



THE COMPANIES ACT OF 2008

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ABOUT NPO LEGAL ISSUES:

This is an electronic newsletter published by: **RICARDO WYNGAARD ATTORNEYS** which is aimed at updating the non-profit sector on relevant legal issues.

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RICARDO WYNGAARD ATTORNEYS is a law practice that specialises in rendering advice and assistance on non-profit law and governance.

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Article Four: Transitional Period

This fourth article focuses on the transition of s21 companies from the Companies Act of 1973 (the current Act) to non-profit companies in terms of the new Companies Act of 2008 (the new Act).

Schedule 5 of the Act

Schedule 5 of the new Act sets out the transitional arrangements to be adhered to when the new Act comes into operation. All existing s21 companies will:

- Continue to exist as if it have been incorporated and registered in terms of the new Act. This means that the provisions of the new Act (unless otherwise provided) will automatically apply to existing s21 companies from the date the Act comes into operation.
- Be deemed to have amended its Memorandum of Incorporation to expressly state that it is a non-profit company.
- Have to ensure that all directors, officers, company secretaries and auditors are not ineligible to be or disqualified from serving in their respective positions.
- Have to ensure that all directors comply with the standard of conduct and duties contained in the new Act.
- Have two years to:
 - File an amendment to its Memorandum of Incorporation and change its name, without charge, to bring it in harmony with the new Act, and
 - Ensure that governance rules issued by the Company are consistent with the new Act.

Issues to consider:

S21 companies will have to consider a number of issues, when the new Act comes into operation, including:

Membership vs. Non-membership – The current Act requires s21 companies to have at least seven members. In some cases the seven members also doubled up as the company's directors. The new Act abandons the requirement for membership for non-profit companies. Current s21 companies having their seven members also serving as the only directors should consider adopting a Memorandum of Incorporation that does not provide for membership but only for directors.

Audit, independent review or neither – S21 companies will have to decide whether the finances of the non-profit company will be audited, independently reviewed or neither. Depending on the final regulations that will be promulgated in terms of the new Act, some companies may not have a choice.



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Committee membership – Members of board committees may, in terms of the new Act, be held liable if they breach any provision of the new Act and any provision of the company's Memorandum of Incorporation. This liability extends to committee members who are not members of the company's board. Existing and new committee members will have to be made aware of the relevant provisions of the new Act.

Business Rescue – The new Act introduces a new concept of business rescue. This would mainly be relevant to non-profit companies carrying on business activities. Should such companies be in financial distress they may, in theory, make use of the business rescue proceedings provided for in terms of the new Act. The ultimate objective here is to rescue a financially distressed company by 'restructuring its affairs, business, property debt and other liabilities' to ensure its continued existence. Time will tell whether this is a useful avenue for non-profit companies, but it should be considered if the company is in financial distress.

Foreign non-profit companies operating in South Africa will have to consider whether it is required from them to register as external non-profit companies in terms of the new Act. These companies that have (or are) conducting defined business or non-profit activities in South Africa must register as external non-profit companies with the Companies Commission within twenty business days after having commenced with those activities.

Such activities include having:

- established or maintained bank or other financial accounts,
- held meetings of its members or directors,
- created or acquired debts, mortgages or security interests in any property,
- acquired any interest in property, or
- entered into contracts of employment.

These external companies will have to maintain at least one office in South Africa, register the address of its office and file annual returns with the Companies Commission.

Risk Management: Legal Issues - Part I

This is the start of a series of checklists aimed at covering some of the legal issues that NPOs may be dealing with on a day-to-day basis. It is hoped that this series will assist boards to manage some of the legal risks that NPOs may be exposed to.

Principle 4.1 of the King Code of Governance Principles (King III) provides that the board should be responsible for the governance of risk. Despite its shortcomings in relation to the nonprofit sector, the King III Report makes a number of positive recommendations in relation to risk management, including:

- Capturing the board's scope of responsibility in a board charter
- Induction and Training
- Appointing a risk committee consisting of three members
- Developing the risk committee's terms of reference
- Developing a risk management policy
- Developing a risk management plan
- Ensuring the performance of regular risk assessments

Managing the legal risks should be one of the key focus areas for the board. This first article will focus briefly on the legal risks that NPOs face in safeguarding their names and reputation.

Questions to keep in mind in this regard:

1. Is the NPO's name reserved for its exclusive use in terms of the Heraldry Act, No. 18 of 1962?
2. Has the NPO got registered trade mark protection for its brand name, logo and slogans?
3. Is the NPO infringing on the trade mark rights of other entities?

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