



# **Comments on the Proposed Requirements for the accreditation of an “accredited entity” as defined in Section 166 (3) of the Companies Act No. 71 of 2008**

Prepared and submitted by

**The South African Dispute Settlement Accreditation Council [“DiSAC”]**

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# **1 Introduction**

## **1.1 DiSAC**

The Dispute Settlement Accreditation Council [‘DiSAC’] is a voluntary Industry Body that aims to provide a uniform system of dispute resolution practitioner accreditation, and aims to represent the collective view of the dispute settlement industry in South Africa. DiSAC was officially launched in March 2010.

DiSAC appreciates the opportunity to comment on the draft accreditation requirements. The views expressed here arise from our cumulative experience of training, coaching, assessing and managing mediators and arbitrators; from administering and conducting dispute resolution processes; and from practice in the field of mediation and arbitration.

We trust that our contribution will enrich the process of deliberation about these requirements.

These comments represent the views of the Dispute Settlement Accreditation Council (“DiSAC”). These comments in addition have the express support of the following members of DiSAC:

- Africa Centre for Dispute Settlement, University of Stellenbosch Business School
- Tokiso Dispute Settlement (Pty) Ltd
- Equillore Group Limited
- Association of Arbitrators, Southern Africa
- Royal Institution of Chartered Surveyors SA
- Conflict Dynamics
- Arbitration Foundation of South Africa (AFSA)
- The Mediation Company.

DiSAC will appreciate the opportunity to engage in discussions on the various issues raised in these comments.

## **1.2 Contact details**

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## **2 The Comments**

### **2.1 General Comment**

Subject to the specific important issues raised below, DiSAC commends the Department on the draft requirements, as well as the structural approach proposed through these accreditation requirements. The document broadly reflects the accepted industry standards that have been adopted in South Africa and Internationally.

### **2.2 Accreditation of “Entities” (a juristic person or an association of persons), as apposed to individual persons**

DiSAC strongly supports the proposed approach of accrediting “entities” rather than individual persons. This is an effective structure for ensuring that there is accountable supervision over the activities of individual mediators and arbitrators.

Normally such a system of supervision will include:

- Affiliation by individual mediators and arbitrators to an accredited entity;
- Assessment by that entity of applicants’ skills and experience, against an objective industry wide standard
- Formal subjection or consent by the practitioners to the code of conduct / practice norms, which includes subjection to the disciplinary processes of that organization
- A complaints process that is accessible to members of the public and that activates the disciplinary process; and
- Regular review of affiliation of mediators, based on their conduct.

By accrediting “entities” with these capabilities, all of these elements will be in place, and there will be an effective system of governance over that activities of individuals.<sup>1</sup>

***We must mention that:***

- ***This above effectively describes the accreditation model that DiSAC has put in place. The “entities” accredited by DiSAC as service providers, were all require to demonstrate the capability.***
- ***These entities were accredited in accordance with DiSAC’s accreditation standard for “service providers”. This standard is contained in section 11 of the attached document entitled MEDIATION ACCREDITATION STANDARDS.***
- ***We would recommend that the suggested accreditation criteria for sect 166 be amplified with the requirements contained in this DiSAC standard***

### **2.3 Similarities with CCMA Accreditation Process ito sect 127 of the LRA**

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<sup>1</sup> Section 166(1)(c) makes mention of “any other person”. The draft requirements though seem to deal with sect 166(1)(b), rather than with individual persons. We support this approach.

In terms of sect 127 of the Labor Relations Act any private body may apply to the CCMA for accreditation to conduct conciliation, mediation, arbitration ito of sect 188A of the LRA.

The CCMA has published a policy as well as accreditation standards in this regard, and has also completed an accreditation process, through which 3 service providers were in fact accredited.

Though you may well be aware of this, we attach for the sake of completeness, copies of the CCMA's policy, as well as its application form.

***The CCMA accreditation requirements include a number of aspects that are not addressed in your proposed requirements, such as those dealing with independence and representivity. We would recommend that these are of critical importance, and that they also be included in your requirements.***

***Though your proposed approach is already well aligned with that of the CCMA, we would recommend that such alignment be as complete as possible – ie that CiPC and CCMA have as far as is possible, a uniform standard of accreditation. This will ensure that a uniform standard is maintained in the industry, and that there is clarity with service providers as to what is required.***

#### **2.4 Assessing the Applications ito sect 166**

The draft requirements stipulate that applicants would (amongst other things) have to submit the following substantive information:

- Details of a case management system
- Rules of procedure adopted for each type of ADR service offered
- Enforcement mechanism for ADR outcomes
- Qualification standards for ADR practitioners
- Code of ethics/ethical rules that the applicant has adopted
- Recourse mechanism for parties in the event of complaints against ADR practitioners

We agree that these are important, and that applicants must show competency in this regard.

However the draft standard gives no indication of:

- (1) What minimum requirements CIPC expects of these matters; and
- (2) What standard CIPC will use to assesse and measure these competencies against.

***We must point out that CIPC's assessment of applications ito sect 166 will be an administrative act subject to PAJA. As such you may be requested to provide reasons, and to justify, why certain applications were rejected, and others accepted. The best possible way of doing this, would be to publish an objective standard against which applicants and their competency will be assessed. This will also ensure that applicants submit high standard applications.***

***In practical terms this may mean that CIPC will have to express a view on matters such as:***

- *The minimum training and experience required of ADR practitioners (such standards are available – see for example the DiSAC standard attached. The Department of Environmental Affairs has also published mediator and arbitrator accreditation standards)*
- *The minimum requirements of a case management system*
- *The minimum content of a code of conduct, as well as recourse mechanisms, etc*

*It is further important to ensure that the person(s) performing the assessment are qualified and competent to do so. If not, the assessment may be open to legal challenge.*

## **2.5 “Enforcement mechanism for ADR outcomes”**

The draft requirements indicate that applicants would have to provide information regarding the “enforcement mechanism for ADR outcomes”.

- Is there an expectation that “entities’ will act as an enforcing body? If so, how would this work? [Our view is that such mechanisms are prescribed by law – statute as well as common law, and that this must prevail]
- If ADR providers are not expected to act as enforcing bodies (which would be preferable and sensible) is this question therefore about seeking to know if ADR providers are able to demonstrate to clients the methodology they (the clients) must use to enforce settlements arising out of different ADR mechanisms, e.g. enforcing mediation settlements in the courts using contract law methodology, enforcing arbitration awards in the courts under procedures set out in statute?

## **2.6 Further Clarity regarding the following requirements should be provided:**

- Proof of compliance with all regulatory and statutory requirements for registration and ongoing conduct of business [please clarify]
- Name of auditors [please clarify]
- Schedule of ADR practitioner fees [presumably providers will be required to set fee scales for ADR practitioners?]
- Cost of Application and Renewal [presumably this will be stipulated in due course. We would recommend that the tariff be set at a level that discourages frivolous applications, but not be a barrier to entry for serious applicants.]

## **2.7 Period of Accreditation**

We would propose a 24 month accreditation period – rather than the proposed 18 months. The process places an administrative burden on all concerned, and we would argue that there is no valid reason for not extending accreditation to 24 months.

**Attachment 1: DiSAC Mediation Accreditation Standards**

**Attachment 2: CCMA Accreditation Policy**

**Attachment 3: CCMA Accreditation Application Form**