

Firstly, you will have two years from the implementation date to replace your existing Memorandum and Articles of Association with a new Memorandum of Incorporation. During this grace period your existing Memorandum and Articles of Association will prevail in the event of a conflict with the new Act. Thereafter, the new Act prevails and your company may be left in a state of great uncertainty if there are conflicts.

Secondly, you will need to review your shareholders' agreement. These agreements will have dealt with matters that are not or could not be included in the Memorandum and Articles of Association under the old Act, and they are critical to the smooth operation of many companies, as well as the protection of shareholder interests. Under the old Act, shareholders' agreements were valid even if

they were inconsistent with the Companies Act. This is set to change and shareholders' agreements will be invalid to the extent that they are inconsistent with the new Act. Unlike your existing Memorandum and Articles of Association, shareholders' agreements do not enjoy a grace period. As soon as the new Act becomes effective, shareholders' agreements will immediately be invalid to the extent they conflict with the new Act.

We believe that the sensible approach is to review your shareholders' agreements and Articles of Association at the same time - they cannot be looked at separately - and to do this as soon as possible. This will ensure that the new Act does not pose any unexpected problems for you and your company.

## new recruits for 2010

*From the 1972 television series, Kung Fu:*

*Po, a blind Kung Fu master, addresses a new recruit after having easily defeated him in combat:*

*Recruit: But you cannot see.*

*Master Po: Ha, ha. Never assume because a man has no eyes he cannot see. Close your eyes. What do you hear?*

*Recruit: I hear the water. I hear the birds.*

*Master Po: Do you hear your own heart beat?*

*Recruit: No.*

*Master Po: Do you hear the grasshopper that is at your feet?*

*Recruit (looking down and seeing the insect):*

*Old man, how is it that you hear these things?*

*Master Po: Young man, how is it that you do not?*

We have taken on three new candidate attorneys this year. They will spend time in each department and, by the end of their two-year internship, they will have a thorough grounding in the law.



Nicola Schröder

**Nicola Schröder** grew up in Winterton, in the central Drakensberg. She schooled at Winterton Primary School and then attended St Johns DSG in Pietermaritzburg. Nicola has a Bachelor of Social Science, majoring in Law and Psychology, and completed her Bachelor of Laws Degree at the University of KwaZulu-Natal (Pietermaritzburg campus). Raised in a farming community, Nicola loves the country and enjoys swimming, fishing, reading and cooking.



Sarah Bulcock

**Sarah Bulcock** attended Howick Preparatory School and Howick High School. After matriculating she participated in a Rotary Short-Term Exchange Programme in Germany. She then tackled her LLB through the University of KwaZulu-Natal,



Lishen Maharaj

**Lishen Maharaj** travelled and worked in the United Kingdom after matriculating. On his return, he completed an LLB from the University of KwaZulu-Natal's Pietermaritzburg campus.

Lishen is the reason for our obscure Kung Fu quote (see above) - Lishen has long been attracted to the discipline involved in martial arts training and has studied under his teacher and friend *Sifu* Salim Badat for many years. Salim, in turn, was taught by none other than Richard Bustillo, Bruce Lee's first student. A little Kung Fu may well come in handy in court!

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Supplement  
May 2010

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## land ownership a new direction?

*I never think of the future. It comes soon enough.  
- Albert Einstein*

Land ownership is a highly emotional issue for most people.

The Department of Rural Development and Land Reform recently ignited these emotions by suggesting that government would nationalise land. The Minister has thankfully doused the flames by, amongst other things, confirming in the Financial Mail on 2 April 2010 that "all we have said is that land is a national asset ... We have not spoken of state ownership over private land. The Department's utterances were unfortunate but there is no plan to nationalise".

The Department recently released its strategic plan for 2010-2013. The plan raises the possibility of a three-tier system of land ownership. It is not entirely clear how this system will operate, but I understand the three tiers to relate only to state-owned land and to land alienated by the state in the future:

The first tier is for state-owned land. It seems that government policy towards state-owned land is changing. This land is regarded as a national asset and, in future, will in general not be sold but leased (perhaps on a 99-year basis), subject to the condition that the land is used productively.

The second tier, freehold land with limited extent, is a little more enigmatic. It is not clear

from the available information, but I understand that this tier operates as an exception to the state-owned land principle - government may sell limited portions of state land but subject to its determination of the maximum number of hectares required for a viable commercial farm or smallholding.

The third tier will be foreign-owned land with, to quote the Minister, "precarious tenure". Conditions, such as partnership with locals, will be attached to ownership to ensure that South Africans derive some benefit from that holding.

A public consultation process will follow; the strategic plan will be formally presented as a green paper in due course. Watch this space for the next instalment!



Redvers Lee  
Property Division

## what is happening with the new companies act?

*The future: that period of time in which our affairs prosper, our friends are true and our happiness is assured.*

*- Ambrose Bierce*



Tim Brown  
Commercial Division

Good question. What is the current status of the new Companies Act of 2008? And when and how will it start to affect you?

### Current status

The new Companies Act will come into force on a date to be notified by government, probably (according to the Department of Trade and Industry) during the third quarter of 2010. The new Act will replace the old Companies Act of 1973.

The Act has already been promulgated, but a significant number of errors have been identified and acknowledged by the Department. It is unclear how these errors are being addressed and when we will see the final, corrected legislation. A set of regulations has also been published, but only for public comment at this stage. The regulations will be finalized in the months to come.

The answer, then, is that the Act will probably come into effect somewhere between July and September 2010, unless the correction of errors occasions further delay.

### Implications for close corporations

Existing close corporations will be entitled to continue operating. You will be able to convert

a corporation to a company under the new Companies Act, but will not be obliged to do so. However, as from the date of effect of the new Companies Act, it will not be possible to register *new* close corporations - so if you are thinking of establishing one in the future, you should acquire a shelf corporation as soon as possible.

### Implications for companies

Imagine that the IRB announces that it has replaced the rules of rugby. The new rules, says the Board, are based on the old rules, but are intended to modernize the game and therefore introduce some fundamental new principles. The new Companies Act will have exactly the same effect on business. The Sharks are lectured by professional referees at the start of each season on the implications of any rule changes made during the off-season. Business people are going to need to do much the same in order to come to terms with the new rules of business. We will be presenting seminars to clients once the implementation date and the final content of the new Act are known.

Other than understanding the new rules, every company will need to take at least two legal steps.