

Jordans Company Secretarial Precedents

Eighth Edition

Cecile Gillard LLB (Hons), FRSA

Charities Legal Manager, Burton Sweet, Chartered Accountants

Debbie Farman

Director of Legal Practice, Jordans Corporate Law Limited

Angela Cotton

Head of Corporate Governance, Jordans Corporate Law Limited

Helen Goose

Corporate Law Manager, Jordans Corporate Law Limited

Published by Jordan Publishing, owned by LexisNexis

Jordan Publishing
Regus
Terrace Floor
Castlemead
Lower Castle Street
Bristol BS1 3AG

© Jordan Publishing 2016

Whilst the publishers and the author have taken every care in preparing the material included in this work, any statements made as to the legal or other implications of any transaction, any particular method of litigation or any kind of compensation claim are made in good faith purely for general guidance and cannot be regarded as a substitute for professional advice. Consequently, no liability can be accepted for loss or expense incurred as a result of relying in particular circumstances on statements made in this work.

All rights reserved. No part of this publication may be reproduced, stored in a retrieval system, or transmitted in any way or by any means, including photocopying or recording, without the written permission of the copyright holder, application for which should be addressed to the publisher.

Crown Copyright material is reproduced with kind permission of the Controller of Her Majesty's Stationery Office.

British Library Cataloguing-in-Publication Data

A catalogue record for this book is available from the British Library.

ISBN 978 1 78473 176 2

Typeset by Letterpart Limited, Caterham on the Hill, Surrey CR3 5XL

Printed in Great Britain by CPI Group (UK) Ltd, Croydon, CR0 4YY

Introduction and How to Use this Book

Welcome to this eighth edition of Jordans Company Secretarial Precedents, which has been updated to reflect practical and legal changes in company administration since the previous edition, including the latest changes to procedures now required by Companies House for compliance by companies with their statutory obligations and for the submission of data for the public records of registered companies.

In this introduction, we identify the areas of law and practice that the book covers, comment on the practical impacts of the Companies Act 2006 (as amended by the Small Business, Enterprise and Employment Act 2015) on the secretarial administration of private companies, and explain how to use the precedents.

ABOUT THIS BOOK

This book offers practical help to those facing the many challenges posed by the company secretarial administration of private companies. It provides precedents for situations and transactions that the corporate administrator or company secretary of a private limited company will find themselves dealing with, either frequently because they are common situations and transactions, or occasionally, when particular needs and circumstances arise. Emphasis is placed on the private limited company, as the vast majority of companies currently registered in the United Kingdom are private companies.

Many of the precedents are suitable for private companies limited by shares or by guarantee. Others are indicated as being specific to one or the other type of company. For further information about how to use the precedents see below.

(The book does not deal with precedents or procedures specific to public companies, under the Companies Act 2006 or other legislation, such as the financial services legislation, including those that have any listing.)

Each chapter focuses on particular subject matter, such as 'Shares and Share Capital'. Where there is a large quantity of material, it is subdivided into appropriate sub-sections within each chapter (eg 'Appointment and cessation of office – directors'). Each section or sub-section begins with an overview summary of the key legal rules and practical issues, cross referring to the appropriate precedents which follow. Individual precedents are annotated with specific notes to indicate important issues the user should be aware of.

GENERAL MATTERS – SECRETARIAL ADMINISTRATION OF COMPANIES

The secretarial administration of private companies is a matter that requires careful and expert attention. The many regulatory and other corporate legal obligations imposed on a company are the principal legal responsibility of its directors, but they will certainly look to the person dealing with the secretarial administration for advice and assistance in complying correctly with

those obligations. Companies must meet a wide range of annual and event related public filing obligations within the appointed time limits. Failure to do so exposes both the company and its board to various liability risks, including enhanced civil financial penalties and many potential criminal sanctions.

Companies House is a very effective and efficient regulator of compliance by companies with the latest public accountability requirements. Further, those responsible for company administration need to be aware of how accessible corporate data is – a company is exposed to the public gaze of anyone with access to the internet, via the Companies House website and many other data sources. Actual or potential customers, suppliers and business partners, the company's own members, those who may become future employees, the company's competitors and many others (including the press and general public) can therefore identify any corporate compliance defaults as readily as they can check that a particular company in which they have any interest is in 'good order'.

A board of directors must ensure it has in place the right systems and procedures, and above all that it can call on help from the right people, with appropriate skills and up-to-date knowledge, to meet these accountability standards and the increasing expectations of that wide range of 'stakeholders'. Whether the key person providing that assistance is described as a 'secretary' or not is less important than the importance of their practical role.

SMALL BUSINESS ENTERPRISE AND EMPLOYMENT ACT 2015 (SBEEA 2015)

SBEEA makes a number of important changes to company law and regulation, by amendments to the Companies Act 2006. The changes that impact on the secretarial administration of private companies are dealt with in relevant chapters.

IMPACT OF THE COMPANIES ACT 2006 – GENERAL

The Companies Act 2006 was the culmination of a comprehensive review of company law that started in 1998. The original aim of the review was to make the UK a good place to do business by bringing company law up to date to meet modern business needs. There was welcome recognition that the regulatory burden for small companies needed to be simplified, which has to a large extent resulted in a 'think small first' approach.

During the review events such as the collapse of Enron in the USA focused attention on public confidence in company financial statements and the audit process. Consequently, closer attention was paid to areas such as the audit of accounts, the accountability of companies with publicly traded shares to their shareholders and related questions of corporate governance. This is clearly reflected in the final provisions of the Act, as once again company law reform has reacted to perceived 'scandal and mischief'.

The twin themes of reducing the burden for small companies and ensuring that companies with publicly traded shares are properly accountable has resulted in a further divergence of the compliance requirements applying to private companies on the one hand and public and quoted companies on the other.

These factors, plus the consolidation of the majority of company law provisions into the 2006 Act, have resulted in a very lengthy statute. The few parts of the Companies Acts 1985 and 1989 that remain include provisions dealing with investigations into companies, provisions about the Financial Reporting Council and the law applicable to community interest companies. However,

despite the consolidation, a great deal of the detail of the law applicable to companies remains *outside* the 2006 Act. This is because in many specific areas the Act gives power to make regulations regarding the detail of the relevant provisions and that has been widely used. So there is still a lot of company law and regulation relevant to private companies that has to be assimilated from different sources – yet another challenge to those responsible for company secretarial administration.

It should be noted that the provisions of the 2006 Act extend to the whole of the United Kingdom, including Northern Ireland. All registered companies in England and Wales, Scotland and Northern Ireland are registered at Companies House (which is an Executive Agency of the Department for Business, Skills and Innovation). There are now more than 2.7 million registered companies, with an additional 400,000 new incorporations occurring annually.

IMPACT OF THE COMPANIES ACT 2006 – SECRETARY

A private company has the option to appoint a formal company secretary or not (with effect from 1 April 2008, as a result of changes introduced by the Companies Act 2006). However, this is subject to the terms of the individual company's articles of association. If those articles oblige the company to appoint a secretary there must be a person holding that office unless and until the company formally alters its articles to remove the obligation.

Such a constitutional obligation may be imposed at the choice of the shareholders, in some commercial companies limited by shares. This is less likely to occur in practice if the company is a wholly owned subsidiary in a commercial group or if its shareholders are the same, or largely the same, people who serve as its directors. If there is a wider ownership or other factors that influence the shareholders' views on the point, they may opt to impose an obligation on the board to appoint a secretary.

In non-commercial companies, including those limited by guarantee, it is much more likely that retaining the distinct role of secretary is advisable. In which case, an obligation to appoint a secretary may well be specified in the articles. Factors influencing the decision to make the role compulsory will include the wider regulatory and public accountability issues for such companies. For example, a charitable company limited by guarantee that has income from public funding sources and/or public donations or has a wider public membership, beyond its trustees/directors would probably retain a company secretary. It would also be likely to make the post obligatory, through provisions in its articles. A community interest company may also opt to engage a secretary, in view of its public accountability obligations, the demands of the 'community interest test' and the rest of the CIC specific legal regime as well as the standards demanded of its directors.

Public companies remain subject to a statutory obligation to appoint a secretary.

COMPANIES ACT 2006 – IMPLEMENTATION AND IMPACT ON EXISTING COMPANIES

Implementation of the Companies Act 2006 was a protracted process. The Act received Royal Assent on 8 November 2006 (only a small number of provisions were brought into force on that date). A series of commencement orders then brought it into force over a three year period.

One of the areas of difficulty in the implementation of the Act was its application to existing companies. Transitional provisions mean that not only is it necessary to understand the changes that were introduced to company law but also to understand:

- when such changes came into force;
- whether the changes *automatically* apply to existing companies;
- whether existing companies need to take some *action* to take advantage of the changes (for instance by passing a resolution or altering articles);
- whether the changes only apply in respect of financial years beginning on or after a certain date (or in some cases ending on or after a certain date);
- whether any other transitional provisions apply, and if so, whether they will cease to apply when the remaining parts of the Act come into force.

TABLE A AND THE 'MODEL' ARTICLES

Table A has been superseded by 'model' articles for companies. These model articles only apply to companies formed under the 2006 Act and incorporated *on or after* the relevant implementation date (1 October 2009). Previously existing companies are not automatically subject to the model articles (any applicable version of Table A that forms part of their articles continues to have effect). Older companies may choose to alter their existing articles to adopt some or all of the model articles. For further details see chapter 1 (Incorporation of a private limited company) and chapter 4 (Alterations to memorandum and articles of association).

HOW TO USE THE PRECEDENTS

The precedents are set out within chapters that cover particular subject matter – directors, company meetings, shares and share capital etc. Each set of precedents is preceded by a commentary, explaining the context in which the documents can be used. That provides a general introduction to the subject. For more detailed commentary on applicable law and practice in any subject area refer to:

- *Companies Act 2006: A Guide for Private Companies*;
- *Jordans Company Administration and Governance*;
- *Gore-Browne on Companies*; and
- *Jordans Charities Administration Service*.

The precedents provided are framework documents. They should be adapted and supplemented as appropriate to the particular situation and circumstances being dealt with. Care should be taken to consider the impact of the individual company's articles of association and the Companies Act 2006 on the situation being addressed.

Particular care should be taken in relation to companies incorporated prior to implementation of relevant Companies Act 2006 provisions. That is particularly the case when carrying out transactions and procedures that were altered or introduced by the 2006 Act.

In more complex transactions, additional and often custom drafted documentation will be needed. Professional advice should be taken whenever appropriate in relation to legal issues, VAT and general taxation matters and accounting and reporting implications.

The precedents have been completed with fictional names and other details, in cases where that will assist understanding of their correct completion and use. Otherwise, such details have been left blank.

PRECEDENTS – DIRECTORS’ DECISIONS

Decision-making by directors of private companies can potentially be quite informal, especially because of changes made by the Companies Act 2006. However, it is important that board decisions are both properly taken and properly recorded. So, use of board meetings with formal minutes or signed written resolutions of the board will remain appropriate for most situations where a substantive decision is to be taken or a specific transaction dealt with. The book therefore offers precedents for both minutes of formal board meetings and for directors’ written resolutions, where appropriate.

PRECEDENTS – MEMBERS’ DECISIONS

The Companies Act 2006 retains a careful balance of power between the board of directors and the members of a private company. It therefore requires the authority or approval of the members for a number of actions and transactions. This can usually be given either by formal resolution of the members passed at a general meeting or by written resolution, using the Companies Act 2006 statutory members’ written resolution procedures. The book offers precedents for both, where appropriate. Specific material and precedents relating to written resolutions of members can be found in chapter 15, reflecting the important changes that the 2006 Act made to the previous law in this area.

COMPANIES LIMITED BY GUARANTEE AND CHARITABLE COMPANIES

Companies limited by guarantee are used for non-commercial activities and often have ‘non-profit distribution’ clauses in their articles, ensuring their entire funds and assets must be applied to the stated objects. Note that the objects may now be described as ‘charitable purposes’ in the constitutions of charitable companies. This is more likely to be the case for companies that have updated their constitutions or new charitable companies, incorporated since the implementation of modified legal rules on what is ‘charitable’ in English law (see the Charities Act 2011) and the different rules on what is ‘charitable’ under the law of Scotland (see the Charities and Trustee Investment (Scotland) Act 2005) and the law of Northern Ireland (see the Charities (Northern Ireland) Act 2008).

Guarantee companies are commonly used as:

- professional bodies and trade associations;
- charities that opt for the increasingly popular legal form of a company;
- clubs and societies;
- community amateur sports clubs;
- property management companies (in England and Wales).

Company law in general and in particular a number of the provisions of the Companies Act 2006, are often modified substantially or even disapplied in relation to charitable companies. In addition, such companies are subject to the charity law applicable to the jurisdiction or jurisdictions in which they are registered as charities.

A charitable company registered in England and Wales that occupies land or premises in Scotland; that is managed or controlled wholly or mainly from Scotland; or that carries out activities in any office, shop or similar premises in Scotland will have to register on the Scottish Charity Register, as well as the register of charities for England and Wales.

Note that there are specific and different statutory provisions for:

- England and Wales – those parts of the Charities Acts 1992 and 1993 that remain in force, plus the Charities Act 2011 (which is largely a consolidating Act) plus associated regulations;
- Scotland – the Charities and Trustee Investment (Scotland) Act 2005 plus associated regulations.

Charity law specific to Northern Ireland has been introduced under the Charities Act (Northern Ireland) 2008. This has established a third register of charities in the UK, on which organisations that are charities under the law of Northern Ireland need to be registered (the registration process is taking place in stages, as the Charity Commission for Northern Ireland calls batches of organisations forward for registration). The Act provides the statutory basis for the Charity Commission for Northern Ireland, with a Charity Tribunal for Northern Ireland to provide an independent body to hear appeals. There are Northern Ireland specific rules on the legal meaning of ‘charity’ and what purposes can be recognised as charitable purposes under the law of Northern Ireland, as well as rules on public benefit. It will probably take at least two further years to complete implementation of the entire legal and regulatory regime for charities in Northern Ireland.

For more detailed guidance on law and practice for the administration of charitable companies and a wide range of relevant precedent material, see *Jordans Charities Administration Service*.

COMMUNITY INTEREST COMPANIES

Community interest companies (or ‘CICs’) are an optional corporate legal form for social and community enterprise activities. Note that CICs cannot be charities.

CICs are registered at Companies House. They are subject to company law in general, with some modifications (especially to a range of statutory restrictions on activities, funding and assets and to enhanced reporting obligations). In addition, they are subject to applicable provisions of the Companies (Audit, Investigations and Community Enterprise) Act 2004 and associated regulations.

CICs are therefore subject to a dual regulatory regime. The CIC Regulator has jurisdiction over them in relation to CIC specific legal requirements and the Registrar of Companies has jurisdiction over them in relation to the usual company requirements to which they are also subject.

This book contains a chapter dealing specifically with CICs. Note that CICs are subject to some additional and some dual statutory fees, compared to private limited companies.

CITATIONS AND REFERENCES TO STATUTORY PROVISIONS, FEES, PRESCRIBED FORMS AND FILING OBLIGATIONS

To assist the user of this book, relevant statutory citations and references are given, mostly in the footnotes to the texts. These abbreviations are used:

- BNA 1985 – Business Names Act 1985
- CA 1985/1985 Act – the Companies Act 1985
- CA 2006/2006 Act – the Companies Act 2006
- IA 1986 – Insolvency Act 1986
- LLP 2000 – Limited Liability Partnerships Act 2000
- SBEEA 2015 – Small Business Enterprise and Employment Act 2015

Statutory fees are subject to future change by statutory instrument.

Some prescribed forms are reproduced. In most cases electronic filing may be carried out as an alternative to use of a hard copy form (see in particular the chapter dealing with electronic communications). This has many advantages to company secretarial practitioners and is greatly encouraged by Companies House.

ADDITIONAL MATTERS

The law is stated as at 31 October 2015.

The notable contribution of the late Gerard Leighton in developing the concept for this book and contributing to many previous editions of it is acknowledged with gratitude.

The authors of this edition also acknowledge with thanks the help and assistance of our many contacts and of our many past and current colleagues. Our experiences in working with all of those people on company administration matters have facilitated the contents of this book in many ways. Also gratefully acknowledged is the skilful assistance and enthusiastic encouragement offered by all members of the Jordan Publishing team in preparing this eighth edition of *Jordans Company Secretarial Precedents*.

We hope that you, the reader, will find using the book as rewarding as we have found creating it.

Cecile Gillard