act of 88 of 1989. This Act was repealed and replaced by the Judges Remuneration and Conditions of Employment Act 47 of 2001. The section should be amended to refer to Judges Remuneration and Conditions of Employment Act 47 of 2001.

2.162 Section 53(6) should be amended to refer to the Supreme Court of Appeal, not the Appellate Division.

(p) Designs Act 195 of 1993

2.163 The Designs Act 195 of 1993 provides for the registration of designs and for matters connected therewith.

2.164 Despite being gender correct in sections 20(3), 26(4) and 44(1), the following sections of the Designs Act 195 of 1993 refer only to the masculine gender and should be

amended: the definition of 'proprietor', sections 6(2), 10, 11(1), 12(1), 13, 16, 17, 20(1), 321(2), (7), (11), (12), 23(2), 25(2), (3), (4), (5) and (7), 26(3), 27(1), 28, 29(2), 30(1), 31(1), 35(2) and (6), 36(1), 37(1) and (2), 41(2), 44(3), 45(1), 46(1) and (3), 49(2), (3) and (4), 53 and 54. The same applied to regulations 1A(4), 5(4), 6(3), 12(1) and (2), 20(1) and (2), 22(1) and (2), 24, 26(1) and (2), 27, 28, 29, 32(1), 35(2) and (4), 36(1) and (2), 441(1), (2) and (5), 46(3) and (4).

2.165 Section 54(a) refers to the Minister of State Expenditure. This should be replaced with the Minister of Finance.

2.166 The High Court and its divisions are referred to as the Supreme Court in the definition of 'court', in section 11(2) and the SALRC recommends that it should be corrected.

(q) Intellectual Property Laws Rationalisation Act 107 of 1996

2.167 The Intellectual Property Laws Rationalisation Act 107 of 1996 provided for the integration of intellectual property rights subsisting in Bophuthatswana, Transkei, Venda and Ciskei into the national system, to extend the South African intellectual property rights legislation throughout the Republic; to repeal certain other intellectual property laws; and to provide for matters connected therewith.

2.168 The Intellectual Property Laws Rationalisation of 1996 is not obsolete. The extension of the Intellectual Property Laws to the whole of the Republic of South Africa still serves a purpose. Were it not for the Intellectual Property Laws Rationalisation Act of 1996, separate rules regarding Intellectual Property would still have applied in the Transkei, Venda, Bophuthatswana and Ciskei. Prior to the re-incorporation of the former TBVC states (Transkei, Bophuthatswana, Venda and Ciskei) into the national territory of the Republic of South Africa, these former TVBC states enacted their own laws on Intellectual Property. On 27 April 1994 the TBVC states ceased to exist.⁵² However, the laws that were in force in these states continued in force in the areas of the former states until repealed or amended.⁵³ The SALRC reviewed this Act and found none of its provisions to be unconstitutional, redundant and obsolete. The SALRC recommends that the Act be retained to ensure that its objectives are achieved.

⁵² The founding statutes of these states were repealed by s 242 and Schedule 7 of the Constitution of the Republic of South Africa 200 of 1993.

⁵³ Section 229 of the Constitution of the Republic of South Africa 200 of 1993.

(r) Intellectual Property Laws Amendment Act 38 of 1997

2.169 To amend the Merchandise Marks Act, 1941, so as to substitute, to delete or to amend certain definitions; to define certain expressions; to repeal the provisions relating to the unlawful trading in counterfeit goods in so far as these provisions are to be superseded by other envisaged legislation regarding the counterfeiting of goods; to adjust the powers of inspectors to enter and search premises and attach goods; to substitute or delete certain obsolete provisions and references; to delete a provision imposing a burden of proof on an accused; to provide for a presumption with respect to the offence of offering for sale or hire goods to which any false trade description is applied; and to adjust the provisions regarding penalties for offences; to amend the Performers' Protection Act, 1967, so as to delete or to amend certain definitions; to define certain expressions; to protect performances in countries which are members of the World Trade Organization; to lengthen the term of protection for performances to fifty years; to provide for all broadcasters; to adjust the provisions regarding penalties for offences; and to extend the application of the Act to performances which took place before its commencement to correspond with the Agreement on Trade Related Aspects of Intellectual Property Rights (the TRIPS Agreement); to amend the Patents Act, 1978, so as to define certain expressions; to amend or to substitute certain definitions; to clarify the provisions with respect to the payment of renewal fees, the priority dates of matter as opposed to patent claims, the principle of privilege regarding communications by or to patent agents and the assessment of damages; to bring the Act in line with the Trade Marks Act, 1993, the Designs Act, 1993, and the TRIPS Agreement; to provide for the implementation of the Patent Cooperation Treaty in the event of South Africa's accession thereto; to effect a correction in the Afrikaans text; to repeal or amend certain obsolete provisions and references; and to amend the long title; to amend the Copyright Act, 1978, so as to substitute, to amend or to delete certain definitions; to elaborate the requirement that a work must exist in a material form to qualify for copyright; to adjust the term of copyright in a cinematograph film and to extend the scope of copyright in computer programs in view of the TRIPS Agreement; to provide for all broadcasters; to amend the provisions relating to damages and other compensation for the infringement of copyright in order that it corresponds with the Trade Marks Act, 1993, and the Designs Act, 1993; and to substitute a certain word in the Afrikaans text; to amend the Trade Marks Act, 1993, so as to amend the provisions regarding marks that may not be registered as trademarks and those regarding the protection of well-known trademarks to ensure compliance with the TRIPS Agreement and Article 6*ter* of the Paris Convention; to effect a correction in the English text; to further regulate the relief for the infringement of registered trademarks; to provide that the registrar

must keep a list of emblems of convention countries and international organisations; and to replace an incorrect reference; to amend the Designs Act, 1993, so as to define an expression; to delete a definition; to adjust the requirements for the registration of a design; to amend the provisions regarding the notification of registration and the certificate of registration; to adjust the provisions regarding compulsory licences in respect of certain registered designs and to further regulate the effect of the registration of a design and the amendment of an application for registration, and of a registration of a design, to ensure compliance with the TRIPS Agreement; and to correct or to clarify certain provisions; and to provide for matters connected therewith.

2.170 None of the changes are inconsistent with section 9 of the Constitution. The Intellectual Property Laws Amendment Act 38 of 1997 will ensure legal certainty. It is therefore proposed that the amendment Act be retained.

(s) Counterfeit Goods Act 37 of 1997

2.171 This Act introduces measures aimed against the trade in counterfeit goods so as to further protect owners of trademarks, copyright and certain marks under the Merchandise Marks Act 17 of 1941, against the unlawful application to goods, of the subject matter of their respective intellectual property rights and against the release of such goods into channels of commerce, prohibiting certain acts, including the possession of counterfeit goods in certain circumstances, creating offences in that regard and prescribing penalties in relation thereto. It confers powers on inspectors and certain members of the South African police force to enter premises, search, seize and remove counterfeit goods or suspected counterfeit goods and provides the Commissioner for Customs and Excise with similar rights in respect of counterfeit goods that are imported into or enter the Republic.

2.172 Section 2(f) should be amended to read as follows: “be imported into or exported from, or transited through for import or export, the Republic except.....” The present wording is capable of the interpretation that goods in transit are not covered when it was clearly the intention of the legislature that they should be (see section 113A (1)(b)(iii) of the Customs and Excise Act of 1964).

2.173 None of the provisions are inconsistent with section 9 of the Constitution. The SALRC proposes that the Act be retained on the statute book.

(t) Counterfeit Goods Amendment Act 25 of 2001

2.174 The purpose of the Counterfeit Goods Amendment Act of 2001 is to amend the Counterfeit Goods Act of 1997, so as to amend the definition of “intellectual property right”; to make further provision regarding an inspector’s powers in relation to counterfeit goods; and to effect a technical correction; and to provide for matters connected therewith. None of the changes are inconsistent with the Constitution. The SALRC proposes that the Amendment Act be retained on the statute book.

(u) Intellectual Property Laws Amendment Act 28 of 2013

2.175 The Intellectual Property Laws Amendment Act of 2013 was approved by the President and published in the Government Gazette on 10 December 2013. The Act is enacted to ensure effective protection mechanisms for indigenous knowledge (IK) as a form of intellectual property in South Africa. To this end, it makes amendments to the Performers' Protection Act 1967, the Copyright Act of 1978, the Trade Marks Act of 1993 and the Designs Act of 1993. The Act is not yet in effect, and will only come into effect on a date to be fixed by the President.

2.176 None of the changes are inconsistent with section 9 of the Constitution. The Intellectual Property Laws Amendment Act 28 of 2013 will ensure legal certainty when it comes into operation. It is therefore proposed that the Amendment Act be retained on the statute book.

Theme 5: Credit Agreements and Usury

(a) National Credit Act 34 of 2005

2.177 The purpose of the National Credit Act 34 of 2005 (NCA) is to promote a fair and non-discriminatory marketplace for access to consumer credit and for that purpose to provide for the general regulation of consumer credit and improved standards of consumer information; to promote black economic empowerment and ownership within the consumer credit industry; to prohibit certain unfair credit and credit-marketing practices; to promote responsible credit granting and use and for that purpose to prohibit reckless credit granting; to provide for debt re-organisation in cases of over-indebtedness; to regulate credit information; to provide for registration of credit bureau, credit providers and debt counseling services; to establish national norms and standards relating to consumer credit; to promote a consistent enforcement framework relating to consumer credit; to establish the National Credit Regulator and the National Consumer Tribunal; to repeal the Usury Act of 1968, and the Credit Agreements Act of 1980; and to provide for related incidental matters.

2.178 During the course of the investigation the National Credit Amendment Act 19 of 2014 was passed and came into operation on 13 March 2015. The National Credit Amendment Act of 2014 solved a problem that was raised in the consultation paper as revealed in the paragraphs that follow.

2.179 Section 89 of the NCA deals with unlawful credit agreements. The relevant part of the section that has a problem is subsection (5)(c). Although the problem in section 89(5)(c) is beyond the present mandate of the SALRC, it is crucial that it be brought before the DTI. Section 89(5)(c) provided as follows before the Amendment in 2014:

(5) If a credit agreement is unlawful in terms of this section, despite any provision of common law, any other legislation or any provision of an agreement to the contrary, a court must order that—

(c) all the purported rights of the credit provider under that credit agreement to recover any money paid or goods delivered to, or on behalf of, the consumer in terms of that agreement are either

(i) cancelled, unless the court concludes that doing so in the circumstances would unjustly enrich the consumer; or

(ii) forfeit to the State, if the court concludes that cancelling those rights in the circumstances would unjustly enrich the consumer.

2.180 The issue with section 89(5)(c) of the NCA was whether it was consistent with the right not to be arbitrarily deprived of property in section 25(1) of the Constitution. This question was raised for the first time in *Opperman v Boonzaaier and Others* (WCC)⁵⁴ (unreported case no 24887/2010, 17-4-2012) and confirmed in the Constitutional Court in the *National Credit Regulator v Opperman*.⁵⁵

2.181 The dispute in the *Opperman* case was whether section 89(5)(c) of the NCA was consistent with the right not to be arbitrarily deprived of property in section 25(1) of the Constitution. The Constitutional Court in *National Credit Regulator v Opperman* confirmed the Cape High Court's decision in *Opperman v Boonzaaier* to pronounce section 89(5)(c) of the NCA unconstitutional.

2.182 The applicant, Mr Opperman lent a sum of money, which was above the threshold prescribed in terms of section 42(1) of the NCA, to a friend, Mr Boonzaaier the first respondent, Mr Opperman was not registered as a credit provider at the time of providing the loan as required by the NCA. When the dates for the repayment of the loans had passed, Mr Boonzaaier informed his friend that he was unable to meet his obligations. Mr Opperman applied for the sequestration of Mr Boonzaaier's estate in the high court. This application was unopposed and a provisional order was granted. On the return date the court, of its own volition, raised concerns about the provisions of the NCA, and refused to grant a final order. It postponed the sequestration proceedings and allowed parties to prepare argument to address its concerns. After various postponements and an amendment to the notice of motion to include a constitutional challenge against section 89(5)(c), the matter came before Binns-Ward J in the Cape High Court. The Minister of Finance, the Minister of Trade and Industry and the National Credit Regulator were joined as respondents. The High Court found that there was insufficient reason to deprive the first respondent of his right to restitution of the money lent. Thus section 89(5)(c) provides for an arbitrary deprivation of property in breach of section 25(1) of the Constitution. It further held that the provision could not be saved under section 36(1) of the Constitution as a reasonable and justifiable limitation of the right not to be arbitrarily deprived of property. The high court held that section 89(5)(c) was inconsistent with section 25(1) and thus constitutionally invalid.

⁵⁴ *Opperman v Boonzaaier and Others* (WCC) (unreported case no 24887/2010, 17-4-2012)

⁵⁵ *National Credit Regulator v Opperman* 2013 2 SA 1 (CC).

2.183 In the Constitutional Court the NCR contended that the section could be interpreted in a way that does not allow for arbitrary deprivation. The Minister of Trade and Industry, on the other hand, acknowledged that the section effected a deprivation of property then again that it was not arbitrary because there were sufficient reasons for it. As an alternative, the Minister was satisfied that, if the section was unconstitutional, the declaration of invalidity ought to be suspended and that an interim reading-in should apply. The respondent contended in favour of the High Court's interpretation, namely that the proper construct of the section indeed resulted in arbitrary deprivation.⁵⁶

2.184 The Constitutional Court declared section 89(5)(c) of the NCA inconsistent with section 25(1) of the Constitution and thus invalid. The Constitutional Court held that it would be preferable for Parliament to address the content of the provision comprehensively, "rather than for a court to venture into patch-work legislating". Hence, the Court decided to declare the provision invalid without any reading in.

2.185 During the course of the investigation the National Credit Amendment Act of 2014 was passed and section 27 thereof amended section 89(5) to read as follows:

Amendment of section 89 of Act 34 of 2005

27. Section 89 of the principal Act is hereby amended—

(a) by the substitution in subsection (5) for the words preceding paragraph (a) of the following words:

"If a credit agreement is unlawful in terms of this section, despite **[any provision of common law,]** any other legislation or any provision of an agreement to the contrary, a court must make a just and equitable order including but not limited to an order that—"; and

(b) by the deletion in subsection (5) of paragraphs (b) and (c).

2.186 The amendment above deletes section 89(5)(c) which was declared unconstitutional by the Constitutional Court. It also deletes section 89(5)(b)⁵⁷ which places an obligation on the credit provider to refund to the consumer any money paid by the consumer under the credit agreement that is declared unlawful. In the consultation paper the SALRC pointed out that section 89(5)(b) was also unconstitutional on the basis that it

⁵⁶ *Opperman* –Cape High Court para 2.

⁵⁷ Although it was only section 89(5)(c) that was declared unconstitutional.

permitted an arbitrary deprivation of property in that it made it obligatory for courts to order the refund without leaving room for judicial discretion. On 5 June 2015 the Constitutional Court confirmed that the provision of the section 89(5)(b) of NCA is unconstitutional.⁵⁸

2.187 In this matter the Constitutional Court (CC) was called to confirm an order by the Western Cape the High Court to the effect that section 89(5)(b) of the NCA was unconstitutional on the basis that it permitted an arbitrary deprivation of property in contravention of section 25 of the Constitution. The SALRC says 'was' because subsequent to the High Court's decision, the National Credit Amendment Act 19 of 2014 came into operation on 13 March 2015 deleting section 89(5)(b) and curing the constitutional defect complained of. It was held that the R 33 000 000.00 does constitute property in terms of section 25 of the Constitution and that it would amount to arbitrary deprivation if Chevron is deprived thereof in a procedurally unfair manner. It was held that section 89(5)(b), which indicated that a court must refund to the consumer any money paid under an agreement where the provider was not registered, meant that a court could not take important circumstances into account in making an order. The court could for example not consider the conduct of the parties, their financial positions, the possible apportionment of blameworthiness etc.

2.188 It was noted that the prevention of, and punishment for, unlawful credit agreements serve an important purpose: to protect consumers. To remedy the defect, the court ordered, that retrospectively, from 5 June 2014 to 13 March 2015, Section 89(5) is deemed to read as follows:

(5) If a credit agreement is unlawful in terms of this section, despite any other legislation or any provision of an agreement to the contrary, a court must make a just and equitable order including but not limited to an order that—

(a) the credit agreement is void as from the date the agreement was entered into;

2.189 The Credit Amendment Act 9 of 1985, Credit Amendment Act 53 of 1987, and Credit Amendment Act 79 of 1995 were not repealed together with the Credit Act 75 of 1980. The SALRC recommends that these amendment Acts be removed from the statute book because the Act that they amend, the Credit Act 75 of 1980, has been repealed by the National Credit Act 34 of 2005.

⁵⁸ *Chevron SA (Pty) Limited v Wilson t/a Wilson's Transport and Others* [2015] ZACC 15 (5 June 2015)T

2.190 The Usury Amendment Act 100 of 1988, Usury Amendment Act 67 of 1990, Usury Amendment Act 30 of 1993, Usury Amendment Act 81 of 1995 and Usury Amendment Act 10 of 2003 were not repealed when the Usury Act 73 of 1968 was repealed by section 172(4) of the National Credit Act 34 of 2005. The SALRC recommends that they be repealed.

Theme 6: Trade Practices

(a) Manufacturing Development Act 187 of 1993

2.191 The object of this statute is to establish the Regional Industrial Development Board; to provide for the establishment of programmes for regional industrial development and matters incidental thereto. The Regional Industrial Development Board is established as a juristic person. Its object is to promote industrial growth by means of incentives and concessions with due regard to regional requirements.

2.192 There are no redundant or obsolete provisions or provisions in conflict with section 9 of the Constitution. The SALRC recommends that the Act must not be removed from the statute book.

(b) Measurement Units and Measurement Standards Act 18 of 2006

2.193 The purpose of Measuring Units and National Measuring Standards Act 18 of 2006 was to provide for the use of measurement units of the International System of Units and certain other measurement units. It also provides for the designation of national measurement units and standards; and for the keeping and maintenance of national measurement standards and units. The Act further deals with the establishment and functions of the National Metrology Institute; to provide for the repeal of certain laws and to provide for matters connected therewith.

2.194 The Measurement Units and Measurement Standards Act of 2006 contains no sections that are redundant, obsolete or unconstitutional and it should remain in the statute book.

(c) Accreditation for Conformity Assessment, Calibration and Good Laboratory Practice Act 19 of 2006

2.195 The purpose of this Act is to provide for an internationally recognized and effective accreditation and monitoring system for the Republic by establishing South African National Accreditation System (SANAS) as a juristic person, to recognise SANAS as the only accreditation body in the Republic for the accreditation of conformity assessment and calibration and monitoring of good laboratory practice and to provide for matters connected therewith.

2.196 Section 30 of this Act defines the “Companies Act” as the Companies Act 61 of 1973. The Companies Act 61 of 1973 has been repealed by the Companies Act 71 of 2008. It is recommended that the outdated reference to the Companies Act be rectified. There are no redundant or obsolete provisions or provisions in conflict with section 9 of the Constitution and the SALRC recommends that the Act be kept in the statute book.

Theme 7: Consumer Protection

(a) The Legal Metrology Act 9 of 2014

2.197 The purpose of to provide for the administration and maintenance of legal metrology technical regulations in order to promote fair trade and to protect public health and safety and the environment; and to provide for matters connected therewith.

2.198 No provisions that infringe the section 9 of the Constitution have been identified in this Act. The SALRC therefore proposes that the Legal Metrology Act of 2014 be retained on the statute book.

(b) National Building Regulations and Building Standards Act 103 of 1977

2.199 The purpose of this Act is to provide for the promotion of uniformity in the law relating to the erection of buildings in the areas of jurisdiction of local authorities; for the prescribing of building standards, and for matters connected therewith.

2.200 In section 1 “architect” is defined as an architect as defined in section 1 of the Architects’ Act, 1970 (Act No. 35 of 1970). The Architects’ Act 35 of 1970 has been repealed

by s 43 of the Architectural Profession Act 44 of 2000. The SALRC recommends that reference to an outdated Act must be corrected.

2.201 None of the changes made to the National Building Regulations and Building Standards Amendment Act 36 of 1984, the National Building Regulations and Building Standards Amendment Act 62 of 1989 and the National Building Regulations and Building Standards Amendment Act 49 of 1995 are inconsistent with section 9 of the Constitution. These amendment Acts ensure legal certainty. It is therefore proposed that they be retained in the statute book.

(c) Lotteries Act 57 of 1997

2.202 The objective of the Lotteries Act 57 of 1997 is to regulate and prohibit lotteries and sports pools; to establish a National Lotteries Board; to determine its powers and to provide for matters connected therewith. The Act amended the Post Office Act 44 of 1958; to repeal the Gambling Act of 1965, the Gambling Act of 1982 (Ciskei), the State Lotteries Act of 1984 (Ciskei), and the Lotteries Decree, 1989 (Transkei); and to provide for matters connected therewith.

2.203 The definition of “broadcasting service” in section I of Act 57 of 1997 is outdated as it refers to the Broadcasting Act 73 of 1976. Section 41(1) of the Broadcasting Act 4 of 1999 repealed the Broadcasting Act 73 of 1976. The SALRC recommends that reference to this repealed legislation be corrected.

2.204 The two definitions in the Act require clarity, i.e. the definition of ‘Department’ and of ‘Minister’. In section 1(vii) the Department is defined as “the Department of the national sphere of government for which the Minister is responsible.” And in section 1(xiii) The ‘Minister’ is defined to mean “the Minister to whom the administration of this Act has been assigned.” It is not possible to identify the Department and the Minister under whom the Act is vested for administration without referring to the Regulations. The Act should therefore be amended to provide that it is the Department or Minister of Trade and Industry.

2.205 Section 46(1) of the Lotteries Act of 1997 refers to an outdated Public Accountants’ and Auditors’ 80 of 1991. The Public Accountants’ and Auditors’ Act of 1991 has been repealed by section 58 of the Auditing Profession Act 26 of 2005. It is recommended that reference to an outdated Act be corrected.

2.206 No provisions that infringe the section 9 of the Constitution have been identified in this Act. The SALRC therefore proposes that the Lotteries Act 57 of 1997 be retained on the statute book.

(d) Lotteries Amendment Act 10 of 2000

2.207 The purpose of this Act is to amend the Lotteries Act of 1997, so as to remove the prohibition of participation in the National Lottery by certain persons; and to provide for matters connected therewith. None of the changes are inconsistent with section 9 of the Constitution. The Lotteries Amendment Act of 2000 ensures legal certainty. It is therefore proposed that the amendment Act be retained.

(e) Lotteries Amendment Act 46 of 2001

2.208 The purpose of this act is to amend the Lotteries Act of 1997, so as to further regulate the conduct of promotional competitions; and to provide for matters incidental thereto. None of the changes are inconsistent with section 9 of the Constitution. The Lotteries Amendment Act of 2001 ensures legal certainty. It is therefore proposed that the amendment Act be retained.

(f) Lotteries Amendment Act 32 of 2013

2.209 The purpose of the Act is to amend the Lotteries Act of 1997 to provide for the establishment of a National Lotteries Commission; to provide for the extension of the powers of the board; to provide for the licensing of an organ of state to conduct the National Lottery; to provide for a clear accountability process for the distributing agency; to provide for the professionalisation of the distributing agency; to eliminate overlapping of functions between the Minister and the board; to provide for the removal of the reconstruction and development programme as a category entitled to be allocated money of the fund; and to amend by certain definitions.

2.210 The SALRC has reviewed this Act and none of the changes are inconsistent with section 9 of the Constitution. The Lotteries Amendment Act of 2013 ensures legal certainty. It is therefore proposed that the amendment Act be retained.

(g) National Gambling Act 7 of 2004

2.211 The purpose of this Act is to provide for the co-ordination of concurrent national and provincial legislative competence over matters relating to casinos, racing, gambling and wagering, and to provide for the continued regulation of those matters; for that purpose to establish certain uniform norms and standards applicable to national and provincial regulation and licensing of certain gambling activities; to provide for the creation of additional uniform norms and standards applicable throughout the Republic; to retain the National Gambling Board; to establish the National Gambling Policy Council; to repeal the National Gambling Act, 1996; and to provide for matters incidental thereto.

2.212 In section 1 the definition of “South African Bureau of Standards” still refers to the Standards Act 29 of 1993 which has been repealed by section 35 of the Standards Act 8 of 2008. Reference to this repealed Act 29 of 1993 also appears in sections 19, 22, and 24 of the Gambling Act of 2004. It is recommended that reference to outdated Standards Act 29 of 1993 be corrected wherever it appears, in those sections

2.213 In section 49 and 52(i) of the Gambling Act 2004 the Corruption Act 94 of 1992 is referred to. The Corruption Act 94 of 1992 has been repealed by section 36(1) of the Prevention and Combating of Corrupt Activities Act 12 of 2004. It is recommended that reference to the Corruption Act of 1992 be corrected wherever it appears in sections 49 and 52(i).

(h) Gambling Matters Amendment Act 36 of 1999

2.214 The purpose of this Act is to amend the National Gambling Act of 1996, so as to empower the Minister of Trade and Industry to determine by notice in the *Gazette* the date from which the national sphere of government or any organisation which holds or administers any asset or right in respect of gambling activities for or on behalf of that sphere shall not have any financial interest in any gambling activity; to further regulate the date until when a provincial licensing authority shall disregard certain financial interest when considering an application for a casino licence; and to repeal the Gambling Act of 1965; and to provide for matters connected therewith.

2.215 Basically the purpose of the Act was to repeal the Gambling Act 51 of 1965 and to amend section 13(1) of the National Gambling Act 33 of 1996. The National Gambling Act 33

of 1996 has been repealed by the National Gambling Act 7 of 2004. It is recommended that the National Gambling Amendment Act 36 of 1999 be repealed as the primary legislation which it repeals has been repealed namely the National Gambling Act 33 of 1996.

(i) The National Regulator for Compulsory Specifications Act 5 of 2008

2.216 The National Regulator for Compulsory Specifications Act of 2008 came into effect on 1 September 2008 and has as its object the establishment of a National Regulator for Compulsory Specifications of South Africa. It aims to provide for the administration and the maintenance of compulsory specifications in the interests of public safety and health and for the protection of the environment and matters connected therewith.

2.217 There are no redundant or obsolete provisions or provisions in conflict with section 9 of the Constitution. It is proposed that the National Regulator for Compulsory Specifications Act of 2008 be retain on the statute book.

Theme: 8 Miscellaneous Statutes

(a) Sugar Act 9 of 1978

2.218 The purpose of the Sugar Act 9 of 1978 was to consolidate and amend the laws relating to the sugar industry and to provide for matters incidental thereto. This Act has been amended by the Sugar Amendment Act 9 of 1984, Act 69 of 1987 and Act 71 of 1992.

2.219 Section 1 of this Act defines 'Minister' as the 'Minister of Economic Affairs'. This definition should be amended to indicate the Minister of Trade and Industry.

2.220 No provisions, which infringe the constitutional equality provisions, have been identified in this Act. It is proposed that the Sugar Act of 1978 be retained on the statute book.

2.221

(b) Sugar Amendment Act 9 of 1984

2.222 The purpose of the Act is to amend the Sugar Act of 1978, so as to make provision for the regulation and control of the transportation of sugar cane from growers to millers, and for matters connected therewith. None of the changes are inconsistent with section 9 of the Constitution. The Sugar Amendment Act 9 of 1984 will ensure legal certainty. It is therefore proposed that the amendment Act be retained.

(c) Sugar Amendment Act 69 of 1987

2.223 The purpose of the Sugar Amendment Act 69 of 1987 was to amend the Sugar Act of 1978, so as to further regulate the powers of the Minister to determine the terms of the Sugar Industry Agreement and effect amendments thereto with retrospective effect; to validate temporarily the Cane Transport Rules; and to provide for incidental matters. The Sugar Amendment Act 69 of 1987 will ensure legal certainty. It is therefore proposed that the amendment Act be retained.

(d) Sugar Amendment Act 71 of 1992

2.224 The purpose of this Act was to amend the Sugar Act of 1978, so as to grant the power to the South African Sugar Association to impose certain penalties; to authorize the Association to set the maximum industrial price of sugar industry products; and to set the maximum industrial prices at which certain sugar industry products could have been sold during certain periods; and to provide for matters connected therewith.

2.225 This amendment Act is neither obsolete nor redundant and no provisions that infringe the equality provisions of the Constitution were identified. The SALRC proposes that it should be retained on the statute book.

(e) Abolition of the Fuel Research Institute Act 30 of 1983

2.226 The purpose of this Act was to repeal the Fuel Research Institute and Coal Act of 1963 and to provide for the vesting of the assets and liabilities, and the transfer of employees, of the Fuel Research Institute of South Africa in and to the Council for Scientific and Industrial Research; and for matters connected therewith.

2.227 Section 2(1) of the Act provides for the vesting of assets, liabilities, rights and obligations of the Fuel Research Institute of South Africa (Institute) to the Council for Scientific and Industrial Research (CSIR). In terms of section 2(5) money in possession of the Institute, before the commencement of the Act vested in the Director –General Mineral and Energy. Because of the provisions of section 2(1) the function of dealing with liabilities of the then Institute, rests with the CSIR.

2.228 The Act refers, in sections 3 and 4, to the “Minister of Industries, Commerce and Tourism”. The Minister under whose administration this Act is placed is the Minister of Trade and Industry. It is recommended that reference to the “Minister of Industries, Commerce and Tourism” be replaced with “Minister of Trade and Industry”.

2.229 The SALRC in its consultation paper on energy related legislation considered this Act as part of the review of energy related legislation. As the title of the Act suggests, the purpose of this Act was to repeal the Fuel Research Institute and Coal Act 35 of 1963. It also repealed a number of Fuel Research Institute and Coal Amendment Acts and a section in the General Law Amendment Act 57 of 1975. It provided for the vesting of the assets and

liabilities, and the transfer of the employees, of the Fuel Research Institute of South Africa in and to the Council for Scientific and Industrial Research, and provided for matters connected therewith. Section 2(2) provides, for example, that the registrar of deeds in charge of the deeds registry where any title to any such asset or right is registered shall endorse the document of title concerned upon production thereof to the effect that such asset or right has so vested and shall make the necessary entries in his records.

2.230 The SALRC stated in its consultation paper that it presumed that this Act has accomplished the purpose for which it was adopted 26 years ago. The SALRC posed the question to the Department of Energy whether there was still a need to retain the Act. It also noted that this Act was not listed in Proclamation 44 of 2009 as a statute being administered by the Department of Energy or the Department of Mineral Resources. The SALRC requested the Department of Energy to confirm its responsibility for administering this Act and the need for the retention of this Act.

2.231 The Department of Energy indicated that although it has no objection to the repeal of the Act, it made provision for the vesting of assets and liabilities of the Fuel Research Institute in the Council for Scientific and Industrial Research referred to in section 2 of the Scientific Research Council Act 32 of 1962 (repealed by Act 82 of 1984) which was further succeeded by Act 46 of 1988. The Department notes that the administration of the latter Act had been assigned to the Minister. The Department suggests that since the Abolition of the Fuel Research Institute Act refers to the Scientific Research Council Act the Department of Science and Technology should be requested to comment on the repeal of the Abolition of the Fuel Research Institute Act. In March 2010 the SALRC requested the Department of Science and Technology to indicate what its views are on the repeal of the latter Act. The Department of Science and Technology responded by indicating that the Abolition of the Fuel Research Institute Act is reflected in the DTI Medium-term strategic framework 2010-2013 as one of the statutes administered by the DTI. The Department of Science and Technology therefore suggested that the SALRC might like to seek further confirmation from the DTI as the custodian of the said Act. The Department of Science and Technology further noted that the Scientific Research Council Act was, during the promulgation of the above Act, also administered by the DTI.

2.232 The SALRC requested the DTI to confirm its responsibility for administering this Act and the need for the retention of this Act. The DTI pointed out that-

“Unlike most Acts, the Abolition of the Fuel Research Institute Act of 1983 contains no definition section defining the Minister responsible for the

administration thereof. However, that does not detract from the fact that the Act is indeed administered by the DTI. According to DTI this Act has been dormant for decades. This in all probability stems from the fact that the scope and ambit of its practical application is so limited, if not obsolete. Its substantive essence is really no more than to transfer the assets, liabilities and personnel of the Fuel Research Institute to the CSIR, subsequent to the repeal of the Fuel Research Institute and Coal Act 35 of 1963. In this regard the trite principle is that laws the operation of which has become obsolete should not remain dormant on the statute book. The DTI also indicated that, furthermore, it is in a sense anomalous that they administer an Act that is so closely related to the Scientific Research Council Act 46 of 1988, whereas the latter Act is not administered by the DTI.

2.233 The DTI supports the SALRC recommendation for the repeal of this Act for the reasons the SALRC stated in its consultation paper that it presumed that this Act has accomplished the purpose for which it was adopted 26 years ago.

(f) Space Affairs Act 84 of 1993

2.234 The purpose of this Act was to provide for the establishment of a Council to manage and control certain space affairs in the Republic; to determine its objects and functions; to prescribe the manner in which it is to be managed and controlled; and to provide for matters connected therewith.

2.235 This Act refers to the Minister of State Expenditure in sections 2 and 9. The Act should be amended by the substitution of the words 'Minister of State Expenditure', wherever they occur, by 'Minister of Finance'.

2.236 Section 9(2)(a)(i) refers to a judge as defined in section 1(1) of the Judges' Remuneration and Conditions of Employment Act 88 of 1989. Section 17 of the Judges' Remuneration and Conditions of Employment Act 47 of 2001 repealed the Judges' Remuneration and Conditions of Employment Act 88 of 1989. It is recommended that this outdated reference be deleted.

2.237 The reference to the "Supreme Court of South Africa" in section 17(2) of the Space Affairs Act of 1993 is out-dated and should be replaced with "High Court of South Africa".

2.238 No provisions, which infringe the constitutional equality provisions, have been identified in this Act. It is proposed that the Space Affairs Act of 1993 be retained in the statute book.

(g) Space Affairs Amendment Act 64 of 1995

2.239 The purpose of this Act is to amend the Space Affairs Act, 1993, so as to make provision for the appointment of a vice-chairperson to the South African Council for Space Affairs; and to make further provision for the delegation of certain powers and duties; and to delete an obsolete provision; and to provide for matters connected therewith. The SALRC considers that the Space Affairs Amendment Act of 1995 continues to serve a purpose to ensure legal certainty and proposes that the Amendment Act be retained on the statute book.

(h) Non-Proliferation of Weapons of Mass Destruction Act 87 of 1993

2.240 Under the Non-Proliferation Act. 87 of 1993, the DTI provides resources to the South African Council for the Non-Proliferation of Weapons of Mass Destruction to protect the South African interests, fulfill its obligations in accordance with the national non-proliferation policy, and to meet its undertakings regarding international treaties and regimes. The Council is responsible for implementing government policy on non-proliferation in compliance with multilateral rules governing trade in controlled goods and technology related to weapons of mass destruction (WMD).

2.241 In terms of section 1 of this Act “Armscor” means the Armaments Development and Production Corporation of South Africa, Limited, established in terms of the Armaments Development and Production Act 57 of 1968. The Armaments Development and Production Act 57 of 1968 has been repealed by section 23 of Armaments Corporation of South Africa, Limited Act 51 of 2003. It is recommended that reference to the Armaments Development and Production of Act 57 of 1968 be corrected.

2.242 Section 5 refers to the Import and Export Control Act 45 of 1963 which was repealed by section 63(2) of the International Trade Administration Act 71 of 2002. Section 5 also refers to the Armaments Development and Production Act 57 of 1968 which was repealed by section 23 of the Armaments Corporation of South Africa, Limited Act 51 of 2003. It is recommended that reference to the repealed Import and Export Control Act 45 of 1963 and the Armaments Development and Production of Act 57 of 1968 be corrected.

2.243 Section 11 refers to judge as defined in section 1(1) of the Judges' Remuneration Act 88 of 1989 has been repealed by section 17 of the Judges' Remuneration and Conditions of Employment Act 47 of 2001. It is recommended that reference to the Judges' Remuneration Act 88 of be corrected.

2.244 The reference to the "Supreme Court of South Africa" in section 17(2) of this Act is out-dated and should be replaced with "High Court of South Africa".

2.245 No provisions, which infringe the constitutional equality provisions, have been identified in this Act. It is proposed that the Act be retained.

(i) Non-Proliferation of Weapons of Mass Destruction Amendment Act 50 of 1995

2.246 The purpose of this Act is to amend the Non-Proliferation of Weapons of Mass Destruction Act, 1993, so as to make provision for the appointment of a vice-chairperson to the South African Council for the Non-Proliferation of Weapons of Mass Destruction; to make further provision for the delegation of certain powers and duties; and to delete an obsolete provision; and to provide for matters connected therewith.

2.247 None of the changes are inconsistent with the Constitution. The Non-Proliferation of Weapons of Mass Destruction Amendment Act of 1995 will ensure legal certainty. It is therefore proposed that the amendment Act be retained.

(j) Non-Proliferation of Weapons of Mass Destruction Amendment Act 59 of 1996

2.248 The purpose of this Act is to amend the Non-Proliferation of Weapons of Mass Destruction Act, 1993, so as to make provision for the representation of the Department of Trade and Industry in the South African Council for Non-Proliferation of Weapons of Mass Destruction; and to render punishable any contravention of, or any failure to comply with, the provisions of a certain notice or the conditions of a certain permit; and to make provision for matters connected therewith.

2.249 None of the changes are inconsistent with the Constitution. The Non-Proliferation of Weapons of Mass Destruction Amendment Act of 1996 will ensure legal certainty. It is therefore proposed that the amendment Act be retained.

(k) National Empowerment Fund Act 105 of 1998

2.250 The purpose of this Act was to establish a trust for the promotion and facilitation of ownership of income generating assets by historically disadvantaged persons; to set out the objects of the trust; to provide for the powers, appointment and mode of operation of the trustees; to provide for the establishment of other investment entities for the attainment of the objects; to provide for the powers of the Minister to give implementation directives; to provide for the sale of shares in State Owned Commercial Enterprises at a discount to the trust or by the trust to the beneficiaries; to provide for the control of the financial affairs of the trust; to provide for the establishment of an investment holding company by the trust; to provide for the promulgation of regulations; to provide for the dissolution of the trust; and to provide for other incidental matters.

2.251 In terms of section 1 of the National Empowerment Fund Act 105 of 1998 “Chief Executive Officer” means the Chief Executive Officer of the Trust appointed in terms of section 17, and has the same meaning ascribed to it in terms of the Reporting by Public Entities Act 93 of 1992. Section 94 of the Public Finance Management Act 1 of 1999 repealed the Reporting by Public Entities Act 93 of 1992. The SALRC recommends that reference to this repealed Act be corrected.

2.252 Section 18(3)(c) refers to the Reporting by Public Entities Act 93 of 1992 which was repealed by section 94 of the Public Finance Management Act 1 of 1999. It is recommended that reference to the repealed Act 93 of 1992 be corrected.

2.253 In terms of 25(6)(a) the financial statements of the Trust must be audited by an auditor or firm of auditors registered in terms the Public Accountants and Auditors Act 80 of 1991. The Public Accountants and Auditors Act 80 of 1991 has been repealed by section 58 of the Auditing Profession Act 26 of 2005. It is recommended that reference to the repealed Act 80 of 1991 be corrected.

(l) Broad-based Black Economic Empowerment Act 53 of 2003

2.254 The purpose of the Act is to establish a legislative framework for the promotion of black economic empowerment; to empower the Minister to issue codes of good practice and to publish transformation charters; to establish the Black Economic Empowerment Advisory Council; and to provide for matters connected therewith.

2.255 The Act has been analysed and there are no provisions that are redundant, obsolete or in conflict with section 9 of the Constitution.

(m) Broad-Based Black Economic Empowerment Amendment Act 46 of 2013

2.256 To amend the Broad-Based Black Economic Empowerment Act, 2003, so as to insert certain definitions and to amend others; to clarify interpretation; to provide for the remuneration of Council members; to promote compliance by organs of state and public entities and to strengthen the evaluation and monitoring of compliance; to include the creation of incentive schemes to support black owned and managed enterprises in the strategy for broad-based black economic empowerment; to provide for the cancellation of a contract or authorisation; to establish the Broad-Based Black Economic Empowerment Commission to deal with compliance of broad-based black economic empowerment; to provide for offences and penalties; and to provide for matters connected therewith.

2.257 None of the changes are inconsistent with section 9 the Constitution. The Broad-Based Black Economic Empowerment Act of 2013 will ensure legal certainty. It is therefore proposed that the amendment Act be retained on the statute book.

(n) Liquor Act 59 of 2003

2.258 The purpose of this Act is to establish national norms and standards in order to maintain economic unity within the liquor industry; to provide for essential national standards and minimum standards required for the rendering of services; to provide for measures to promote co-operative government in the area of liquor regulation; and to provide for matters connected therewith.

2.259 No obsolete or redundant provisions or provisions that infringe the constitutional equality provisions have been identified in this Act. The SALRC therefore proposes that the Liquor Act of 2003 be retained on the statute book.

(o) Standards Act 8 of 2008

2.260 The purpose of this Act is to provide for the development, promotion and maintenance of standardisation and quality in connection with commodities and the rendering of related conformity assessment services; and for that purpose to provide for the continued existence of the SABS, as the peak national institution; to provide for the establishment of the Board of the SABS; to provide for the repeal of the Standards Act 29 of 1993; to provide for transitional provisions; and to provide for matters connected therewith.

2.261 No obsolete or redundant provisions or provisions that infringe the constitutional equality provisions have been identified in this Act. The SALRC therefore proposes that the Standards Act of 2008 be retained on the statute book.

C. RATIONALISATION OF LAWS

2.262 When the interim Constitution came into force in 1994 and the final Constitution in 1997, the former homelands⁵⁹ were accepted as part of one united democratic South Africa. In the interest of legal certainty, given the different applicable laws in the homelands and other parts of South Africa, the final Constitution provided that any law in force when the new Constitution took effect remained in force as long as it was consistent with the Constitution and had not been repealed or amended.⁶⁰ Most of the Acts administered by DTI were rationalised in 1995 and 1996.⁶¹ During the review the SALRC discovered that there are

⁵⁹ The former TBVC states and the self-governing territories.

⁶⁰ Item 2 of Schedule 6 of the final Constitution; *Khohliso v S and Another* [2014] ZACC 33.

⁶¹ The Rationalisation of Corporate Laws Act 45 of 1996 and the Intellectual Property Laws Rationalisation Act 107 of 1996. The Usury Acts were integrated in 1996 and in 2005 a uniform NCA was promulgated. The Liquor Act 27 of 1989 was made applicable to the former self-governing territories and TBVC states in 1995 and a new Act was promulgated in 2003.

pieces of legislation that did not go through the process of rationalisation.⁶² The implication of this is that these pieces of legislation may not be applicable throughout the national territory of the Republic of South Africa. The SALRC recommends that the following Acts be taken through the same process of rationalisation that was undertaken in 1995 and 1996:

- The Industrial Development Act 22 of 1940 has been amended on 11 occasions but has never been extended to the former TBVC territories.
- The Export Credit and Foreign Investments re-insurance Act 78 of 1957 has been amended on six occasions but has never been extended to the former TBVC territories.
- The Sugar Act 9 of 1978 was amended on three occasions but has never been extended to the former the TBVC territories.
- The Protection of Businesses Act 99 of 1978 was amended in 1979, 1987 and in 1996 but has also not been extended to the former the Republics of Transkei, Bophuthatswana, Venda and Ciskei.
- The Alienation of Land Act 68 of 1981 has been amended a number of times but has also not been extended to the former TBVC territories.
- Property Time Sharing Control Act 75 of 1983 was passed during the period in which the TBVC states were seen as independent and has never been extended to these former territories.
- The Convention on Agency in the International Sale of Goods Act 4 of 1986 was also passed during the period in which the TBVC states were seen as independent and has never been extended to these former territories.
- The Housing Development Schemes for Retired Persons Act 65 of 1988 was also passed during the period in which the TBVC states were seen as independent and has never been extended to these former territories.

⁶²

DTI brought the issue of rationalization to the attention of the SALRC in relation to the National Building Regulations and Building Standards Act 103 of 1977 which has never been extended to the former TBVC territories.

ANNEXURE A

TRADE AND RELATED MATTERS REPEAL AND AMENDMENT BILL

To repeal and amend certain laws of the Republic

BE IT ENACTED by the Parliament of the Republic of South Africa, as follows:

1 Repeal of laws

(1) The laws specified in the First Schedule are hereby repealed.

(2) The laws specified in the Second Schedule are hereby repealed to the extent set out in the third column of that Schedule.

(3) The laws specified in the Third Schedule are hereby amended to the extent set out in the third column of that Schedule.

2 Short title and commencement

This Act shall be called the Trade and Related Matters Repeal and Amendment Act of and comes into effect on a date determined by the President by proclamation in the *Gazette*.

Schedule 1 Acts repealed in whole

Number and year of law	Title or subject
Act 3 of 1946	Merchandise Marks Amendment of 1946
Act 40 of 1951	Industrial Development Amendment Act of 1951
Act 37 of 1961	Unauthorised Use of Emblems Act of 1961
Act 66 of 1961	Export Credit Re-insurance Amendment Act of 1961
Act 88 of 1962	Export Credit Re-insurance Amendment Act of 1962
Act 89 of 1965	Industrial Development Amendment Act of 1965
Act 96 of 1980	Industrial Development Amendment Act of 1980
Act 87 of 1986	Temporary Removal of Restrictions on Economic Activities Act of 1986
Act 72 of 1987	Temporary Removal of Restrictions on Economic Activities Amendment Act, 1987
Act 67 of 1988	Temporary Removal of Restrictions on Economic Activities Amendment Act, 1988
Act 100 of 1988	Usury Amendment Act, 1988
Act 67 of 1990	Usury Amendment Act, 1990
Act 30 of 1993	Usury Amendment Act, 1993
Act 79 of 1995	Credit Agreements Amendment Act, 1995
Act 81 of 1995	Usury Amendment Act, 1995
Act 57 of 1996	Integration of Usury Laws Act, 1996
Act 36 of 1999	Gambling Matters Amendment Act, 1999
Act 10 of 2003	Usury Amendment Act, 2003

Schedule 2

Number and year of law	Title or subject	Extent of repeal
Act 69 of 1987	Sugar Amendment Act 69 of 1987	Section 3 (a) & (b)
Act 4 of 1986	Convention on Agency in the International Sale of Goods Act, 1986	Sections (2)(2) and (3)
Act 71 of 1992	Sugar Amendment Act, 71 of 1992	Section 4

Schedule 3

Number and year of law	Title and subject	Extent of amendment
Act 11 of 1985	International Convention for Safe Containers Act, 1985	Sections 2(3) and 3(2) are hereby amended by the substitution of [House of Parliament] <u>National Assembly and National Council of Provinces</u>
Act 59 of 1980	Share Blocks Control Act 59 of 1980	Section 1 is hereby amended by the substitution of the definition of "Minister" by the following definition: " <u>Minister</u> " means the <u>Minister of Trade and Industry.</u>
Act 17 of 1941	The Merchandise Marks Act, 1941	<p>Sections 15(2) and 20(2) are hereby amended by the insertion of <u>/she</u> alongside the word 'he' wherever it appears.</p> <p>Section 15(1)(b) is hereby amended by the insertion of the following (underlined) phrase: any mark, word, letter or figure or any arrangement or combination thereof, <u>provided that the person using the mark, word, letter or figure or any arrangement or combination thereof is afforded an opportunity of making representations before the Minister.</u></p>
Act 31 of 1962	Inventions	Section 4(2) is hereby amended

	Development Act, 1962	<p>by the removal of the reference to the [Patents Act No.37 of 1952] and the substitution thereof with the <u>Patents Act No. 57 of 1978.</u></p> <p>Sections 6 and 9 are hereby amended by the removal of the word [chairman] and the substitution therefor of the word <u>chairperson.</u></p> <p>Section 13 is hereby amended by the removal of the reference to the [Public Accountants and Auditors Act No. 51 of 1951] and the substitution therefor of the <u>Public Accountants and Auditors Act No. 80 of 1991.</u></p> <p>Section 16 is hereby amended by the substitution of the [Companies Act No. 46 of 1926] and the substitution therefor of the <u>Companies Act No. 61 of 1973.</u></p> <p>Sections 2(2), 4(m), 8(2), 13(2), 15(c) and (h) and 16(2) are hereby amended by the insertion of the word <u>she</u> alongside the word 'he' wherever it appears.</p>
Act 11 of 1967	Performers Protection Act, 1967	Sections 8(2)(e), 9(1)(c), 12(2)(a) and 13 are hereby amended by the insertion of <u>/she</u> alongside the word 'he' wherever it appears

Act 62 of 1977	Registration of Copyright in Cinematograph Films Act, 1977	<p>The Act is gender insensitive throughout and requires <u>she</u> to be inserted wherever the word 'he' appears.</p> <p>Section 1(a) is hereby amended by the substitution of the definition of "Minister" by the following definition: <u>"Minister", means the Minister of Trade and Industry;</u></p> <p>Sections 12(4), 25(1), 25(2), 28, 33(2), 33(4)(a), 33(4)(b), 33(5) are hereby amended by the deletion of the reference to the [Supreme Court] and the substitution therefore of the words <u>High Court and its divisions.</u></p> <p>Sections 19 and 21 are hereby amended by the deletion of the reference to the [Copyright Act 63 of 1965] and the substitution therefore of the <u>Copyright Act 98 of 1978.</u></p> <p>Section 12(2) of the ^{Regulations} is hereby amended by the removal of the words [English or Afrikaans languages] and the insertion of the following (underlined) words: Any document in a language other than <u>one of the official</u></p>
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		<p><u>languages of South Africa</u> shall be accompanied by an exact translation thereof, certified to the satisfaction of the Registrar.</p>
Act 9 of 1978	Sugar Act, 1978	<p>1. Section 1 is hereby amended:</p> <p>(a) by the substitution of the definition of 'Minister' by the following definition:</p> <p style="padding-left: 40px;"><u>'Minister', means the Minister of Trade & Industry;</u></p> <p>2. By the deletion of the following words (contained in brackets) from section 5: [Unless the Agreement expressly provides to the contrary in respect of any particular growers, millers or refiners, or any particular class or category of growers, millers or refiners,]</p>
Act 57 of 1978	Patents Act, 1978	<p>Section 2 and the Introduction to the Regulations are hereby amended by the deletion of the definition of ['Minister'] and the substitution therefor of the following definition:</p> <p><u>'Minister' means the Minister of Trade and Industry;</u></p> <p>Sections 12(2), 15(1)(b), 16(1), 17(1) and (2), 18(2) and (3), 19(1), 20(1) and (3), 21(2), 22(1) and (2), 23(1), (2), (3) and (5), 24(1) and (4), 27(1), 28(1), 29(1),(3), and (4), 30(4) and (6),</p>

		<p>31(4), 36(1) and (2), 37(1), 38(2), 39(1), 41, 42(3), 45(2), 47(2), 48(1) and (3), 49(2),(3) and (7), 50(3),(4), (5) and (6), 51(1) and (10), 53(2), (3), (4) and (5), 54(2) and (4), 55, 56(2), (4) and (13), 59(2), 60(1), 61(1) and (3), 63, 64(1), 65(5), 66(1), (2), (4) and (5), 67(3), 68, 70(1) and (2), 74(2), 75, 77, 79(1) and (6), 80(1) and (3), 84, 85(2), (3) and (4), 89, 90(1) and (2) and Regulations 1A(4), 8(2) and (6), 27, 28A(9), 44, 45, 50, 53, 54, 55,57, 71, 74(2), 75, 78, 81, 84, 88, 90(2) and (3), 94, 94A, 95, 97, 98(1) and (2), 99, 100</p> <p>are hereby amended by the insertion of the word <u>she</u> alongside the word 'he' wherever it appears.</p> <p>The definition of 'court' and Sections 8, 9, 15(2), 17(1) and (3), 19(1), (2) and (3), 76(2) and Regulations 73(3), 80, 81 and 100 are hereby amended by the deletion of the reference to [Supreme Court] and the substitution therefor of the words <u>High Court and its divisions</u>.</p>
Act 98 of 1978	Copyright Act, 1978	<p>The definition of 'author' in Section 1(a) and 1(b) is hereby amended by the insertion of the following (underlined) words:</p>

		<p>(a) a literary, musical or artistic work, means the <u>natural</u> person who first makes or creates the work;</p> <p>(b) a photograph, means the <u>natural</u> person who is responsible for the composition of the photograph;</p> <p>Section 9A is hereby amended by the insertion of a proviso reading:</p> <p><u>The provisions of this section are subject to the provisions of Section 9.</u></p> <p>Sections 14, 19, 20, 21, 22, 23, 26, 27, 28, 31, 32, 33, 45 and Regulations 3, 10, 11, 13, 15, 26, 30, 37 and 38 are hereby amended by the insertion of <u>/she</u> alongside the word 'he' wherever it appears.</p> <p>The definition of 'archives depot' in Section 1 of the Regulations is hereby amended by the removal of the reference to the [Archives Act No. 6 of 1962] and the substitution therefor of the <u>Archives Act No. 88 of 1996</u></p> <p>The definition of 'local authority' in Section 1 of the Regulations</p>
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		<p>is hereby amended by the removal of (a) in its entirety.</p> <p>Section 17 of the Regulations is hereby amended by the deletion of the words [or 'outeursreg', or 'kopiereg'] and [or o, or k,] and [or 'alle regte voorbehou'] and the insertion of the following (underlined) words:</p> <p>Provided that such name shall be preceded or followed by the word 'copyright', <u>or a word meaning 'copyright' in any one of the official languages of South Africa</u> or the symbol c, <u>or a letter referring to the symbol c in any one of the official languages of South Africa</u>, or the words 'all rights reserved' <u>or words meaning 'all rights reserved' in any one of the official languages of South Africa</u>.</p> <p>Sections 29(1)(c), 36 and 40, and Regulations 27, 35(3) and (4), and 36(2) are hereby amended by the deletion of the words [Supreme Court] and the substitution therefor of the words <u>High Court and its divisions</u>.</p>
Act 59 of 1980	Share Blocks Control Act, 1980	<p>s 1 definition of property:</p> <p>"property' means any land of which a share block company is the registered owner and on</p>

	<p>which a building has or any buildings have been erected <u>and excludes property leased by the share block company;</u>”</p> <p>Amendment to s 7(1): “The main object and business of any share block company shall be to operate a share block scheme in respect of immovable property owned [or leased] by it.”</p> <p>Amendment to s 1 definition of “share block scheme: “share block scheme” means any scheme in terms of which a share, in any manner whatsoever, confers a right to or an interest in the use of immovable property <u>and includes any fractional ownership scheme;</u>”</p> <p>Amendment to s 7(1): “The main object and business of any share block company shall be to operate a share block scheme in respect of immovable property owned [or leased] by it.”</p> <p>3.2.17 Amendment to s 1 definition of “share block scheme: “share block scheme” means any scheme in terms of which a share, in any manner whatsoever, confers a right to or an interest in the use of immovable property <u>and includes any fractional ownership scheme;</u>”</p>
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		<p>Include in s 1: “lien” over the shares of the share block company on behalf of the company to secure any outstanding debts by the shareholder due to the company, provided it is explicitly included in the articles of the share block company.”</p> <p>Include in s 1: “Ranking of lien: A lien on behalf of the share block company ranks after the “pledge” of the shares by the holder to the seller from whom he acquired the shares to secure the balance of the purchase price if some is still outstanding.”</p> <p>Section 1 add: “Agricultural land: Any reference to 'agricultural land' in this or any other act should be cross references to the definition in section 1 of Act 68 of 1981: “agricultural land' means any land used or intended to be used mainly for commercial farming operations”.</p> <p>The formulation of criteria used for the identification of land that should be included as “used mainly for commercial farming operations” is delegated to the commercial farmers associations as the professional grouping in the best position to identify land that fits this purpose.</p>
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Act 30 of 1983	Abolition of the Fuel Research Institute Act, 1983	Sections 3 and 4 are hereby amended by the substitution of the words 'Minister of Industries, Commerce and Tourism' for the words: <u>Minister of Trade and Industry.</u>
Act 75 of 1983	Property Time-sharing Control Act, 1983	delete sub 4(w) [the group or groups as set out in section 12 of the Group Areas Act, No. 36 of 1966, to whom time-sharing interests in respect of the property time-sharing scheme concerned, will be sold.]
Act 11 of 1985	International Convention for Safe Containers, 1985	<i>Sections 2, 3 and 4: Amendment not provided: parliamentary dispensation and section 231 treaties (see par 2.23 above)</i>
Act 4 of 1986	Convention on Agency in the International Sale of Goods Act, 1986	<i>Sections 2(2) and (3): aligned to wording of section 231 of Constitution Sections 3(3) and (4) still reflect houses of Parliament Amendment not provided</i>
Act 65 of 1988	Housing Development Schemes for Retired Persons Act, 1988	<i>[not stated to which section]</i> Amendment: 'The management agency is not entitled to effectively evict the rightful holder of the right of occupancy because the latter is perceived as "frail" if he had been accepted on a lifelong basis – regardless of the change in circumstances

		<p>of the holder of the right. The management should provide for suitable care for all rightful occupiers.’</p> <p>Amendment to Item 9 (1) (q) of the Regulations under this Act:</p> <p><u>“The management association does not have the power to prohibit the transfer or any alienation of any housing interest to a bona fide interested buyer of the interest with whom the rightful holder of the interest had entered into an agreement of sale of the same unless any levy or other money due to the management association in respect of the housing interest concerned has been outstanding and no provision had been made to the satisfaction of the said management association for the payment thereof.”</u></p>
Act 84 of 1993	Space Affairs Act, 1993	<p>1. Sections 2 and 9 are hereby amended by the substitution of the words “Minister of State Expenditure”, whenever they occur, for the words: <u>Minister of Finance.</u></p> <p>2. Section 17(2) is hereby amended by the substitution of the words</p>

		“Supreme Court” for the words <u>High Court</u> .
Act 87 of 1993	Non-Proliferation of Weapons of Mass Destruction Act, 1993	Section 19(2) is hereby amended by the substitution of the words “Supreme Court” for the words <u>High Court</u> .
Act 194 of 1993	Trade Marks Act, 1993	<p>The definition of ‘proprietor’ and Sections 6(2) and (3), 8, 10(4), 12 14(1), 15, 16(2, (3), (4) and (5), 18, 20(2), 23(1) and (2), 24(1) and (3), 25(1), 26(4), 27(1), 29(1), 30(5), 34(2) and (5), 36(1) and (2), 37(3), 38(4) and (5), 39(5), 40(1), 44, 45(1) and (4), 46(1), 47, 50(1), 52(2), 55, 56, 59(1) and (2), 63(3) and (5), 68, and in</p> <p>Regulations 1(4), 6(5), (6) and (7), 8(1) and (2), 9(1), (2) and (3), 10(2), 11(2), 13(4), 15(3) and (5), 19(2) and (3), 26, 27, 28, 30(1), 31-35, 37, 38(1), 43(1), 44(2) and (3), 45, 47, 51, 52(2), 56(3) and (4), 57(4), 58(1).</p> <p>are hereby amended by the insertion of the word <u>/she</u> alongside the word ‘he’ wherever it appears.</p> <p>Section 6(3) is hereby amended by the deletion of the reference to the [Judges Remuneration and Conditions of Employment Act 88 of 1989] and the</p>

		<p>substitution therefor of the <u>Judges Remuneration and Conditions of Employment Act 47 of 2001</u></p> <p>Section 53(6) is hereby amended by the deletion of the words [Appellate Division] and the substitution therefor of the words <u>Supreme Court of Appeal</u>.</p>
Act 195 of 1993	Designs Act, 1993	<p>The definition of 'proprietor' and Sections 6(2), 10, 11(1), 12(1), 13, 16, 17, 20(1), 21(2), (7), (11) and (12), 23(2), 25(2), (3), (4), (5) and (7), 26(3), 27(1), 28, 29(2), 30(1), 31(1), 35(2) and (6), 36(1), 37(1) and (2), 41(2), 44(3), 45(1), 46(1) and (3), 49(2), (3) and (4), 53 and 54 and Regulations 1A(4), 5(4), 6(3), 12(1) and (2), 20(1) and (2), 22(1) and (2), 24, 26(1) and (2), 27, 28, 29, 32(1), 35(2) and (4), 36(1) and (2), 41(1), (2) and (5), 46(3) and (4) are hereby amended by the insertion of the word <u>/she</u> alongside the word 'he' wherever it appears.</p> <p>The definition of 'court' in Section 1(1), Section 11(2) and Regulation 36(1)(k) are hereby</p>

		<p>amended by the deletion of the reference to [Supreme Court] and the substitution therefor of the words <u>High Court and its divisions</u>.</p> <p>Section 54(a) is hereby amended by the deletion of [Minister of State Expenditure] and the substitution therefor of the <u>Minister of Finance</u>.</p>
Act 37 of 1997	Counterfeit Goods Act, 1997	<p>The definition of the word 'counterfeiting' in Section 1(1)(b) is hereby amended by the substitution of the word [calculated] with the word <u>intended</u> as follows:</p> <p>...the subject matter of that intellectual property right, or a colourable imitation thereof so that the other goods are <u>intended</u> to be confused with or to be taken as being the protected goods of the said owner...;</p> <p>The definition of the word 'counterfeiting' in Section 1(1) is hereby amended by the insertion of the following (underlined) words:</p> <p>However, the relevant act of counterfeiting must also have infringed the intellectual property right in question <u>or in the case of an imported article, would have</u></p>

		<p><u>constituted such an infringement if the article had been made in the Republic.</u></p> <p>The definition of 'exporter' in Section 1(1) is hereby amended by the insertion of the following underlined words: 'exporter' includes, <u>subject to the provisions of sub-paragraph 1(3),</u> any person who, at the relevant time:-</p> <p>(a) is the owner or is in control or possession of any goods exported or to be exported from the Republic;</p> <p>(b) carries the risk for any goods so exported or to be exported;</p> <p>(c) represents that or acts as if he or she is the exporter or owner of any goods so exported or to be exported;</p> <p>(d) actually takes or attempts to take any goods from the Republic;</p> <p>(e) has a beneficial</p>
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		<p>interest, in any manner or of any nature whatsoever, in any goods so exported or to be exported;</p> <p>(f) acts on behalf of any person referred to in paragraph (a), (b), (c), (d) or (e) of this definition,</p> <p>and, in relation to imported goods destined for exportation from the Republic, includes the manufacturer, producer, maker, supplier or shipper of those goods or any person inside or outside the Republic representing or acting on behalf of such a manufacturer, producer, maker, supplier or shipper. 'Export' and 'exportation' will be construed in accordance with the provisions of this definition;</p> <p>The definition of 'importer' in Section 1(1) is hereby amended by the insertion of the following underlined words:</p> <p>'importer' includes, <u>subject to the provisions of sub-paragraph 1(3),</u> any person who, at the relevant</p>
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		<p>time –</p> <ul style="list-style-type: none">(a) is the owner or is in control or possession of any goods imported or to be imported into the Republic;(b) carries the risk for any goods so imported or to be imported;(c) represents that or acts as if he or she is the importer or owner of any goods so imported or to be imported;(d) actually brings or attempts to bring any goods into the Republic;(e) has a beneficial interest, in any manner or of any nature whatsoever, in any goods so imported or to be imported;(f) acts on behalf of any person referred to in paragraph (a), (b), (c), (d) or (e) of this
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		<p>definition,</p> <p>and 'import' and 'importation' will be construed accordingly.</p> <p>Section 1 is hereby amended by the insertion of new sections 1(3) and 1(4) to read as follows:</p> <p><u>1(3) The definitions of 'exporter' and 'importer' in relation to goods shall not include a person, other than the owner of the goods or a person having risk in and to the goods, who:</u></p> <p>(a) <u>ordinarily conducts business commercially and for reward as carrier, including a non-vessel owning common carrier, ships agent, insurer, clearing agent, forwarding agent, or a business in the nature of any of the foregoing; and</u></p> <p>(b) <u>in the case of 'counterfeit goods' has no</u></p>
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		<p><u>knowledge, or has no reason to suspect, that the goods in question are counterfeit.</u></p> <p><u>1(4) A person failing within the scope of sub-paragraph 1(3) shall not offend against the provisions of sub-section 2(1)(f) should he or she perform any of the acts prohibited in terms of the sub-section in the ordinary course of business unless it is proved that the person performed the act with the knowledge or with reason to suspect that the goods in question are counterfeit.</u></p> <p>Section 2(f) is hereby amended by the insertion of the following (underlined) words: be imported into or through or exported from <u>the Republic, or transited</u> through the Republic for import or export, except if so imported or exported for the private and domestic use of the importer or exporter, respectively;</p>
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Act 105 of 1998	National Empowerment Fund Act, 1998	Section 1 is hereby amended by the deletion of the following words (contained in brackets) from the definition of 'historically disadvantaged persons': [(Act 108 of 1996)]
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ANNEXURE B

STATUTES ADMINISTERED BY THE DEPARTMENT OF TRADE AND INDUSTRY

Number	Name of Act, number and year
1.	Industrial Development Act 22 of 1940
2.	Merchandise Marks Act 17 of 1941
3.	Industrial Development Amendment Act 27 of 1942
4.	Merchandise Marks Amendment Act 3 of 1946
5.	Merchandise Marks Amendment Act 26 of 1951
6.	Expropriation (Establishment of Undertakings) Act 39 of 1951
7.	Industrial Development Amendment Act 40 of 1951
8.	Merchandise Marks Amendment Act 47 of 1954
9.	Expropriation (Establishment of Undertakings) Amendment Act 52 of 1955
10.	Export Credit and Foreign Investments Insurance Act 78 of 1957
11.	Business Names Act 27 of 1960 repealed by Consumer Protection Act, 2008 (Act No. 68 of 2008)
12.	Unauthorized Use of Emblems Act 37 of 1961
13.	Export Credit Re-insurance Amendment Act 66 of 1961
14.	Industrial Development Amendment Act 67 of 1961
15.	Inventions Development Act 31 of 1962
16.	Export Credit Re-insurance Amendment Act 88 of 1962
17.	Sale and Service Matters Act 25 of 1964 (Previous short title: Price Control Act) repealed see No 11
18.	Inventions Development Amendment Act 45 of 1964
19.	Industrial Development Amendment Act 52 of 1964
20.	Industrial Development Amendment Act 89 of 1965
21.	Industrial Development Amendment Act 45 of 1966
22.	Performers' Protection Act 11 of 1967
23.	Merchandise Marks Amendment Act 55 of 1967
24.	Price Control Amendment Act 80 of 1967 repealed see No 11
25.	Usury Act 73 of 1968
26.	National Supplies Procurement Act 89 of 1970
27.	Export Credit Re-insurance Amendment Act 75 of 1971
28.	Business Names Amendment Act 84 of 1972 repealed see No 11
29.	Companies Act 61 of 1973

Number	Name of Act, number and year
30.	Measuring Units and National Measuring Standards Act 76 of 1973
31.	Trade Metrology Act 77 of 1973
32.	Expropriation (Establishment of Undertakings) Amendment Act 61 of 1974
33.	Companies Amendment Act 76 of 1974
34.	Industrial Development Amendment Act 47 of 1975
35.	National Supplies Procurement Amendment Act 54 of 1975
36.	Price Control Amendment Act 39 of 1976 repealed see No 11
37.	National Supplies Procurement Amendment Act 70 of 1976
38.	Trade Practices Act 76 of 1976 repealed see No 11
39.	Companies Amendment Act 111 of 1976
40.	Estate Agents Act 112 of 1976 removed Human Settlements
41.	Registration of Copyright in Cinematograph Films Act 62 of 1977
42.	Companies Amendment Act 64 of 1977
43.	
44.	National Building Regulations and Building Standards Act 103 of 1977
45.	Sugar Act 9 of 1978
46.	Patents Act 57 of 1978
47.	Companies Amendment Act 59 of 1978
48.	
49.	Trade Practices Amendment Act 78 of 1978-repealed see No 11
50.	Copyright Act 98 of 1978
51.	Protection of Businesses Act 99 of 1978
52.	Patents Amendment Act 14 of 1979
53.	Business Names Amendment Act 31 of 1979 repealed see No 11
54.	National Supplies Procurement Amendment Act 73 of 1979
55.	Protection of Businesses Amendment Act 114 of 1979-repealed see No 11
56.	Companies Amendment Act 115 of 1979
57.	Trade Practices Amendment Act 55 of 1980-repealed see No 11
58.	Copyright Amendment Act 56 of 1980
59.	Share Blocks Control Act 59 of 1980
60.	Credit Agreements Act 75 of 1980
61.	Companies Amendment Act 84 of 1980
62.	Industrial Development Amendment Act 96 of 1980

Number	Name of Act, number and year
63.	Alienation of Land Act 68 of 1981
64.	Export Credit Re-insurance Amendment Act 81 of 1981
65.	Companies Amendment Act 83 of 1981
66.	Small Business Development Act 112 of 1981 Minister Small Business
67.	Companies Amendment Act 29 of 1982
68.	National Supplies Procurement Amendment Act 31 of 1982
69.	Share Blocks Control Amendment Act 33 of 1982
70.	Abolition of the Fuel Research Institute Act 30 of 1983
71.	Alienation of Land Amendment Act 51 of 1983
72.	Copyright Amendment Act 66 of 1983
73.	Patents Amendment Act 67 of 1983
74.	Property Time-sharing Control Act 75 of 1983
75.	Trade Practices Amendment Act 7 of 1984 repealed see No 11
76.	Sugar Amendment Act 9 of 1984
77.	Inventions Development Amendment Act 10 of 1984
78.	
79.	Share Blocks Control Amendment Act 15 of 1984
80.	Price Control Amendment Act 16 of 1984 repealed see No 11
81.	National Building Regulations and Building Standards Amendment Act 36 of 1984
82.	Estate Agents Amendment Act 51 of 1984
83.	Copyright Amendment Act 52 of 1984
84.	Industrial Development Amendment Act 53 of 1984
85.—	Close Corporations Act 69 of 1984
86.	Companies Amendment Act 70 of 1984
87.	Protection of Businesses Amendment Act 71 of 1984
88.	Credit Agreements Amendment Act 9 of 1985
89.	
90.	International Convention for Safe Containers Act 11 of 1985
91.	Companies Amendment Act 29 of 1985
92.	Trade Practices Amendment Act 49 of 1985
93.	Share Blocks Control Amendment Act 78 of 1985
94.	Convention on Agency in the International Sale of Goods Act 4 of 1986
95.	Companies Amendment Act 31 of 1986

Number	Name of Act, number and year
96.	Close Corporations Amendment Act 38 of 1986
97.	Copyright Amendment Act 39 of 1986
98.	Estate Agents Amendment Act 40 of 1986
99.	Patents Amendment Act 44 of 1986
100.	Temporary Removal of Restrictions on Economic Activities Act 87 of 1986
101.	Credit Agreements Amendment Act 53 of 1987
102.	Merchandise Marks Amendment Act 54 of 1987
103.	Usury Amendment Act 62 of 1987
104.	Sugar Amendment Act 69 of 1987
105.	Temporary Removal of Restrictions on Economic Activities Amendment Act 72 of 1987
106.	Protection of Businesses Amendment Act 87 of 1987
107.	Copyright Amendment Act 13 of 1988
108.	National Supplies Procurement Amendment Act 25 of 1988
109.	Share Blocks Control Amendment Act 26 of 1988
110.	Export Credit and Foreign Investments Re-insurance Amendment Act 27 of 1988
111.	Scientific Research Council Act 46 of 1988 (to be administered by the Department of Science and Technology)
112.	Companies Amendment Act 63 of 1988
113.	Close Corporations Amendment Act 64 of 1988
114.	Housing Development Schemes for Retired Persons Act 65 of 1988
115.	Temporary Removal of Restrictions on Economic Activities Amendment Act 67 of 1988
116.	Consumer Affairs (Unfair Business Practices) Act 71 of 1988 repealed by Act 68 of 2008
117.	Patents Amendment Act 76 of 1988
118.	Usury Amendment Act 100 of 1988
119.	Housing Development Schemes for Retired Persons Amendment Act 20 of 1989
120.	Inventions Development Amendment Act 21 of 1989
121.	Copyright Amendment Act 61 of 1989
122.	National Building Regulations and Building Standards Amendment Act 62 of 1989

Number	Name of Act, number and year
123.	Companies Amendment Act 78 of 1989
124.	Usury Amendment Act 91 of 1989
125.	Trade Metrology Amendment Act 15 of 1990
126.	Close Corporations Amendment Act 17 of 1990
127.	Companies Amendment Act 18 of 1990
128.	Harmful Business Practices Amendment Act 43 of 1990
129.	Usury Amendment Act 67 of 1990
130.	Companies Second Amendment Act 69 of 1990
131.	Housing Development Schemes for Retired Persons Amendment Act 70 of 1990
132.	Harmful Business Practices Amendment Act 64 of 1991
133.	Housing Development Schemes for Retired Persons Amendment Act 66 of 1991
134.	Businesses Act 71 of 1991 (assigned)
135.	Sugar Amendment Act 71 of 1992
136.	Close Corporations Amendment Act 81 of 1992
137.	Companies Amendment Act 82 of 1992
138.	Copyright Amendment Act 125 of 1992
139.	Trade Metrology Amendment Act 17 of 1993
140.	Standards Act 29 of 1993
141.	Usury Amendment Act 30 of 1993
142.	Harmful Business Practices Amendment Act 33 of 1993
143.	Price Control Amendment Act 71 of 1993
144.	Space Affairs Act 84 of 1993
145.	Non-Proliferation of Weapons of Mass Destruction Act 87 of 1993
146.	Estate Agents Amendment Act 144 of 1993
147.	Businesses Amendment Act 186 of 1993 (assigned)
148.	Manufacturing Development Act 187 of 1993
149.	Trade Marks Act 194 of 1993
150.	Designs Act 195 of 1993
151.	Trade Metrology Amendment Act 42 of 1994
152.	Industrial Development Amendment Act 9 of 1995
153.	National Building Regulations and Building Standards Amendment Act 49 of 1995

Number	Name of Act, number and year
154.	Non-Proliferation of Weapons of Mass Destruction Amendment Act 50 of 1995
155.	Space Affairs Amendment Act 64 of 1995
156.	National Supplies Procurement Amendment Act 78 of 1995
157.	Credit Agreements Amendment Act 79 of 1995
158.	Sale and Service Matters Amendment Act 80 of 1995
159.	Usury Amendment Act 81 of 1995
160.	Estate Agents Amendment Act 21 of 1996
161.	Rationalisation of Corporate Laws Act 45 of 1996
162.	Integration of Usury Laws Act 57 of 1996
163.	Trade Metrology Amendment Act 58 of 1996
164.	Non-Proliferation of Weapons of Mass Destruction Amendment Act 59 of 1996
165.	National Small Business Act 102 of 1996
166.	Intellectual Property Laws Rationalisation Act 107 of 1996
167.	Close Corporations Amendment Act 26 of 1997
168.	Counterfeit Goods Act 37 of 1997
169.	Intellectual Property Laws Amendment Act 38 of 1997
170.	Lotteries Act 57 of 1997
171.	Regional Industrial Development Amendment Act 22 of 1998
172.	Measuring Units and National Measuring Standards Amendment Act 24 of 1998
173.	Companies Amendment Act 35 of 1998
174.	Companies Second Amendment Act 60 of 1998
175.	Competition Act 89 of 1998
176.	Estate Agents Amendment Act 90 of 1998
177.	Alienation of Land Amendment Act 103 of 1998
178.	National Empowerment Fund Act 105 of 1998
179.	Companies Third Amendment Act 125 of 1998
180.	Harmful Business Practices Amendment Act 23 of 1999
181.	Competition Amendment Act 35 of 1999
182.	Gambling Matters Amendment Act 36 of 1999 (to be repealed?)
183.	Companies Amendment Act 37 of 1999
184.	National Gambling Amendment Act 39 of 1999 (to be repealed)

Number	Name of Act, number and year
185.	Lotteries Amendment Act 10 of 2000
186.	Competition Amendment Act 15 of 2000
187.	Competition Second Amendment Act 39 of 2000
188.	Export Credit and Foreign Investments Re-insurance Amendment Act 9 of 2001
189.	Patents Amendment Act 10 of 2001
190.	Consumer Affairs (Unfair Business Practices) Amendment Act 21 of 2001
191.	Close Corporations Amendment Act 22 of 2001
192.	Counterfeit Goods Amendment Act 25 of 2001
193.	Trade Practices Amendment Act 26 of 2001
194.	Companies Amendment Act 35 of 2001
195.	Lotteries Amendment Act 46 of 2001
196.	Industrial Development Amendment Act 49 of 2001
197.	Merchandise Marks Amendment Act 50 of 2001
198.	Performers' Protection Amendment Act 8 of 2002
199.	Copyright Amendment Act 9 of 2002
200.	Export Credit and Foreign Investments Insurance Amendment Act 34 of 2002
201.	Corporate Laws Amendment Act 39 of 2002
202.	Patents Amendment Act 58 of 2002
203.	Merchandise Marks Amendment Act 61 of 2002
204.	International Trade Administration Act 71 of 2002
205.	Usury Amendment Act 10 of 2003
206.	National Small Business Amendment Act 26 of 2003
207.	Broad-based Black Economic Empowerment Act 53 of 2003
208.	Liquor Act 59 of 2003
209.	National Gambling Act 7 of 2004
210.	Companies Amendment Act 20 of 2004
211.	National Small Business Amendment Act 29 of 2004
212.	Co –operatives Act 14 of 2005
213.	Patents Amendment Act 20 of 2005
214.	Close Corporations Amendment Act 25 of 2005
215.	National Credit Act 34 of 2005
216.	Corporate Laws Amendment Act, 24 of 2006

Number	Name of Act, number and year
217.	Measurement Units and Measurement Standards Act 18 of 2006
218.	Accreditation for Conformity Assessment, Calibration and Good Laboratory Practice Act 19 of 2006
219.	National Regulator for Compulsory Specifications Act 5 of 2008
220.	Standards Act 8 of 2008
221.	National Gambling Amendment Act 10 of 2008
222.	Companies Act 71 of 2008
223.	Competition Amendment act 1 of 2009
224.	Companies Amendment Act 3 of 2011
225.	Co-operatives Amendment Act 6 of 2013
226.	Intellectual Property Laws Amendment Act 28 of 2013