

## Companies Act 2006

The Companies Act 2006 (“the Act”) received Royal Assent on the 16th October 2006 and came into operation on the 1st November 2006. The Financial Supervision Commission has been appointed Registrar of Companies (“the Registrar”) by the Treasury and is responsible for the administration of the Act.

The Act is, with the exception of the provisions relating to liquidation and receivership, a stand alone piece of legislation. Companies incorporated under it (“2006 Act companies”) will co-exist with present and future companies incorporated under the Companies Acts 1931-2004 (“1931 Act Companies”).

### Key Features

A 2006 Act company has a number of key features including:

- no requirement for authorised share capital;
- no capital maintenance requirements (subject to satisfaction of a solvency test);
- no prohibition on the giving of financial assistance;
- reduced compulsory registry filings;
- less prescriptive accountancy requirements;
- no distinction between public and private companies;
- simplified offering document requirements;
- the ability to have single directors and (within certain restrictions) corporate directors;
- no requirement to hold an AGM;
- the availability of transfer of domicile procedures;
- re-registration procedures; and
- merger and consolidation procedures.

### Types of Vehicles Available

A 2006 Act company will be a legal entity in its own right separate from its members and will continue in existence until it is dissolved.

A company can be incorporated, registered or continued under the Act as:

- a company limited by shares;
- a company limited by guarantee;
- a company limited by shares and by guarantee;
- an unlimited company with shares; or
- an unlimited company without shares.

### Incorporation

Every company will be required to have both a registered agent in the Isle of Man and a registered office address in the Isle of Man. Only the holder of the appropriate licence granted by the Isle of Man Financial Supervision Commission pursuant to the Isle of Man Fiduciary Services Acts 2000 and 2005 is permitted to act as a registered agent.

In order to incorporate a 2006 Act company, the proposed memorandum and articles of the company must be submitted to the Registrar by the first registered agent. Provided the proposed memorandum and articles meet the legal requirements in the Act, the Registrar will register them, allot a company registration number to the company and issue a certificate of incorporation. The company is then incorporated.

### Power and Capacity

The memorandum of a 2006 Act company may contain a statement specifying the purposes for which the company is established or the business, activities or transactions which the company is permitted to undertake or the restrictions (if any) upon such purposes, business activities or transactions for which the company is established.

However, notwithstanding any provision to the contrary included in a 2006 Act company’s memorandum or articles, a company has (irrespective of corporate benefit and irrespective of whether or not it is in the best

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interests of, the company to do so), unlimited capacity to carry on or undertake any business or activity, to do, or to be subject to, any act or to enter into any transaction.

In addition, in favour of any person dealing with a company in good faith, the power of the directors to bind the company or to authorise others to do so, is deemed to be free of any limitations (including limitations deriving from any provision in the company's memorandum or articles, any resolution of the members, or any agreement between the members).

## Directors

Unlike 1931 Act companies, a 2006 Act company can have a single director which may be an individual or a body corporate. A body corporate will only be eligible to act as a corporate director if it, or another body corporate of which it is a subsidiary, is:

- the holder of an appropriate licence issued by the Isle of Man Financial Supervision Commission under the Isle of Man Fiduciary Services Acts 2000 and 2005; or
- permitted to act as a corporate director by regulations made pursuant to the Act.

Subject to any contrary provision in a company's memorandum or articles, the Act expressly provides that the business and affairs of the company will be managed by or under the direction or supervision of the directors and that the directors will have all the powers necessary for managing, directing and supervising the business and affairs of the company.

The directors will exercise their powers by resolutions:

- passed at a board meeting; or
- passed as written resolutions.

Resolutions passed at board meetings will require the approval of the majority of the directors present (subject to any contrary provision in the company's memorandum or articles). There is express authority in the Act to enable telephonic or electronic board meetings to be held provided that all directors participating in the meeting can communicate with each other.

Directors' written resolutions will require the agreement of all of the directors or of such majority (greater than 50%) as is specified in the company's memorandum or articles. Written resolutions can be consented to in writing or by email, telex, fax or other electronic communication.

The directors of a 2006 Act company, whether they be individual directors or corporate directors, will still be subject to the various duties imposed on directors by common law as well as fiduciary duties, including the duties to act bona fide in the best interests of the company and for proper purposes.

## Members

The Act permits 2006 Act companies to be single member companies. Subject to contrary provision in the Act or a company's memorandum or articles, the members exercise their powers by resolutions:

- passed at a meeting of the members; or
- passed as a written resolution.

Resolutions passed at a members meeting require the approval of a member or members holding in excess of 50% of the voting rights exercised in relation thereto (subject to any contrary provision in the Act or in the company's memorandum or articles). Telephonic or electronic members' meetings may be held provided that all members participating in the meeting are able to communicate with each other.

Members' written resolutions will require the agreement of all of the members entitled to vote or of a member or members holding such percentage of the voting rights as is specified in the memorandum or articles (subject to any requirement in the Act for any resolution to be passed by a particular majority). Written resolutions can be consented to in writing or by email, telex, fax or other electronic communication without the need for any notice.

The terms "ordinary", "special" and "extraordinary" resolution are not used in the Act.

## Shares

The Act provides that shares in a 2006 Act company may (without limitation):

- be convertible, common or ordinary;
- be redeemable at the option of the shareholder or the company or either of them;
- confer preferential rights to distributions;
- confer special, limited or conditional rights, including voting rights; and/or
- entitle participation only in certain assets.

In addition, subject to any contrary provisions in a company's memorandum or articles, a company may:

- issue bonus shares and nil or partly paid shares;
- issue shares with or without a par value;
- issue shares in any currency (if the shares have a par value);
- issue shares numbered or unnumbered; and/or
- issue fractional shares.

As with 1931 Act companies, bearer shares are not permitted.

## Offering Documents

The offering document requirements in the Act are far less prescriptive than those applying to 1931 Act companies but are no less stringent. The Act requires that any offering document issued in relation to a company must:

- contain all material information relating to the offer or invitation contained therein (i) that the intended recipients would reasonably expect to be included therein in order to enable them make an informed decision as to whether or not to accept the offer or make the application referred to therein; and (ii) of which the directors or proposed directors were aware at the time of issue of the offering document or of which they would have been aware had they made such enquiries as would have been reasonable in all the circumstances; and
- set out such information fairly and accurately.

It is the duty of the directors or proposed directors (in the case of a company yet to be incorporated) to ensure that any offering document complies with these requirements.

## The Solvency Test and Distributions

The solvency test replaces the traditional capital maintenance requirements which apply to 1931 Act companies.

A company will satisfy the "solvency test" if:

- it is able to pay its debts as they become due in the normal course of its business; and
- the value of its assets exceeds the value of its liabilities.

A "distribution" essentially means the transfer of company assets or the incurring of a debt by a company to or for the benefit of a member and includes the payment of dividends and the redemption, purchase or other acquisition by a company of its own shares.

The Act allows the directors of a company to authorise a distribution by the company to its members at such time and of such amount as they think fit. However, before doing so, they must be satisfied, on reasonable grounds, that the company will satisfy the solvency test immediately after the distribution.

## Accounting Records

The accounting requirements imposed on a 2006 Act company are less prescriptive than those imposed on 1931 Act companies. The Act requires a company to keep reliable accounting records which:

- correctly explain the transactions of the company;
- enable the financial position of the company to be determined with reasonable accuracy at any time; and
- allow financial statements to be prepared.

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A 2006 Act company must also retain such invoices, contracts and other information as are necessary to allow the company to document:

- all sums of money received and expended and the matters in respect of which the receipt and expenditure took place;
- all sales and purchases; and
- the assets and liabilities of the company.

## **Statutory Books**

Originals or copies (as required) of the following statutory books and documents are required to be kept at all times at the office of the registered agent of a 2006 Act company:

- memorandum and articles signed by each subscriber;
- register of members;
- register of directors;
- register of charges;
- copies of all notices and other documents filed with the Registrar in the previous 6 years;
- its accounting records.

2006 Act Companies must also keep minute books of meetings and resolutions passed by its directors, members and classes of members. If these minutes are not kept at the office of the registered agent, the directors are required to advise the registered agent of the physical address where such records are kept.

## **Filing Requirements**

A 2006 Act Company is required to file the following with the Registrar:

- its memorandum and articles and any subsequent amendments;
- any change in its name;
- any change of its registered office address;
- any change of its registered agent;
- its annual return;
- any applications and filings in connection with its dissolution, restoration or winding up; and
- any applications and filings in connection with any re-registration, scheme of merger, consolidation or arrangement, transfer of domicile or conversion into a protected cell company.

There is no requirement for the company to file with the Registrar details of any change in its directors as they occur (although these details will be required to be disclosed on the company's annual return), any increase or reduction in its share capital, any alteration to its share capital, any allotment of shares or any members resolutions (other than as required in connection with any of the matters listed above).

A 2006 Act Company can, however, elect to file a copy of its register of directors and/or register of members with the Registrar. If a company makes such an election it must notify the Registrar of any changes to the details held on the relevant register(s) within a month of the change taking place. In addition, a company may choose to file any offering document which it issues with the Registrar, but it is not required to do so.

A 2006 Act company is required to register any charge which it creates (including any charge existing on property acquired by the company) with the Registrar within one month after the date of its creation (or the date of acquisition of the property). Failure to register a charge will result in the charge being void against the liquidator and any creditor of the company.

If a 2006 Act company neglects to file a charge with the Registrar, the company may submit the charge to the Registrar for late registration at any time prior to the commencement of the winding up of the company. However, any late registration of a charge will be subject to the rights of any person acquired during the period between the date of creation of the charge and the date of its registration.



## **Re-registration Procedures, Transfer of Domicile, Schemes of Merger, Consolidation or Arrangements and Protected Cell Companies**

The Act also contains relatively simple procedures to enable:

- a 2006 Act company to be re-registered as a different type of company permitted under the Act;
- a 1931 Act company to be re-registered as a 2006 Act company;
- a 2006 Act company to be continued in a country or territory outside the Isle of Man and discontinued under the Act;
- a foreign company to be continued in the Isle of Man as a 2006 Act company;
- companies to be merged or consolidated or to be subject to a scheme of arrangement under the Act; and
- a company which has been constituted as a company limited by shares to be converted into a protected cell company.