

List of alterable provisions in the Companies Act, 2008

1. The Companies Act, 2008 ("**the 2008 Act**") provides that a company's Memorandum of Incorporation ("**MOI**") is subject to the 2008 Act and must be consistent with its provisions. To the extent that a provision of the MOI contravenes or is inconsistent with the 2008 Act, it is void (section 15(1)).
2. The 2008 Act, however, recognises that not all its provisions are suitable for all companies and therefore section 15(2) permits a company's MOI to -
 - 2.1 include matters that are not addressed in the 2008 Act;
 - 2.2 alter the effect of any "alterable" provision;
 - 2.3 impose on the company a higher standard, greater restriction, longer period of time or any similarly more onerous requirement, than would otherwise apply to the company in terms of an unalterable provision of the 2008 Act;
 - 2.4 contain any restrictive conditions applicable to the company, and any requirement for the amendment of any such condition in addition to the requirements for amendments of MOIs set out in section 16;
 - 2.5 prohibit the amendment of any particular provision of the MOI,
 - 2.6 provided that the MOI may not include any provision that negates, restricts, limits, qualifies, extends or otherwise alters the substance or effect of an unalterable provision of the 2008 Act, except to the extent contemplated in paragraph 2.3.
3. An "alterable" provision is a provision of the 2008 Act "in which it is expressly contemplated that its effect on a particular company may be negated, restricted, limited, qualified, extended or otherwise altered in substance or effect by that company's MOI" (section 1).



4. This note sets out the provisions of the 2008 Act, which we have identified as being "alterable".

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ALTERABLE PROVISIONS

| Section number | Relevant provision |
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| Chapter 1 – Interpretation, purpose and application | |
| Section 4(2)(c) | Solvency and liquidity test - distributions – <i>"unless the Memorandum of Incorporation of the company provides otherwise, when applying the test in respect of a distribution contemplated in paragraph (a) of the definition of 'distribution' in section 1, a person is not to include as a liability any amount that would be required, if the company were to be liquidated at the time of the distribution, to satisfy the preferential rights upon liquidation of shareholders whose preferential rights upon liquidation are superior to the preferential rights upon liquidation of those receiving the distribution."</i> (sic) |
| Chapter 2 Part B - Incorporation and legal status of companies | |
| Section 15(3) | Rules relating to governance - <i>"Except to the extent that a company's Memorandum of Incorporation provides otherwise, the board of the company may make, amend or repeal any necessary or incidental rules relating to the governance of the company in respect of matters that are not addressed in this Act or the Memorandum of Incorporation."</i> The MOI may also set out details regarding publication of rules (see section 15(3)(a)). |
| Section 16(2) | Amending the MOI - <i>"A company's Memorandum of Incorporation may provide different requirements than those set out in subsection (1)(c)(i) with respect to proposals for amendments [of the MOI]."</i> |
| Section 19(1)(b) | Powers and capacity of company - <i>"The company has all of the legal powers and capacity of an individual, except to the extent that . . . the company's Memorandum of Incorporation provides otherwise."</i> |
| Section 19(2) | Liability of incorporators - <i>"A person is not, solely by reason of being an incorporator, shareholder or director of a company, liable for any liabilities or obligations of the company, except to the extent that this Act or the company's Memorandum of Incorporation provides otherwise."</i> |
| Section 30(2)(b)(ii)(aa) | Annual financial statements - <i>"The annual financial statements must ... be either ... audited voluntarily If the company's Memorandum of Incorporation, or a shareholders resolution, so requires or if the Company's board has so determined ..."</i> |

| Section number | Relevant provision |
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| Chapter 2 Part C - Transparency, accountability and integrity of companies | |
| Section 34(2) | Additional accountability requirements for certain companies – <i>"A private company, personal liability company or non-profit company is not required to comply with the extended accountability requirements set out in Chapter 3, except to the extent contemplated in section 84(1)(c), or as required by the company's Memorandum of Incorporation."</i> |
| Chapter 2 Part D – Capitalisation of profit companies | |
| Section 35(6)(a) | Shares of pre-existing companies – <i>"Despite the repeal of the Companies Act, 1973 (Act No. 61 of 1973), a share issued by a pre-existing company, and held by a shareholder immediately before the effective date, continues to have all of the rights associated with it immediately before the effective date, irrespective of whether those rights existed in terms of the company's Memorandum of Incorporation, or in terms of that Act, subject only to— (a) amendments to that company's Memorandum of Incorporation after the effective date"</i> |
| Section 36(2)(b) | Amendments to share capital and classes - <i>"The authorisation and classification of shares, the numbers of authorised shares of each class, and the preferences, rights, limitations and other terms associated with each class of shares, as set out in a company's Memorandum of Incorporation, may be changed only by – (a) an amendment of the Memorandum of Incorporation by special resolution of the shareholders; or (b) the board of the company, in the manner contemplated in subsection (3), except to the extent that the Memorandum of Incorporation provides otherwise."</i> |
| Section 36(3) | Amendments to share capital and classes - <i>"Except to the extent that a company's Memorandum of Incorporation provides otherwise, the company's board may increase or decrease the number of authorised shares of any class of shares; reclassify any authorised but unissued classified shares; classify any authorised but unused unclassified shares; or determine the preferences, rights, limitations or other terms of shares in a class contemplated in section 36(1)(d)."</i> |
| | |
| Section 37(2) | Voting rights - <i>"Each issued share of a company, regardless of its class, has associated with it one general voting right, except to the extent provided otherwise by (a) this Act; or (b) the preferences, rights, limitations and other terms determined by or in terms of the company's"</i> |

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| | <i>Memorandum of Incorporation in accordance with section 36."</i> |
| Section 39(1)(a) | Pre-emptive right provisions - <i>"This section does not apply to a public company or state-owned company, except to the extent that the company's Memorandum of Incorporation provides otherwise."</i> |
| Section 39(3) | <p>Pre-emptive right provisions - <i>"A private or personal liability company's Memorandum of Incorporation may limit, negate, restrict or place conditions upon the statutory pre-emptive right in subsection (2), with respect to any or all classes of shares of that company."</i></p> <p>Section 39(2) states: <i>"If a private company proposes to issue any shares, other than as contemplated in subsection (1)(b), each shareholder of that private company has a right, before any other person who is not a shareholder of that company, to be offered and, within a reasonable time to subscribe for, a percentage of the shares to be issued equal to the voting power of that shareholder's general voting rights immediately before the offer was made."</i></p> |
| Section 39(4) | Subscription of shares – <i>"Except to the extent that a private or personal liability company's Memorandum of Incorporation provides otherwise— (a) in exercising a right in terms of subsection (2), a shareholder may subscribe for fewer shares than the shareholder would be entitled to subscribe for under that subsection; and (b) shares not subscribed for by a shareholder within the reasonable time contemplated in subsection (2), may be offered to other persons to the extent permitted by the Memorandum of Incorporation."</i> |
| Section 43(2) | Debt instruments - <i>"The board of a company— (a) may authorise the company to issue a secured or unsecured debt instrument at any time, except to the extent provided otherwise by the company's Memorandum of Incorporation; and (b) must determine whether each such debt instrument is secured or unsecured."</i> |
| Section 43(3) | <p>Debt instruments - <i>"Except to the extent that a company's Memorandum of Incorporation provides otherwise, a debt instrument issued by the company may grant special privileges regarding—</i></p> <p><i>(a) attending and voting at general meetings and the appointment of directors; or (b) allotment of securities, redemption by the company, or substitution of the debt instrument for shares of the company, provided that the securities to be allotted or substituted in terms of any such privilege, are authorised by or in terms of the company's Memorandum of Incorporation in accordance with section 36."</i></p> |

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| Section 44(2) | <p>Financial assistance for subscription or purchase of securities – <i>"Except to the extent that the Memorandum of Incorporation of a company provides otherwise, the board may authorise the company to provide financial assistance by way of a loan, guarantee, the provision of security or otherwise to any person for the purpose of, or in connection with, the subscription of any option, or any securities, issued or to be issued by the company or a related or inter-related company, or for the purchase of any securities of the company or a related or inter-related company, subject to subsections (3) and (4)."</i></p> |
| Section 45(2) | <p>Loans or other financial assistance to directors or related / inter-related parties – <i>"Except to the extent that the Memorandum of Incorporation of a company provides otherwise, the board may authorise the company to provide direct or indirect financial assistance to a director or prescribed officer of the company or of a related or inter-related company, or to a related or inter-related company or corporation, or to a member of a related or inter-related corporation, or to a person related to any such company, corporation, director, prescribed officer or member, subject to subsections (3) and (4)."</i></p> |
| Section 47(1) | <p>Capitalisation of shares – <i>"Except to the extent that a company's Memorandum of Incorporation provides otherwise— (a) the board of that company, by resolution, may approve the issuing of any authorised shares of the company, as capitalisation shares, on a pro rata basis to the shareholders of one or more classes of shares; (b) shares of one class may be issued as a capitalisation share in respect of shares of another class; and (c) subject to subsection (2), when resolving to award a capitalisation share, the board may at the same time resolve to permit any shareholder entitled to receive such an award to elect instead to receive a cash payment, at a value determined by the board."</i></p> |
| <p>Chapter 2 Part E – Securities registration and transfer</p> | |
| Section 56(1) | <p>Beneficial interest in securities – <i>"Except to the extent that a company's Memorandum of Incorporation provides otherwise, the company's issued securities may be held by, and registered in the name of, one person for the beneficial interest of another person."</i></p> |

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| Chapter 2 Part F – Governance of Companies | |
| Section 57(2)(a) | Voting – profit company with sole shareholders - <i>"If a profit company, other than a state-owned company, has only one shareholder that shareholder may exercise any or all of the voting rights pertaining to that company on any matter, at any time, without notice or compliance with any other internal formalities, except to the extent that the company's Memorandum of Incorporation provides otherwise."</i> |
| Section 57(3)(a) | Sole director of profit company - <i>"If a profit company, other than a state-owned company, has only one director that director may exercise any power or perform any function of the board at any time, without notice or compliance with any other internal formalities, except to the extent that the company's Memorandum of Incorporation provides otherwise."</i> |
| Section 57(4)(a) | All shareholders are also directors - <i>"If every shareholder of a particular company, other than a state-owned company, is also a director of that company any matter that is required to be referred by the board to the shareholders for decision may be decided by the shareholders at any time after being referred by the board, without notice or compliance with any other internal formalities, except to the extent that the Memorandum of Incorporation provides otherwise."</i> |
| Section 58(3) | Proxies – <i>"Except to the extent that the Memorandum of Incorporation of a company provides otherwise— (a) a shareholder of that company may appoint two or more persons concurrently as proxies, and may appoint more than one proxy to exercise voting rights attached to different securities held by the shareholder; (b) a proxy may delegate the proxy's authority to act on behalf of the shareholder to another person, subject to any restriction set out in the instrument appointing the proxy; and (c) a copy of the instrument appointing a proxy must be delivered to the company, or to any other person on behalf of the company, before the proxy exercises any rights of the shareholder at a shareholders meeting."</i> |
| Section 58(7) | Proxies - <i>"A proxy is entitled to exercise, or abstain from exercising, any voting right of the shareholder without direction, except to the extent that the Memorandum of Incorporation, or the instrument appointing the proxy, provides otherwise."</i> |
| Section 59(3) | Record date - <i>"If the board does not determine a record date for any action or event, the record date is— (a) in the case of a meeting, the latest date by which the company is required to give shareholders notice of that meeting; or (b) the date of the</i> |

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| | <p><i>action or event, in any other case,</i></p> <p><i>unless the Memorandum of Incorporation or rules of the company provide otherwise."</i></p> |
| Section 61(4) | <p>Shareholders' meetings – "A company's Memorandum of Incorporation may specify a lower percentage in substitution for that set out in subsection (3)(b)."</p> |
| Section 61(9) | <p>Location of shareholders' meetings - "Except to the extent that the Memorandum of Incorporation of a company provides otherwise— (a) the board of the company may determine the location for any shareholders meeting of the company; and (b) a shareholders meeting of the company may be held in the Republic or in any foreign country."</p> |
| Section 62(2) | <p>Notice of shareholder meetings – "A company's Memorandum of Incorporation may provide for longer or shorter minimum notice periods than required by subsection (1)."</p> |
| Section 63(2) | <p>Shareholders' meetings – electronic communication - "Unless prohibited by its Memorandum of Incorporation, a company may provide for— (a) a shareholders meeting to be conducted entirely by electronic communication; or (b) one or more shareholders, or proxies for shareholders, to participate by electronic communication in all or part of a shareholders meeting that is being held in person, as long as the electronic communication employed ordinarily enables all persons participating in that meeting to communicate concurrently with each other without an intermediary, and to participate reasonably effectively in the meeting."</p> |
| Section 64(2) | <p>Meeting quorums – "A company's Memorandum of Incorporation may specify a lower or higher percentage in place of the 25% required in either or both of subsection (1)(a) or (b)."</p> |
| Section 64(6) | <p>Postponement of meetings - "A company's Memorandum of Incorporation or rules may specify a different time in substitution for— (a) the period of one hour contemplated in subsections (4) and (5), respectively; or (b) the period of one week contemplated in subsection (4)."</p> |
| Section 64(9) | <p>Quorum - "Unless the company's Memorandum of Incorporation or rules provide otherwise, after a quorum has been established for a meeting, or for a matter to be considered at a meeting, the meeting may continue, or the matter may be considered, so long as at least one</p> |

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| | <i>shareholder with voting rights entitled to be exercised at the meeting, or on that matter, is present at the meeting."</i> |
| Section 64(13) | Adjournment of meetings - <i>"A company's Memorandum of Incorporation may provide for different maximum periods of adjournment of meetings than those set out in subsection (12), or for unlimited adjournment of meetings."</i> |
| Section 65(8) | Ordinary resolutions – <i>"Except for an ordinary resolution for the removal of a director under section 71, a company's Memorandum of Incorporation may require—</i> <i>(a) a higher percentage of voting rights to approve an ordinary resolution; or (b) one or more higher percentages of voting rights to approve ordinary resolutions concerning one or more particular matters, respectively,</i> <i>provided that there must at all times be a margin of at least 10 percentage points between the highest established requirement for approval of an ordinary resolution on any matter, and the lowest established requirement for approval of a special resolution on any matter."</i> |
| Section 65(10) | Special resolutions - <i>"A company's Memorandum of Incorporation may permit— (a) a lower percentage of voting rights to approve any special resolution; or (b) one or more lower percentages of voting rights to approve special resolutions concerning one or more particular matters, respectively, provided that there must at all times be a margin of at least 10 percentage points between the highest established requirement for approval of an ordinary resolution on any matter, and the lowest established requirement for approval of a special resolution on any matter."</i> |
| Section 66(1) | Board's managerial responsibility and authority - <i>"The business and affairs of a company must be managed by or under the direction of its board, which has the authority to exercise all of the powers and perform any of the functions of the company, <u>except to the extent that this Act or the company's Memorandum of Incorporation provides otherwise.</u>"</i> |
| Section 66(3) | Number of directors - <i>A company's Memorandum of Incorporation may specify a higher number in substitution for the minimum number of directors required by subsection (2).</i> |
| Section 66(5)(b) | Ex officio directors - <i>"A person contemplated in subsection (4)(a)(ii) [ex officio director] – (a)..... (b) who holds office or acts in the capacity</i> |

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| | <i>of an ex officio director of a company has all the— (i) powers and functions of any other director of the company, except to the extent that the company's Memorandum of Incorporation restricts the powers, functions or duties of an ex officio director; and (ii)</i> " |
| Section 66(8) | Directors' remuneration - <i>"Except to the extent that the Memorandum of Incorporation of a company provides otherwise, the company may pay remuneration to its directors for their service as directors, subject to subsection (9)."</i> |
| Section 66(12) | Number of committees on which a director may serve - <i>"Save as otherwise provided elsewhere in this Act or in the company's Memorandum of Incorporation, any particular director may be appointed to more than one committee of the company, and when calculating the minimum number of directors required for a company in terms of subsections (2) and (3), any such director who has been appointed to more than one committee must be counted only once."</i> |
| Section 68(1) | Election of Directors – <i>"Subject to subsection (3), each director of a profit company, other than the first directors or a director contemplated in section 66(4)(a)(i) or (ii), must be elected by the persons entitled to exercise voting rights in such an election, to serve for an indefinite term, or for a term as set out in the Memorandum of Incorporation."</i> |
| Section 68(2) | Election of Directors - <i>"Unless a profit company's Memorandum of Incorporation provides otherwise, in any election of directors— (a) the election is to be conducted as a series of votes, each of which is on the candidacy of a single individual to fill a single vacancy, with the series of votes continuing until all vacancies on the board at that time have been filled; and (b) in each vote to fill a vacancy— (i) each voting right entitled to be exercised may be exercised once; and (ii) the vacancy is filled only if a majority of the voting rights exercised support the candidate."</i> |
| Section 68(3) | Board vacancies - <i>"Unless the Memorandum of Incorporation of a profit company provides otherwise, the board may appoint a person who satisfies the requirements for election as a director to fill any vacancy and serve as a director of the company on a temporary basis until the vacancy has been filled by election in terms of subsection (2), and during that period any person so appointed has all of the powers, functions and duties, and is subject to all of the liabilities, of any other director of the company."</i> |
| Section 72(1) | Board committees – <i>"Except to the extent that the Memorandum of Incorporation of a company provides otherwise, the board of a company</i> |

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| | <i>may (a) appoint any number of committees of directors; and (b) delegate to any committee any of the authority of the board."</i> |
| Section 72(2) | Board committees - <i>"Except to the extent that the Memorandum of Incorporation of a company, or a resolution establishing a committee, provides otherwise, the committee— (a) may include persons who are not directors of the company, but (i) any such person must not be ineligible or disqualified to be a director in terms of section 69; and (ii) no such person has a vote on a matter to be decided by the committee; (b) may consult with or receive advice from any person; and (c) has the full authority of the board in respect of a matter referred to it."</i> |
| Section 73(2) | Board meetings – <i>"A company's Memorandum of Incorporation may specify a higher or lower percentage or number in substitution for those set out in subsection (1)(b)."</i> |
| Section 73(3) | Board meetings – electronic communication - <i>"Except to the extent that this Act or a company's Memorandum of Incorporation provides otherwise— (a) a meeting of the board may be conducted by electronic communication; or (b) one or more directors may participate in a meeting by electronic communication, so long as the electronic communication facility employed ordinarily enables all persons participating in that meeting to communicate concurrently with each other without an intermediary, and to participate effectively in the meeting."</i> |
| Section 73(5) | Board meetings – conduct - <i>"Except to the extent that the company's Memorandum of Incorporation provides otherwise— (a) if all of the directors of the company— (i) acknowledge actual receipt of the notice; (ii) are present at a meeting; or (iii) waive notice of the meeting, the meeting may proceed even if the company failed to give the required notice of that meeting, or there was a defect in the giving of the notice; (b) a majority of the directors must be present at a meeting before a vote may be called at a meeting of the directors; (c) each director has one vote on a matter before the board; (d) a majority of the votes cast on a resolution is sufficient to approve that resolution; and (e) in the case of a tied vote— (i) the chair may cast a deciding vote, if the chair did not initially have or cast a vote; or (ii) the matter being voted on fails, in any other case."</i> |
| Section 74(1) | Decisions other than at a board meeting – <i>"Except to the extent that the Memorandum of Incorporation of a company provides otherwise, a</i> |

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| | <i>decision that could be voted on at a meeting of the board of that company may instead be adopted by written consent of a majority of the directors, given in person, or by electronic communication, provided that each director has received notice of the matter to be decided."</i> |
| Section 78(4) | Indemnification – <i>"Except to the extent that a company's Memorandum of Incorporation provides otherwise, the company— (a) may advance expenses to a director to defend litigation in any proceedings arising out of the director's service to the company; and (b) may directly or indirectly indemnify a director for expenses contemplated in paragraph (a), irrespective of whether it has advanced those expenses . . ."</i> |
| Section 78(5) | Indemnification - <i>"Except to the extent that the Memorandum of Incorporation of a company provides otherwise, a company may indemnify a director in respect of any liability arising other than as contemplated in subsection (6)."</i> |
| Section 78(7) | D&O Insurance - <i>"Except to the extent that the Memorandum of Incorporation of a company provides otherwise, a company may purchase insurance to protect— (a) a director against any liability or expenses for which the company is permitted to indemnify a director in accordance with subsection (5); or (b) the company against (i) any expenses— (aa) that the company is permitted to advance in accordance with subsection (4)(a); or (bb) for which the company is permitted to indemnify a director in accordance with subsection (4)(b); or (ii) any liability for which the company is permitted to indemnify a director in accordance with subsection (5)."</i> |
| Section 84(1)(c) | Application of Chapter 3 - <i>"This Chapter applies to ... a private company, a personal liability company or a non-profit company — (i) if the company is required by this Act or the regulations to have its annual financial statements audited every year: Provided that the provisions of Parts B and D of this Chapter will not apply to any such company; or (ii) otherwise, only to the extent that the company's Memorandum of Incorporation so requires, as contemplated in section 34(2)."</i> |
| Section 115(2)(a) | Quorum requirement for approval of fundamental transaction - <i>"A proposed transaction contemplated in subsection (1) must be approved - (a) by a special resolution adopted by persons entitled to exercise voting rights on such a matter, at a meeting called for that purpose and at which sufficient persons are present to exercise, in aggregate, at least 25% of all of the voting rights that are entitled to be exercised on that matter, or any higher percentage as may be required by the company's Memorandum of Incorporation, as contemplated in section 64 (2) ..."</i> |

| Section number | Relevant provision |
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| Schedule 1 – Provisions concerning non-profit companies | |
| Sch 1, Item 1(8) | Non-profit companies – voting - <i>"The vote of each member of a non-profit company is of equal value to the vote of each other voting member on any matter to be determined by vote of the members, except to the extent that the company's Memorandum of Incorporation provides otherwise."</i> |
| Schedule 5 – Transitional arrangements (Note: here all references to the Memorandum of Incorporation, are to a company's memorandum and articles of association) | |
| Sch 5, Item 4(4) | Position for two years from the effective date - <i>"During the period of two years immediately following the general effective date— (a) if there is a conflict between— (i) a provision of this Act, and a provision of a pre-existing company's Memorandum of Incorporation, the latter provision prevails, except to the extent that this Schedule provides otherwise; (ii) a binding provision contemplated in sub-item (3), and this Act, the binding provision prevails; or (iii) a provision of an agreement contemplated in sub-item (3A), and this Act or the company's Memorandum of Incorporation, the provision of the agreement prevails, except to the extent that the agreement, or the Memorandum of Incorporation, provides otherwise ..."</i> |
| Sch 5, Item 7(1) | Directors, officers etc of pre-existing companies - <i>"A person holding office as a director, prescribed officer, company secretary or auditor of a pre-existing company immediately before the effective date, continues to hold that office as from the effective date, subject to the company's Memorandum of Incorporation, and this Act."</i> |