These notes refer to the Companies Act 2006 (c.46)
which received Royal Assent on 8 November 2006

COMPANIES ACT 2006

EXPLANATORY NOTES

TERRITORIAL EXTENT AND DEVOLUTION

Chapter 2: Articles of Association

65. A company's articles are rules, chosen by the company's members, which govern a company's internal affairs. They form a statutory contract between the company and its members, and between each of the members in their capacity as members, and are an integral part of a company's constitution. At present, companies may divide their constitutional rules between their memoranda and their articles, with the terms of their memoranda being capable of being altered after formation in some respects but not in others. In future, the memorandum will be a very simple document of purely historic significance, evidencing an intention to form a company, and all the company's key internal rules on matters such as the allocation of powers between the members of a company and its directors will be set out in the articles – see notes on sections 8 and 28.

Section 18: Articles of association

66. This section replaces section 7(1) and (3) and section 744 of the 1985 Act. It carries forward the requirement that all registered companies must have articles. The provisions of this section have been updated to reflect the changes made by section 19, which gives the Secretary of State the power to prescribe "default" model articles for different descriptions of companies. As a result of this change, some types of company that are currently required to register articles with the relevant registrar of companies (for example, private companies limited by guarantee) will have the option of not registering articles but relying on the "relevant model articles" for that description of company.

67. As now, the articles must be contained in a single document and must be divided into consecutively numbered paragraphs.

68. Generally speaking, companies formed under the 1985 Act have freedom to make such rules about their internal affairs as they see fit, subject to the qualification that if a company's articles contain anything that is contrary to the provisions of that Act, or against the general law, then it will have no effect. This principle will also apply to the articles of companies which are formed and registered under the Act.

Section 19: Power of Secretary of State to prescribe model articles

Section 20: Default application of model articles

69. Section 8 of the 1985 Act enables the Secretary of State to prescribe model forms of articles for companies registered under that Act (see the Companies (Tables A to F) Regulations 1985 (SI 1985/805)). Articles for certain special types of companies used in particular sectors, for example, commonhold associations, right to manage ("RTM") companies, and right to enfranchise ("RTE") companies are prescribed by regulations made under the Acts of Parliament that created these types of company.

70. Although sections 8 and 8A of the 1985 Act allow the Secretary of State to prescribe forms of articles (and memoranda) for a number of different types of company under section 8, he is only able to prescribe "default" model articles for companies limited by shares. "Default" model articles are model articles which apply to companies of a particular description where they have not registered any articles of their own, or have not made provision for a particular matter for which there is a corresponding model article. "Default" model articles apply to a company of the description for which they are prescribed only to the extent that it has not modified the default provision in question in its own registered articles or excluded it, or the model articles in their entirety, from the registered articles.

71. The rationale behind this is that the model articles should operate as a "safety net" which enables the members and directors of such companies to take decisions in circumstances where a company has failed to provide the appropriate authority in its registered articles (or failed to register articles at all).

72. These two sections replace section 8 of the 1985 Act. In line with the CLR's recommendations (Company Formation and Capital Maintenance, paragraph 2.22), the Secretary of State will have the power to prescribe model articles, including "default" model articles, for different descriptions of companies formed under the Act.

73. For existing companies, there will be no change. The principle is maintained that the version of the model articles that was in force at the time that a particular company was originally registered will continue to apply to that company. For the majority of companies limited by shares on the register at the date that the Act comes into force, the "default" model articles will continue to be the Companies Act 1985 Table A ("Table A").

74. Existing companies will be free to adopt, wholly or in part, the model articles prescribed for companies of a particular description formed under the Act (see *subsection (3)* of section 19). For example, an existing private company limited by shares may prefer to adopt the new model articles for private companies limited by shares, or indeed the new model articles for public companies formed under the Act (with or without modification) in place of the current Table A articles, or previous articles of its own devising.

75. As with Table A, the adoption of model articles by companies formed under the Act will be entirely a matter for individual companies. They will be able to incorporate (with or without amendment) provisions from the model articles, and/or add to those provisions, and/or exclude such provisions as they think fit.

76. They will also be able to adopt the provisions of model articles by reference. This is a common practice, which enables a company that wishes to incorporate specific provisions of the model articles into its own registered articles to do this without having to copy out the provision in question. To take an example, a company's registered articles may say something to the following effect: "*the model articles apply except for articles x, y and z*", or "*the company's articles are A, B and C, plus model articles g, p and q. Model article n applies but is amended as follows*: …". Companies have found such techniques useful in the past and they will continue to be permitted.

Section 21: Amendment of articles

77. *Subsection (1)* provides that, as now, a company's articles can in general be amended by special resolution. This restates section 9(1) of the 1985 Act.

78. *Subsections (2) and (3)* make it clear that this general principle is subject to certain rules in charities legislation about the ability of companies which are charities to change their constitutions and the effects which such changes have. There are separate but broadly similar rules for English and Welsh, Scottish and Northern Irish charities.

Section 22: Entrenched provisions of the articles

79. Section 22 is a new provision. It replaces the current practice (provided for in section 17(2)(b) of the 1985 Act), whereby companies are able to entrench certain elements of their constitution by putting them in their memoranda and providing that they cannot be altered.

80. This section permits companies to provide in their articles that specified provisions may be amended or repealed only if conditions are met that are more restrictive than would apply in the case of a special resolution. Such a provision is referred to as a "provision for entrenchment". As a result of this section companies formed under the Act will not be permitted to provide in their articles that an entrenched provision can never be repealed or amended.

Section 23: Notice to registrar of existence of restriction on amendment of articles

81. This is a new provision that requires a company to give notice to the registrar when an entrenching provision is included in its articles (whether on formation or subsequently) or where the company's articles are altered by order of a court or other authority so as to restrict or exclude the power of the company to amend its articles. There is a corresponding requirement as to notice where the company amends its articles so as to remove a provision for entrenchment or where the articles are altered by order of a court or other authority so as to remove a provision for entrenchment or any other restriction on, or any exclusion of, the power of the company to amend its articles.

Section 24: Statement of compliance where amendment of articles restricted

82. This is a new provision. Where a company's articles contain provision for entrenchment or where the articles are subject to an order of a court or other authority restricting or excluding the company's power to amend its articles and the company subsequently amends its articles, it is required to send to the registrar the document making or evidencing the amendment. This document must be accompanied by a "statement of compliance" (see note on section 13).

83. The statement of compliance must certify that the amendment to the articles has been made in accordance with the company's articles (including any provision for entrenchment) or, where relevant, in accordance with any order of the court or other authority that is in force at the time of the amendment.

84. The purpose of the provisions in sections 23 and 24 is to ensure that the registrar, and any person searching the public register, is on notice that the articles contain entrenching provisions and that special rules therefore apply to the company's articles.

Section 25: Effect of alteration of articles on company's members

85. This section restates section 16 of the 1985 Act. The only difference is that section 16 also applied to alterations of a company's memorandum. A company formed under the Act will not be able to (or need to) alter its memorandum.

86. This section retains the principle that a member of a company is not bound by any alteration made to the articles subsequent to his becoming a member if the alteration has the effect of increasing his liability to the company or requires him to take more shares in the company. A member may however give his written consent to such an alteration and, where he does, he will be bound by it.

Section 26: Registrar to be sent copy of amended articles

87. The First Company Law Directive (68/151/EEC) requires Member States to take such measures as are required to ensure that companies disclose certain constitutional information which will then be made available to the public in a central register. In particular, companies are to be required to disclose (i) their "*instrument of constitution,*

and the statutes if they are contained in a separate instrument"; (ii) *any amendments to these instruments*; and (iii) "*after every [such] amendment…the complete text of the instrument or statutes as amended to date*". For UK companies, the "instrument of constitution" equates to the memorandum and the "statutes" equate to the articles. The central registers are those kept by the registrars of companies for England and Wales, Scotland and Northern Ireland.

88. This section replaces equivalent provisions in section 18(2) and (3) of the 1985 Act and Schedule 24 to that Act.

89. Where a company fails to comply with the provisions of this section, the company and every officer of the company who is in default commits an offence. The penalty for this offence is set out in *subsection (4)*.

Section 27: Registrar's notice to comply in case of failure with respect to amended articles

90. This section is a new provision. It gives the registrar a means of ensuring that companies comply with the obligation set out in section 26 without having to resort to criminal proceedings. (However, the offence of failing to file amended articles is retained: see of section 26(3)).

91. Where the registrar becomes aware of any default in complying with section 26 (or any similar provision of another enactment that was in force at the time of the default, for example, section 18(2) of the 1985 Act), she may give notice to the company requiring it to rectify the breach within 28 days. Where the company complies with the notice, the company will avoid prosecution for its initial failure to comply. If the company does not comply, it will be liable to a civil penalty of £200, recoverable by the registrar as a debt, in addition to any criminal penalty that may be imposed (see, for example, section 26(4)).

Section 28: Existing companies: provisions of memorandum treated as provisions of articles

92. For companies formed under the Act, the memorandum will contain limited information evidencing the intention of the founder members to form a company. The memoranda of existing companies, on the other hand, will contain key constitutional information of a type which will in future be set out in the articles or provided to the registrar in another format (see Part 2). *Subsection (1)* of this section provides that such material is to be treated for the future as part of the company's articles.

93. *Subsection (2)* of this section makes it clear that where the memorandum of an existing company contains a provision for entrenchment (see note on section 22) at the date that this part of the Act comes into force, this will be deemed, with effect from that date, to be a provision for entrenchment in the company's articles.