



Fact sheet – Development and review of governance documents

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Constitution of charities

GENERAL

- Most common legal forms of charities in HK: Companies limited by guarantee
- Constitution/Governing Instrument = Articles of Association (“AOA”)
 - “Backbone” of the companies’ operations
- One of the most important clauses – Object Clauses
 - Inland Revenue Department (“IRD”) requires that the objects for which a charity is established must be **precisely and clearly** stated in the AOA

IMPORTANCE OF OBJECT CLAUSES

- Charities can only carry out activities compatible with its objects.
- It also relates to the profits tax liability of charities.
- If charities carry on trade or business which are outside the scope as specified in their object clauses:
 - the relevant profits are more likely to be subject to profits tax; and/or
 - IRD may revoke its tax exemption status.
- Legal basis: s.88 of the Inland Revenue Ordinance (Cap. 112)
- In essence, if a charity is considered as carrying on a trade or business, the relevant profits are exempt from profits tax only if:

- the profits are applied solely for charitable purposes;
- the profits are not expended substantially outside Hong Kong; and
- either:
 - the trade or business is exercised in the course of the actual carrying out of the **expressed objects** of the charity; or
 - the work in connection with the trade or business is mainly carried on by persons whose benefit such charity is established.

REVISED TAX GUIDE FOR CHARITABLE INSTITUTIONS AND TRUSTS OF A PUBLIC CHARACTER

In April 2020, IRD published a revised *Tax Guide for Charitable Institutions and Trusts of a Public Character*.

Key revisions of the revised tax guide:

- Explains definitions of “trade” (行業、生意) and “business” (業務) – Note: added a whole new section about indicia of carrying on business;
- Emphasizes such definitions are not exhaustive;
- Provides further examples of trades/businesses considered as carrying out of the expressed objects of the charity;
- New sections are added to explain the profits tax effects in various situations, e.g.:
 - charities charging for their services;
 - charities engaging in investment; and
 - charities engaging in property letting;
- New sections are added to emphasize the tax reporting obligation of charities.

Key takeaway

- It provides clearer guidance to charities on tax aspect, especially on what activities would be considered as activities carrying out of the expressed objects of the charity.

Articles of association

CONDUCT MEETINGS/EXECUTE DOCUMENTS BY ELECTRONIC MEANS

Conduct meetings by electronic means

Note: Model Articles mentioned below refer to Model Articles applicable to companies limited by guarantee

PREVIOUS VERSION OF MODEL ARTICLES (10/12/2010 VERSION)	CURRENT VERSION OF MODEL ARTICLES
<ul style="list-style-type: none"> × No express provision as to whether non-physical meetings (both directors and members' meetings) are allowed i.e. not permissible 	<ul style="list-style-type: none"> ✓ Provides flexibility for meetings (both directors and members' meetings) by various means: <ul style="list-style-type: none"> • attendees not required to be present in the same place • sufficient that they are able to communicate with each other
	COMPANIES ORDINANCE (CAP. 622)
	<ul style="list-style-type: none"> ✓ Expressly allows the use of technology to conduct members' meeting (no such express provisions for directors' meetings)

Execution of documents by electronic means

PREVIOUS VERSION OF MODEL ARTICLES (10/12/2010 VERSION)	CURRENT VERSION OF MODEL ARTICLES
<ul style="list-style-type: none"> × No express provision as to whether board/ members' minutes or resolutions can be executed electronically i.e. not permissible 	<ul style="list-style-type: none"> × No express provision as to whether board/ members' minutes or resolutions can be executed electronically i.e. not permissible

In view of COVID-19, companies (both profit-making and charities) start to recognize the need to provide for more flexibility for conducting meetings or executing documents by electronic means:

- conducting meeting electronically: E.g. teleconference, online meeting through Skype or Zoom;
- execution of documents electronically: through tools such as DocuSign.

Solution: Charities may have to consider amending their AOA

AMENDMENT OF ARTICLES OF ASSOCIATION

An overview of the procedures

1. Prepare the revised draft AOA, preferably by professionals.
2. Preferable to first submit a copy of the revised draft AOA to the IRD for consideration.
3. Board of directors to pass resolutions by written resolutions/ through board meeting to:
 - propose special resolutions to be passed by members approving the amendment of AOA; and
 - approve amendment of AOA subject to the passing of members' special resolutions.
4. Members to pass special resolutions by written resolutions/ though members' meeting approving the amendment of AOA.
5. Submit relevant forms to the Companies Registry notifying it of the amendment of AOA generally within 15 days and submit the members' special resolutions to the Companies Registry for filing.
6. Notify IRD of the amendment of AOA within one month.

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- Legal clinic;
- NGO governance;
- Tax/charitable status advice;
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Meeting our people

If you have any questions on the above or would like to obtain further legal advice, please feel free to reach out to Anderson Lam (anderson.lam@dlapiper.com), our Partner and Co-Head of Tax, Asia or Angel Chim (angel.chim@dlapiper.com), our Associate.

If you are interested in partnering with us to build pro bono projects together, please feel free to reach out to Aaron Chan (aaron.chan@dlapiper.com), our Pro Bono Associate.

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— Simon Levine