

# Implications for charitable companies of the Companies Act 2006

**James Sinclair Taylor** explains why charities should review their memorandum and articles and supporting policies.

The Act, meant to simplify company law, has instead created a situation where most charities must review their memorandum and articles and supporting policies to:

- understand new rules on conflicts
- recognise provisions that overrule current memorandum and articles
- utilise new deregulation
- clarify directors' duties.

## Conflicts of interest

Difficulties arise where there is a trustee of both your charity and charity B, who as a result of being a trustee of your charity, becomes aware of an opportunity which would also be important for charity B, thus creating a conflict of interest. The Act says the trustee should declare the conflict for the other directors to authorise. Unfortunately for charitable companies, the Act states that conflict can only be authorised if there is a provision in their articles allowing such authorisation. Although the Memorandum of Association frequently contains provisions dealing with a conflict directly between the charity and the trustee, these provisions will not cover the conflict of interest outlined here.

## Are your articles overruled by the Act?

### Proxy voting for all

Before the Act, many charitable companies only

permitted voting to be in person. Since October 2007, all companies must allow proxy voting. Not notifying members of their rights to vote by proxy is a punishable offence.

### Written resolutions

The Act makes it easier for members to pass a resolution without holding a general meeting by allowing written approval of at least 75% of the members (in the case of a special resolution) or more than 50% of the members (in the case of an ordinary resolution). Prior to the Act, 100% approval was required.

### Taking advantage of deregulation

- The required notice period for general meetings is now 14 days. However, the relaxation doesn't apply where the company's articles require a longer notice period.
- A general meeting can now be called on short notice with the written approval of at least 90% of members. Previously this was 100% for an AGM and 95% for an EGM.
- Companies are no longer obliged to hold annual general meetings, unless their articles require them to do so. If you amend your articles to stop holding AGMs, you should consider the implications for trustee election.
- It is no longer obligatory to give the company's accounts and reports before members at an AGM.

Despite these changes, you will still have to comply with the old law if your articles have not been updated.

### **Directors' duties**

Directors' duties are now clarified in statute:

- To act within the company's powers.
- To exercise independent judgement.
- To exercise reasonable care, skill and diligence.
- To act in the way, which a director considers in good faith, would be best to achieve the company's purposes.

Three further statutory duties are expected on 1 October 2008:

- Avoid conflicts of interest.
- Refuse benefits from third parties resulting from being a director or doing or not doing anything as a director.
- Ensure the company declares the nature and extent of a director's direct or indirect interest in any proposed or existing transaction or arrangement. The declaration can be made through a directors' meeting or a notice sent to other directors (by general notice for example, through a register of interests set before directors, worded appropriately).

These duties also apply where a director could have a direct or indirect conflicting interest. The Act does not define how an indirect interest must be evaluated. Conflicts can arise because of the interests of persons treated as connected to a director. These include:

- a partner with whom the director lives in an enduring family relationship

- children, including step-children.

An additional complexity arises, as this list of connected persons is different than in the Charities Act.

### **Paying trustees**

The Charities Act 2006 allows paying trustees for services provided in certain circumstances. However, if a charity utilises this provision, it needs to observe the requirements in the Companies Act, requiring copies of all directors' service contracts to be available for inspection and allowing members to attend and take copies of such contracts.

### **Recommendations**

We recommend that charitable companies review their memorandum and articles to ensure that there are no contradictions between those articles and the new rights and duties under the Companies Act, and also, to ensure that they can take advantage of the various liberalisations now available.

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