



THE NEW COMPANIES ACT

Facing Up To the Implications

INTRODUCTION

The new Companies Act 71 of 2008 is expected to come into force in the latter half of 2010.

It is extremely important that companies prepare for the transition from the old Act to the new Act as soon as possible. All directors, managers and relevant employees need to acquaint themselves with the provisions of the new Act.

Existing companies will need to take a number of important steps to avoid being tripped up by the new Act and the purpose of this document is to highlight some of the implications.

While there are a number of challenges ahead, Cliffe Dekker Hofmeyr is well positioned to help your company ensure compliance with the new legislation. We also offer training tailored to your business needs to help you meet your obligations.

SOME KEY CHANGES

- 1. Memorandum of incorporation (MOI):** A single MOI will replace the memorandum and articles of association that are the current constitutional documents of a company.
- 2. Categories of companies:** Although the fundamental nature of companies remains unchanged, the new Act now divides all companies into two broad categories –
 - “profit companies” (comprising state owned, private, personal liability and public companies), and

- “non-profit companies”.

The concept of a widely held company has been done away with.

- 3. No par value shares:** The new Act no longer provides for par value shares. Instead, all shares issued by companies in terms of the new Act will be no par value shares.
- 4. Audit committees:** The new Act generally requires all public and state-owned companies to comply with enhanced accountability and transparency requirements, which include appointing an audit committee.

A 'state-owned company' includes an enterprise that falls within the meaning of 'state-owned enterprise' in terms of the Public Finance Management Act 1 of 1999 or is owned by a municipality as contemplated in the Local Government: Municipal Systems Act 32 of 2000.

- 5. Directors' duties:** The duties of directors are partially codified for the first time.
- 6. Increased transparency** requirements and increased protection is afforded to shareholders (for example, in the form of information rights, derivative actions and shareholder appraisal rights).
- 7. Shareholders' agreements:** A shareholders' agreement should be consistent with the provisions of a company's MOI, and will be void to the extent that it conflicts with the provisions of the MOI.

8. New bodies:

- A new institution, the Companies Tribunal, is established.
- CIPRO is transformed into the Companies and Intellectual Property Commission.
- The Securities Regulation Panel is now the Takeover Regulation Panel.

WHAT SHOULD YOU DO NOW?

- Replace your existing memorandum and articles of association with a new MOI. We advise you to do so as soon as possible after the new Act comes into operation rather than wait for the permitted two year grace period allowed for this purpose to run its course.
- Convert your par value shares into no par value shares during the five year grace period provided for share conversion, or if deemed necessary, prior to the effective date of the new Act. If you are not going to convert your par value shares close to the effective date of the new Act, you should consider increasing your authorised par value share capital prior to the effective date of the new Act.
- Revise any existing shareholders' agreements. The new Act allows shareholders to enter into a shareholders' agreement concerning any matter relating to the company as long as the agreement is consistent with the provisions of the company's MOI.
- Draft any new shareholders' agreements with a view to the imminent coming into operation of the new Act.
- If for some reason you do not wish to replace the company's existing memorandum and articles of association with effect from the new Act coming into operation, carefully review and, if necessary, amend existing articles to remove any inconsistency between the articles and any shareholders' agreement. In addition, identify which provisions of the articles are effectively overridden by the new Act, even during the two year transitional period.
- If required, adopt incidental rules relating to the governance of the company as contemplated in the new Act.

WHAT MIGHT HAPPEN IF YOU DO NOT COMPLY?

- If a company does not adopt a new MOI within the first two years of the new Act coming into force, the provisions of the new Act will override the provisions of the company's memorandum and articles to the extent that they are inconsistent with the new Act. The undesirable effect will be that the functioning of the company and the relationship between the shareholders could fundamentally change to the default provisions provided for in the new Act.
- If a company does not convert its par value shares into no par value shares within the five year grace period the company will no longer

be able to issue further par value shares. Prior to the conversion of par value shares, and during the five year grace period, companies will only be entitled to issue further par value shares out of its unissued authorised share capital as at the effective date of the new Act.

- If a company does not align its shareholders' agreement with the provisions of the new Act and its MOI, the provisions of the shareholders' agreement that are inconsistent with the MOI will cease to have any further force or effect. This could have a detrimental effect on the relationship between shareholders and on the agreed rights and obligations of shareholders against their co-shareholders and the company.

HOW CAN WE ASSIST YOU?

Our team of experts is ready to assist you to prepare for the coming into operation of the new Act.

Our services include:

- Providing companies, their directors, managers and employees with information and training concerning the provisions of the new Act. Training sessions and seminars can be tailor made to address the specific needs of each company.
- Having regard to the provisions of the current memorandum and articles of association, advising and assisting your company in the preparation and adoption of a new tailor made MOI, or, in the absence of an immediate replacement of the existing memorandum and articles of association, reviewing the existing articles with a view to amending them so that they are aligned with the shareholders' agreement.
- Considering the current shareholders' agreement and assisting with aligning that agreement with the provisions of the new Act and proposed contents of the company's new MOI.
- Considering all other agreements that may be affected by the new Act and assisting in aligning those agreements with the provisions of the new Act.
- Considering and evaluating the existing capital structure of a company and the rights attached to the shares in the company, and advising on the restructuring and conversion of par value shares into no par value shares.
- If required, drafting tailor made rules for a company to comply with the provisions of the new Act.
- Assistance in implementing corporate governance changes.
- Providing specialist advice on all aspects of the new Act.

CONTACT US

For assistance on any aspect relating to the new Companies Act, please contact any member of our team listed below.

JOHANNESBURG (SANDTON)



Chris Ewing
Director
Corporate and Commercial
T +27 (0)11 290 7120
E chris.ewing@dcladh.com



Ian Hayes
Director
National Practice Head
Corporate and Commercial
T +27 (0)11 290 7121
E ian.hayes@dcladh.com



Johan Latsky
Director
Corporate and Commercial
T +27 (0)11 286 1276
E johan.latsky@dcladh.com



Banzi Malinga
Director
Corporate and Commercial
T +27 (0)11 286 1192
E banzi.malinga@dcladh.com



Peter Prinsloo
Director
Corporate and Commercial
T +27 (0)11 290 7075
E peterprinsloo@dcladh.com

CAPETOWN



Peter Hesselning
Director
Regional Practice Head
Corporate and Commercial
T +27 (0)21 405 6009
E peter.hesselning@dcladh.com



David Thompson
Director
Regional Practice Head
Corporate and Commercial
T +27 (0)21 481 6335
E david.thompson@dcladh.com



Jerome Veldsman
Director
Regional Practice Head
Finance, Projects and Banking
T +27 (0)21 405 6035
E jerome.veldsman@dcladh.com



André de Lange
Director
Corporate and Commercial
T +27 (0)21 405 6565
E andre.delange@dcladh.com



Jo Nesper
Director
Corporate and Commercial
T +27 (0)21 481 6329
E jo.nesper@dcladh.com



Francis Newham
Director
Corporate and Commercial
T +27 (0)21 481 6326
E francis.newham@dcladh.com



CONTACT US

If you would prefer to receive our publications electronically, please inform us by sending an email to marketing@dcladh.com with your full contact details.

Our publications are published for general information and are not intended as legal advice.

©2010. For permission to reproduce a publication, please contact our marketing team on marketing@dcladh.com

JOHANNESBURG

6 Sandown Valley Crescent
Sandown
Sandton 2196
Private Bag X40
Benmore 2010
South Africa
Dx 154 Randburg
T +27 (0)11 286 1100
F +27 (0)11 286 1264
E jhb@dcladh.com

1 Protea Place
Sandown
Sandton 2196
Private Bag X7
Benmore 2010
South Africa
Dx 42 Johannesburg
T +27 (0)11 290 7000
F +27 (0)11 290 7300
E jhb@dcladh.com

CAPE TOWN

11 Buitengracht Street
Cape Town 8001
PO Box 695
Cape Town 8000
South Africa
Dx 5 Cape Town
T +27 (0)21 481 6300
F +27 (0)21 481 6388
E ctn@dcladh.com

5th floor Protea Place
Protea Road
Claremont 7708
PO Box 23110
Claremont 7735
South Africa
Dx 5 Cape Town
T +27 (0)21 683 2621
F +27 (0)21 671 9740
E ctn@dcladh.com

www.cliffedekkerhofmeyr.com

EVERYTHING MATTERS

Cliffe Dekker Hofmeyr is a member of DLA Piper Group,
an alliance of legal practices