

## **Companies Act 2006 and Directors' Duties**

The introduction of the Companies Act 2006 has imposed significant new regulatory duties on directors to ensure that a company's interests are fully protected, but few company directors - understandably enough - are aware of the scope and implications of their new regulatory responsibilities.

Directors' main duties include: to act in good faith to the best interest of the company; to avoid conflicts of interest; not to profit from their offices; and a duty of care and skill, all of which are enshrined in common law as well as in statutes such as the Companies Act. The new codification of directors' duties is intended to make the law more consistent, certain and accessible.

Probably the most far reaching change, and the one which has the most obvious effect on directors, is the duty to promote the success of the company, as set out in s. 172. This new duty stems from the overriding principle of the fiduciary duty, i.e., the duty of good faith to act in the company's best interest.

Most specifically, the Act imposes a duty to act in the way a director considers, in good faith, would be most likely to promote the success of the company. When exercising this duty the director is required to have regard to a wide range of factors as listed in s.172 (1), including: the long term consequence of decisions as well as the interests of the employees; the relationships with suppliers and customers; the impact of the decision on community and environment; the desirability of maintaining a reputation for high standards of business conduct; the need to act fairly as between members of the company, as well as introducing wider corporate social responsibility into a director's decision making process.

'Success' is not defined by the Act, however DTI guidance suggests that success in relation to a commercial company is considered to be its "long-term increase in value".

Another key point, as set out in s. 174(1), is the Duty to 'exercise reasonable care, skill and diligence' which, in broad terms, for a director means 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 functions undertaken by the director in relation to the company; and
- b. the general knowledge, skill and experience that the director has.

But how is a director to know what is reasonable knowledge? This is why directors should always seek outside help, especially when it comes to business continuity planning, wherein the consequences of not taking expert advice will almost certainly lead to a dramatic decrease in the value of a company - as opposed to the "long-term increase in value" that the Act prescribes - and an almost certain action from stakeholders.

Lastly, it is essential to remember that it is not necessary to be called a director to be held accountable under the Act. The defining point is what one does and not what one is called. Similarly, it is vital for directors who are also shareholders to remember that two legal personalities operate here, in that a shareholder has a limited liability but a director does not, even if they are also a shareholder. All the more reason to purchase appropriate Directors and Officers cover!