

New Companies Act 2006

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As you may be aware, between now and October 2009 UK company law will undergo the biggest change in 20 years, as the Companies Act 1985 is replaced by the 2006 Act. All companies will be affected. Directors, company secretaries and senior executives need to be aware of the key changes and consider updating their company's policies and procedures and the articles of association.

The Act is complicated; however this document should go some way in assisting by giving a flavour of things, it should only be used for guidance.

Below is a summary of some possible changes to Articles of Association, and related issues, that you might like to consider as a result of sections that are already in force or that will come in later this year. We would be pleased to give you practical assistance and advice on whether your company should make any of these changes. Please let me know if we can do this for you.

Key changes:

- The principal duties of directors are now set out in the Act. Directors and senior executives should be aware of these, and company procedures and policies should be aligned with the new factors which directors are now required to take into account when making decisions. Changes to the rules on directors' conflicts of interest which come into force on 1 October 2008 mean that all companies, particularly quoted ones, should change their articles by that date to provide a framework to deal with actual and potential conflicts. Most companies will want to permit non-conflicted directors to authorise a director to proceed notwithstanding an actual or potential conflict.
- Quoted companies in particular will therefore need to propose changes to their articles at this year's AGM. Protocols should also be updated or established to deal with the disclosure and management of potential conflicts and circumstances where directors are offered hospitality or other benefits.
- The Act now makes it easier for shareholders to bring derivative claims against directors on behalf of the company. Directors should consider putting in place (or updating) company indemnities and directors and officers (D & O) insurance. Companies should also consider whether their articles should be changed to permit the company to indemnify its directors to the maximum extent now allowed by law.
- To take advantage of new provisions in the Act, it is prudent to consider changing articles to facilitate electronic and website communication with shareholders. At the same time, the opportunity could also be taken to update articles to reflect other developments in law and best practice.
- From 6 April 2008 auditors will be able to limit their liability for auditing accounts by agreement with their audit client, subject to certain restrictions.
- The administration of most private companies can now be simplified:
 - Private companies no longer need to hold an AGM unless their articles require it (although it may be necessary to lay accounts at a meeting in 2008).
 - Except for resolutions to remove an auditor, or to remove a director under the statutory procedure (rather than under a provision in the company's articles), all resolutions of private companies can be passed in writing. But public companies (even unquoted privately-owned public companies) cannot pass resolutions in writing at all, even if their articles say that they can.
 - Until October last year a resolution in writing by shareholders was only effective if unanimous. Now an ordinary resolution of a private company can be passed in writing by a simple majority of the total voting rights of eligible members; and a special resolution in writing by 75%. However, the procedure in the Act (rather than any procedure of the type which most existing companies' articles will contain) must be followed or the resolution will be ineffective.
 - Unless the articles specify a longer period (which they usually do), general meetings of both private and public companies require 14 days' notice only, even if a special resolution is proposed. The only exception is that a public company must continue to give at least 21 days' notice of an AGM. Many companies will want to make this change to their articles to allow meetings to be held more quickly.

- Public companies (plc) are subject to stricter rules than private companies, and do not benefit from most of the deregulatory changes in the new Act. It may therefore be worth considering re-registration as private if a company does not need to be a public company.
 - New provisions now in force will necessitate changes to general meeting procedures, notices and proxy cards, particularly for quoted companies. For example, changes have been made to the rules on the appointment of proxies and their rights at meetings, and to voting by corporate representatives. In addition, a registered shareholder in an Official List company can now nominate a person or persons on whose behalf he holds shares (i.e. indirect investors) to receive copies of accounts, circulars, notices of meetings etc, whether or not the company's articles provide for this.
 - Directors' reports of 'Official List' and certain other quoted companies published for financial years starting on or after 1 October 2007 will have to contain additional forward-looking information and information about the company's key customers and suppliers. For financial years starting on or after 20 May 2006 (and therefore all 2007 year accounts, which may currently be in the course of preparation), such reports must include certain information about how the company is controlled, including:
 - the structure of the company's capital including in particular, the rights and obligations attaching to the shares;
 - any restrictions on transferring shares;
 - the identity of any significant shareholders;
 - any restrictions on voting rights;
 - the procedures for appointing and replacing directors and amending the articles and also the powers of the company's directors;
 - any "significant agreements to which the company is a party that take effect, alter or terminate on a change of control", unless disclosure would be "seriously prejudicial" to the company; and
 - any agreements between the company and its directors' or employees providing for compensation for loss of office or employment that occurs because of a takeover bid.
- Once a company has filed an annual return made up to a date after 30 September 2007, a person seeking access to the register of members will have to state his name, address and the purpose for which access is sought. If the company can persuade a court that the purpose is not a proper one, it can refuse access. All companies, particularly high profile ones, need to establish procedures to vet such requests and, if necessary, to apply to court. Those that have not yet filed an annual return since 30 September 2007 may wish to file one as soon as possible.

Please let me know if we can help you with preparing for changes made by the new Act or if you have any questions about this email.

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