

## THE NATIONAL BIODIVERSITY NETWORK TRUST

### RULES AND STANDING ORDERS

#### ANNEXE 1

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#### RULES FOR THE CONDUCT OF TRUSTEES

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## DUTIES AND CONDUCT OF TRUSTEES

- 1) Trustees have and must accept ultimate responsibility for directing the affairs of a charity, and ensuring that it is solvent, well-run, and delivering the charitable outcomes for the benefit of the public for which it has been set up.

### COMPLIANCE – TRUSTEES MUST:

- 2) Ensure that the charity complies with charity law, and with the requirements of the Charity Commission as regulator; in particular ensure that the charity prepares reports on what it has achieved and Annual Returns and accounts as required by law.
- 3) Ensure that the charity does not breach any of the requirements or rules set out in its governing document and that it remains true to the charitable purpose and objects set out there.
- 4) Comply with the requirements of other legislation and other regulators (if any) which govern the activities of the charity.
- 5) Act with integrity, and avoid any personal conflicts of interest or misuse of charity funds or assets.

### DUTY OF PRUDENCE – TRUSTEES MUST:

- 6) Ensure that the charity is and will remain solvent.
- 7) Use charitable funds and assets reasonably, and only in furtherance of the charity's objects.
- 8) Avoid undertaking activities that might place the charity's endowment, funds, assets or reputation at undue risk.
- 9) Take special care when investing the funds of the charity, or borrowing funds for the charity to use.

### DUTY OF CARE – TRUSTEES MUST:

- 10) Use reasonable care and skill in their work as trustees, using their personal skills and experience as needed to ensure that the charity is well-run and efficient.
- 11) Consider getting external professional advice on all matters where there may be material risk to the charity, or where the trustees may be in breach of their duties.

### IF THINGS GO WRONG

- 12) The Charity Commission offers information and advice to charities on both legal requirements and best practice to help them operate as effectively as possible and to prevent problems arising. In the few cases where serious problems have occurred we have wide powers to look into them and put things right. Trustees may also be personally liable for any debts or losses that the charity faces as a result. This will depend on the circumstances and the type of governing document for the charity. However, personal liability of this kind is rare, and trustees who have followed the requirements on this page will generally be protected.

## DUTIES UNDER COMPANY LAW

### THE DIFFERENCE BETWEEN A DIRECTOR AND A TRUSTEE

Although there are many names for trustees, their central responsibilities are the same in all cases.

### DIRECTOR'S GENERAL DUTIES UNDER THE COMPANIES ACT 2006

- 13) The Directors' General Duties have been greatly affected by CA2006 which, in relation to these matters, took effect on 1st October 2007. The exception is the duty to avoid conflicts of interest which will take effect on 1st October 2008.
- a) Duty to act with powers
  - b) Duty to promote the success of the company
  - c) Duty to exercise independent judgment
  - d) Duty to exercise reasonable care, skill and diligence
  - e) Duty to avoid conflicts of interest
  - f) Duty not to accept benefits from third parties
  - g) Duty to declare an interest in proposed transaction or arrangement

#### DUTY TO ACT WITH POWERS

- 14) Directors are required to act in accordance with the company's constitution and to only exercise the powers for the purposes for which they are conferred. This means that they must stay within the constraints of the objects clause, if there is one, and must observe the terms of the articles. This is a continuation of the case law duty, and is straightforward and uncontroversial.
- 15) A company's constitution is the articles and (if applicable) certain resolutions of the members (or a class of them) that affect the constitution.

#### DUTY TO PROMOTE THE SUCCESS OF THE COMPANY

- 16) This is almost universally known as the first duty of directors, but rather confusingly the Act lists it second. It was more hotly debated in Parliament than any other section of the Act and is an attempt to balance a director's duty to the owners of the company with a responsibility to the wider community (the stakeholders). It might be said to be an attempt to square the circle.
- 17) A director must act in a way that he considers, in good faith, would be most likely to promote the success of the company for the benefit of the members as a whole. In most cases this is likely to mean the long-term economic benefit of the shareholders, but it is made clear that where the purposes of the company include things other than the benefit of the members, working to achieve these things will amount to working for the success of the company. A person who is a director of a company that is a charity would, for example, be in this position. It is also made clear that if there is a real risk of insolvency, the interests of the creditors must come first.
- 18) This is exactly what is now understood to be the duty under case law. However, Section 172 goes on to state that a director must have regard (amongst other matters) to -
- a) The likely consequences of any decision in the long term,
  - b) The interests of the company's employees,
  - c) The need to foster the company's business relationships with suppliers, customers and others,
  - d) The impact of the company's operations on the community and the environment,
  - e) The desirability of the company maintaining a reputation for high standards of business conduct, and

- f) The need to act fairly as between members of the company.
- 19) This is quite a remarkable list and the phrase 'amongst other matters' makes it non-exhaustive. What does it mean? It would appear that the director's duty is to work for the benefit of the members, and do what he, in good faith considers would be most likely to achieve this end. However, he must not ignore other matters and must have regard to them. Having considered them he can and should do what he considers would be most likely to promote the success of the company for the benefit of the members as a whole.
- 20) Despite the hot debate probably not much has changed, though one unwelcome consequence could be defensive minute taking as directors attempt to show that they have had regard to the various factors. The courts will over time no doubt provide guidance about exactly what it means, but it seems to give an excellent defence to directors who choose to act in a socially responsible way, rather than exclusively in the narrow economic interest of the shareholders. Three obvious questions should be considered:
- a) The various factors are not listed in order of precedence. What happens when there is a conflict between them?
  - b) What exactly might or might not be considered relevant under the heading 'amongst other matters'.
  - c) Just how is it going to be enforced? Directors' duties are owed to the company and only the company can enforce them. To put it baldly, the environment does not have a vote.

#### DUTY TO EXERCISE INDEPENDENT JUDGMENT

- 21) This means that directors must use their independent judgment and not be unduly influenced by the wishes or instructions of others. They can of course listen to advice and act on it if it appears to them to be sound. This duty could cause difficulties for a director put on the board to look after the interests of a particular person or sectional interest, or the interests of a holding company.
- 22) The duty is not infringed if the director is acting in accordance with an agreement duly entered into by the company that restricts the future exercise of discretion by the directors. Furthermore, it is not infringed if the director is acting in accordance with the company's constitution, which includes resolutions of the members.
- 23) The terms of section 173 do not give directors the power to delegate, but company articles can and almost invariably do.

#### DUTY TO EXERCISE REASONABLE CARE, SKILL AND DILIGENCE

- 24) A director must exercise the degree of care, skill and diligence that would be exercised by a reasonably diligent person with:
- a) the general knowledge, skill and experience that may reasonably be expected of a person carrying out the same functions as the director in relation to the company and
  - b) the general knowledge, skill and experience that the director actually has.
- 25) The director must meet the higher of the two requirements and it is interesting to note that this duty follows the duty set out in Section 214 of the Insolvency Act 1986. As a practical example, it means that a non-executive director who is a well-qualified and experienced solicitor must bring the care, skill and diligence expected of such a person to a very small private company that operates a fish and chip shop. On the other hand an unqualified and inexperienced director of a major public company must meet the standard expected of a director of that type in a company of that type.
- 26) It is relatively easy to set out the required standard, but it must of course be translated into a myriad of individual circumstances, which may not be easy in practice. Judges have in the past (especially in the

distant past) taken a very relaxed view about the standards expected, but the requirements have grown more demanding over the years, and especially in recent years.

- 27) A director is expected to show no less than the same degree of care that an ordinary person would be expected to take when dealing with his own affairs.
- 28) Directors are generally entitled to trust each other and entitled to trust company managers. Business would grind to a halt if they could not do this. This should be tempered with common sense, and reasonable prudence and scepticism. Directors should, of course, be suspicious if there are warning signs to be seen, or if they have in the past been let down or lied to.
- 29) Standards are, in many people's opinion, not set unreasonably high, and circumstances alter cases. More is expected of some directors than others, and more is expected in some companies than others. Nevertheless, there are irreducible minimum requirements of all directors in all companies. If a director cannot meet these requirements, he should not accept the position or, finding himself out of his depth, he should resign or seek suitable advice.
- 30) Some things cannot be delegated but most can, which is just as well because otherwise large companies could not operate. Subject to the articles directors can delegate to committees of directors, including a committee of one, and they can delegate to managers. This should, though be done responsibly.
- 31) Directors can hold a number of directorships and they do not have to give continuous attention to the company's affairs. However, in certain situations, a threatened insolvency being an obvious example, a much bigger time commitment may well be required. They should not take on more directorships and commitments than they can reasonably see their way clear to fulfil.
- 32) It has probably not escaped your notice that the word 'reasonable' appears quite a lot. What does this word mean? It is easy to say but may be hard to apply in practice. Your writer knows this from experience, having served on a jury in a difficult case and struggled to decide the limits of 'reasonable doubt'. Very many years ago a learned judge advised a jury to consider what the man on the Clapham omnibus would consider was reasonable. A judge would now say 'man or woman' and the residents of Clapham may well be riding in cars, but it is still not a bad place to start.

#### DUTY TO AVOID CONFLICTS OF INTEREST

- 33) The statutory provisions of CA2006 are described below, but take effect on 1st October 2008. Until then the matter is governed by the old case law interpretations.
- 34) A director must avoid a situation where he will have, or may have, an interest that conflicts with the interests of the company. This applies to, but is not limited to, the exploitation of any property, information or opportunity, and it applies even if the company could not take advantage of the opportunity.
- 35) The duty is not infringed if the situation cannot reasonably be regarded as likely to give rise to a conflict of interest or if the matter has been authorised by the directors. In the case of a private company there must be nothing in the company's constitution invalidating such authorisation. In the case of a public company the constitution must specifically permit such authorisation. In both cases the director concerned must not vote or count in a quorum.

#### DUTY NOT TO ACCEPT BENEFITS FROM THIRD PARTIES

- 36) A director must not accept a benefit from a third party conferred by reason of his being a director or his doing (or not doing) anything as a director. However, the duty is not infringed if the acceptance of the benefit cannot reasonably be regarded as likely to give rise to a conflict of interest. Notwithstanding this,

acceptance of a benefit may be authorised by the members or (if the constitution permits it and with the director concerned not voting or counting towards a quorum) the board.

37) It will be fascinating to see exactly how this is interpreted in practice. After all, there will be few readers of this book who have not accepted a cup of coffee from a customer or supplier, though almost undoubtedly this would be regarded as not likely to give rise to a conflict of interest. Some people, though, cannot be too careful. Your writer once provided a plate of sandwiches for three employees of the Inland Revenue (as it was then called) during a formal meeting. They offered to pay, and the offer and my decision not to accept the offer appeared in the minutes of the meeting that they later prepared.

38) Presumably circumstances alter cases, but will hospitality accepted by a rich director with no money problems be regarded differently from the same hospitality accepted by a hard-up director struggling to pay his mortgage? We will see.

#### DUTY TO DECLARE AN INTEREST IN PROPOSED TRANSACTION OR ARRANGEMENT

39) A director must declare to the board a direct or indirect interest in a proposed transaction or arrangement with the company. This must be done before the company enters into the proposed transaction or arrangement. No disclosure is necessary if the other directors are already aware of the interest or should reasonably be aware of the interest, or if it cannot reasonably be regarded as likely to give rise to a conflict of interest. Disclosure is required if the director is aware of the interest or should reasonably be aware of the interest, but not otherwise. The interest of a person 'connected to the director' must be disclosed by the director.

40) This duty is closely linked to the duty to avoid conflicts of interest set out in Section 175. A conflict of interest that has been declared as required by Section 177 may be authorised by the unconflicted directors as permitted by Section 175.

#### DIRECTOR'S RESPONSIBILITIES

41) It is the obligation of the directors to carry out their responsibilities or see that it is done. In practice they usually leave most of these to the Company Secretary, but they cannot avoid responsibility and, of course, from 6th April 2008 in private companies the position of Company Secretary will be voluntary. The areas of responsibility fall into the following categories

- Prosecutions, penalties and civil liabilities
- Transactions with directors that in some circumstances require the approval of the members
- Personal use of company assets
- Relationship with the auditor
- Disclosure of directors' remuneration
- Disclosure of terms of a director's service contract
- Filing information at Companies House
- Accounts and accounting records
- Statutory books and registers
- The company's constitution
- Financial difficulties

## HOW TO PROTECT YOURSELVES

- 1) Insurance
- 2) There is little difference between policies that indemnify the charity and those that indemnify the trustees, although the latter might need permission from the Charity Commission. CC guidance is that insurance benefiting a trustee can only be taken out on "acts properly taken in the administration of a charity, or undertaken in breach of trust, but under and honest mistake." It does not cover acts that trustees knew or ought to have known were wrong, nor acts undertaken in reckless disregard of whether they were right or wrong.
- 3) Be aware of what your organisation is able to do under its constitution
- 4) Ensure that you are knowledgeable about the running of the organisation. Make a checklist on matters all organisations have to deal with and ensure they have been dealt with, and if they have not, make sure staff deal with it if possible.
- 5) If you are in doubt, get advice from people who are knowledgeable about the area in which decisions have to be made.
- 6) Review the constitution regularly - at least every other year
- 7) Ensure adequate minutes are taken especially for major decisions
- 8) Keep personal contact with staff/employees
- 9) Regularly review the company's finances, planned and actual