

Herefordshire and Gloucestershire Canal Trust Limited

Proposed new Articles of Association

EXPLANATORY NOTE

What are 'Articles of Association'?

1. Although known as, and called, a 'Trust' our organisation is, legally, a company incorporated and registered under the Companies Acts. As a company, the Articles of Association are its constitution - the rules under company law that deal with the Trust's status, and regulate its internal management.
2. As a registered charity, the Trust is also regulated under the Charities Act 2011. This Act makes certain adaptations to company law specific to charitable companies, including certain specific requirements about what is contained in the Articles of Association.

Why the need for change?

3. The current Articles of Association were adopted in 1992 and there have been many significant changes in both company law and charity law since then (now consolidated in the Companies Act 2006 and the Charities Act 2011 respectively).
4. Furthermore, the Trust has grown considerably in size of membership and extent of its activities since then. Therefore, the current Articles are no longer truly fit for purpose and need substantial updating – and future-proofing. This is most easily done by wholesale replacement with a modern form.
5. Any change to a company's Articles of Association has to be approved by the membership by a 'special resolution' which requires a vote in favour by at least a 75% majority of the members voting.

Who are the 'Trustees'?

6. In a charitable company the company directors are usually described as the 'trustees' in its constitution - Articles of Association - because section 177 Charities Act 2011 provides that the directors of a charitable company have the status, duties and responsibilities of "charity trustees".
7. Therefore, just as the directors are collectively known as the Board of Directors in a standard company, so trustees are collectively known as the Board of Trustees in a charitable company. The proposed new Articles adopts this 'industry standard' nomenclature in the place of the non-standard and confusing (if not misleading) terms 'Council of Management' and 'Council Member' used in the current Articles.

What about the idea of adopting a two-tier structure?

8. This is simply not legally possible as was proposed. Under UK company law, any company (charitable or not) has a 'unitary' board structure. There can only be one board of directors/trustees as the top tier of governance for a UK company. Only this Board can have the top-level powers, duties and responsibility for the proper and lawful management of the company's activities. It is not legally possible (let alone desirable) to separate power to decide the strategic direction of a company from the responsibilities and duties to ensure that strategic direction is appropriately and lawfully implemented.

9. Trustees/directors can delegate the exercise of some of their functions and the implementation of their decisions but they always retain the responsibility for ensuring that the activities of a charitable company (as with any other company) are properly and lawfully conducted.

What are the core duties of the trustees?

10. The Charity Commission summarises the core duties of charity trustees as:
- “Ensure your charity is carrying out its purposes for the public benefit”.
 - “Comply with your charity’s governing document and the law”.
 - “Act in your charity’s best interests”.
 - “Manage your charity’s resources responsibly”.
 - “Act with reasonable care and skill”.
11. Note that it is a fundamental principle of charity law that a charity has to be run for the public benefit – unlike in a standard company where the directors’ main duty is to run the company in the interests of its members. Sometimes this principle is explained as “cause is king”.
12. Charity Commission guidance specifically says that trustees “must do what you and your co-trustees (and no one else) decide will best enable the charity to carry out its purposes”. Furthermore trustees “must make sure that the charity complies with its governing document” and “comply with charity law requirements and other laws that apply to your charity”.

What then is the role of the members?

13. The constitutional role of members is to be a body of interested persons, supportive of the charity’s purposes, to whom the trustees are accountable and to whom trustees must report at least annually on the charity’s activities. It is the members who have the power to appoint and remove trustees and to amend the charity’s constitution. The members’ role and powers are exercised in general meetings – usually just once a year at the annual general meeting. Any member can only ever have one vote.
14. The correct management of the annual general meeting and other general meetings (if any) and member awareness of proper procedure is therefore very important. A brief summary of the key procedural points is given in an Appendix at the end of this Note.
15. Of course, members have a much wider role than the constitutional one as the critical supporters and resource of the Trust. Whilst it is the Trustees who are ultimately responsible to ensure the proper and lawful pursuit of the Trust’s purposes, it is the volunteers (most of whom are members) that have to deliver. To efficiently enable that, broad (and hopefully clearer) powers of delegation from the trustees are included in the proposed new Articles.
16. Any volunteer based charity, to be effective, must be able to handle the full gamut of relationships effectively, and to that end the proposed new Articles include provision for the adoption of a range of Codes of Conduct.

Summary of the proposed new Articles of Association

17. The remainder of this Note gives a summary of the provisions of the proposed new Articles of Association, with a particular focus on the (relatively few) proposed changes to the arrangements for internal management of the Trust that go further than mere updating in language or alignment with changes in the law. To aid understanding, the following is a glossary for some of the technical or less familiar terms:

'annual general meeting'	a type of general meeting that is required to be held once per calendar year
'general meeting'	any meeting of the Members of the Trust called by formal notice and held in accordance with the provisions of the Articles
'objects'	purposes and objectives of the Trust
'ordinary resolution'	a resolution of the members of the Trust passed at a general meeting (or in a written resolution) where a simple majority of those voting is required for it to be passed
'poll'	a formal method of recording the outcome of a vote where every vote cast is formally counted – including all separate votes cast on behalf of multiple members if held by a single proxy
'proxy'	a person authorised by one or more Members to vote on his or her behalf. A proxy need not be a member and can either be instructed how to vote or be allowed to exercise own discretion on behalf of the Members(s)
'show of hands'	a simple method of recording a vote where any person present at a meeting and entitled to vote only has one vote even if present as a proxy for multiple members
'special resolution'	a resolution of the members of the Trust passed at a general meeting (or in a written resolution) where a 75% majority of those voting is required for it to be passed
'the Trust'	depending on the context means either simply the legal entity that is 'The Herefordshire and Gloucestershire Trust Limited' or (in the context of certain decisions required under the Articles) a decision of the Members made in a general meeting or by written resolution
'trustee' or 'director'	the same thing – the terms are interchangeable in the context of the Trust

Interpretation

18. Article 1 cross refers to the Schedule which contains the definitions which are used throughout the document. In particular, note the broad definition of "Waterway".
19. Also note that the company directors are termed 'Trustees' in the Articles for the reasons explained in paragraph 7 above..

Objects

20. The objects of the Trust are set out in Article 2. Everything the Trust does must be in the furtherance of its objects.
21. The objects as set out in Article 2 have been rewritten to reflect the modern circumstances and purposes of the Trust. They do not abandon or change the intent of the current objects but put them into more modern and clearer terms and also to some extent expand them to address the now known challenges faced in restoring through navigation between Hereford

and Gloucester.

22. Note that changes to the objects of a charity require Charity Commission approval and this [will be / is presently being / has been] obtained.

Powers

23. Article 3 sets out the powers which the Trust may exercise in order to achieve its objects. They are not dissimilar to the powers in the current Articles (albeit expressed in more modern terms) except for the new powers at 3.1 and 3.2.
24. The power in Article 3.1 is primarily intended to ensure the Trust is able, should it ever wish and be able to do so, take over navigation authority or harbour authority powers for those waters of the River Severn which would be transited when a vessel navigates between Over Basin and Llanthony Lock.
25. The power in Article 3.2 is intended to provide an explicit power to charge for any use of the Waterway (as broadly defined). Although the Trust is required by charity law to pursue its objects wholly for public benefit, that does not preclude the charging for use. Nevertheless, an explicit power is useful for preventing argument on the point
26. Articles 3.19 and 3.20 contain powers to trade and to incorporate subsidiary companies to carry on trade. The powers are stated fairly simply, but the law relating to the ability of charities to trade is quite complex, and it will be incumbent on the Trustees to ensure that the carrying out any form of trading activity is compliant with that law.
27. Article 3.28 allows the Trust to pay premiums in respect of indemnity insurance on behalf of the trustees and other officers of the Trust. Such insurance can protect trustees against the possibility of personal liability arising as a result of acts of negligence or default, provided always that they have been acting in good faith.
28. In Article 3.29 there is a "sweep-up" power to do anything which is lawful and promotes the Trust's objects.

Limitation on Private Benefits

29. Article 4 contains important provisions about the application of the Trust's funds. There is a general principle of charity law that payments to trustees or certain persons connected to trustees are prohibited unless either there is a statutory power to make the payments, the Charity Commission or the court authorises the payment, or the Articles provide for the payment to be made (subject to statutory limitations).
30. Changes to charity law since the current Articles were adopted (now consolidated in the Charities Act 2011) have made clearer the statutory limits for permissible payments. To take the benefit of these statutory permissible limits, explicit power needs to be adopted in a charity's constitution and many charitable companies have amended their Articles of Association to do so along the lines now proposed for the Trust.
31. In Articles 4.2 and 4.4, there is a full list of the types of payments to members and trustees respectively that the Articles authorise within the statutory permissible limits.
32. Note that Article 4.4 also includes a reference to "Connected Persons" (this term is defined in the Schedule), since the Charity Commission's view is that those with connections trustees, such as spouses, children and businesses in which a trustee has an interest, are also prohibited, unless specifically allowed in the Articles. The benefits which trustees and connected persons can receive from the Trust are:
- 32.1 payments made to them as beneficiaries;
 - 32.2 reasonable expenses (this would cover, for example, travel expenses and

childcare cover for trustees while attending trustees' meetings, but would not cover any form of payment for a trustee's time in attending the meeting);

- 32.3 remuneration for goods and services supplied to the Trust. This would allow, for instance, payments to a trustee who was a professional or technical expert for professional or technical services rendered to the Trust. It does not, however, cover payments to anyone for acting as a trustee, nor services performed by a trustee under a contract of employment with the Trust.

Note that this clause is subject to certain safeguards, essentially requiring the trustee concerned to withdraw from the relevant decision making process, and ensuring that no more than half of the trustees, in any year, can benefit

- 32.4 interest on money lent to the Trust;
32.5 rent on premises let to the Trust;
32.6 premiums for trustee indemnity insurance as referred to above;
32.7 payments under the indemnity provisions in Article 6; and
32.8 payments expressly authorised by the Charity Commission.

33. Article 4.6 has been included to take advantage of provisions in the Companies Act 2006 which allow charitable companies to make it clear that a trustee's duty to avoid a conflict of interest (which applies under the 2006 Act), does not apply to certain transactions. However, a trustee should still comply with the conflict of interest procedures in Articles 21 to 23.
34. The provisions in the Articles concerning private benefits also require Charity Commission approval and this [will be / is presently being / has been] obtained.

Liability of members, indemnity and winding up

35. Article 5 establishes the limited liability for individual members of the company. The maximum liability of any member is to pay £1 towards the Trust's debts and liabilities on winding up.
36. Article 6 provides a general indemnity to the trustees and officers out of the assets of the Trust against certain costs they might incur in fulfilling their functions.
37. Article 7 provides that should the Trust be wound up, its assets must be transferred to a Trust or charities with similar objects.

Trustees

Trustees' powers and responsibilities

38. Articles 8 and 9 formally entrust the management of the Trust to the trustees acting in their capacity as trustees. This does not change the position under the current Articles, though that position was made unclear by use of non-standard language where, what in company law was a board of directors, was described as a 'council of management'.
39. Article 10 allows the trustees to appoint a chair, and to set his or her term of office. They can also remove the chair.
40. Articles 11 to 13 contain provisions concerning delegation of the trustees' powers. It is a general principle that trustees must manage their Trust personally and may only delegate their functions in accordance with the provisions of the constitution. These Articles give fairly wide powers to delegate, but in exercising these powers (as with all their powers), the trustees must act reasonably and prudently.
41. Article 12 provides for the establishment of committees, and covers the functions and

reporting requirements of those committees.

42. Article 13 deals with delegation of investment management.

Decision-making by Trustees

43. Articles 14 to 24 regulate the decision-making of the Trustees.
44. Articles 21 and 22 set out a framework for dealing with trustee conflicts of interest. Under both charity law and company law, trustees of charitable companies must take careful steps to disclose interests and to manage conflicts of interest. In particular, in October 2008 the Companies Act 2006 introduced new statutorily defined duties to avoid conflicts of interest and to disclose interests. As well as introducing the new duties, the Companies Act allows charitable companies to include some limited provisions in their Articles which protect trustees from claims for breach of the duty to avoid a conflict of interest. Articles 21 and 22 reflect these.

Appointment and retirement of Trustees

45. Articles 24 to 26 deal with the appointment and retirement of trustees
46. Article 24 provides for a minimum of four [six] trustees and a maximum of 12. The proposed maximum is a reduction from the current maximum of 18 in the current Articles. The primary task of the trustees, as company directors of the Trust, is to set the strategy of the Trust and oversee its implementation. It needs therefore to be of a size that enables effective debate and discussion and effectively manages its legal responsibilities. Too large a body of trustees makes effective and interactive debate and decision-making unwieldy. Also, too large a body of trustees tends to dilute responsibilities with the risk that certain responsibilities may be over-looked.
47. Article 25 deals with how members become trustees.
48. Trustees can be appointed by ordinary resolution, which is a majority decision of the members, or by the trustees, under Article 25.2. Any appointment by the trustees is in effect a co-option till the next Annual General Meeting.
49. Under Article 25.2, at every annual general meeting one-third of the trustees appointed by the members must retire automatically. This mechanism ensures that there is a regular opportunity to change the trustees if desired. If the vacancy created by a trustee retiring automatically in this way is not filled, the retiring trustee will be deemed to be reappointed unless the members specifically resolve to the contrary, under Article 25.5.
50. Trustees appointed by the trustees must retire automatically at the next annual general meeting under Article 25.3(b) candidates for the post of Trustee not retiring by rotation or not recommended for appointment by the Trustees have to be nominated by another member. This is unchanged form position under the current Articles.
51. Articles 25.7 to 25.9 set out prerequisites and procedures for appointments, including notice which must be given before an appointment is made.
52. Article 25.8 clarifies the timing of automatic retirement.
53. Article 26 sets out when trustees will cease to act.

Termination of a Trustees Appointment

54. Articles 26.1 to 26.4 and 26.8 apply provisions of the Companies Act 2006. Note that under Article 26.8 the members of the Trust may by ordinary resolution (i.e. by a simple majority) vote to remove a Trustee from office.

55. In Article 26.7 the number of Trustee meetings missed by a Trustee before being at risk of removal is proposed to be reduced to three from six under the current Articles. This is to reflect modern good governance practice although such absences will have to be without good cause or reason.
56. Article 26.9 is a new provision albeit one that is commonplace in company constitutions. Trustees are collectively responsible for the proper operation of the Trust. The duty of good faith required of a charitable trustee, and the legal responsibilities to be assumed, are such that if a Trustee significantly fails to perform appropriately, the other Trustees should have the opportunity to remove that Trustee from office. If sufficient members are dissatisfied with such decision of the Trustees, they have the opportunity to call a general meeting and propose an ordinary resolution to restore the Trustee in question to office.

Members

Becoming and ceasing to be a Member

57. Articles 27 and 28 deal with members. Company law and the Articles entrust certain powers to the trustees, and certain powers to the members.
58. Article 27 explains who the members will be. Under Article 27.1 the members will be the individuals who subscribe to the Memorandum of Association which will be filed with Companies House when forming the company. After that, it is up to the trustees to decide who will become members.
59. Article 27 requires members to complete an application form for membership.
60. Article 28 sets out when membership ceases.

Duty of members

61. It is a principle of charity law that charities operate for public benefit and not for the benefit of trustees or members. Article 29 establishes the basic duty that members must exercise their membership rights (i.e. to vote on resolutions) in a manner they believe in good faith will further the public benefit purposes of the Trust rather than in a manner that benefits their own interests.

Classes of membership

62. Article 30 enables different types of membership – for example joint membership at a reduced multiple of the single membership subscription. Also, corporate membership at significantly enhanced subscription is an option. Nevertheless, under the law relating to companies limited by guarantee, voting rights cannot in any event exceed one vote per legal person (natural or corporate).
63. Article 30.4 enables supporters who wish to pay a subscription in support of the work of the Trust but who have no inclination to be involved in governance to nevertheless be termed ‘members’ even though they have no voting rights. [In the RNLI for example only ‘Governor members’ paying an enhanced subscription have rights to vote at general meetings – the vast majority of ‘members’ are in law supporters with no voting rights.]
64. These provisions in Article 30 (as in some other Articles) do not have to be utilised – they are seen as useful options to be available as the Trust grows.

Organisation of General Meetings

65. Articles 31 to 47 deal with general meetings of the members. To a large extent these repeat

statutory provisions regarding the calling and holding of members' meeting.

66. Article 36 enables general meetings to be held at the same time at multiple venues provided there is real time two-way communication.
67. Article 37 deals with the quorum for general meetings and is proposed as a significant change from the current Articles. Currently the quorum for general meetings is 10% of the membership. As membership has grown such a quorum has not been routinely achievable in recent years.
68. The new Articles propose a quorum of 26, which means that, as a minimum, there has to be more members present that are not Trustees than are Trustees. Whilst this may appear a low figure, it ensures business can still be transacted with unexpected low attendance caused, for example, by severe inclement weather.
69. Against the risk of contentious decisions being made at poorly attended general meetings is the right for a poll to be called on any vote including, if appropriate, after the meeting.

Administrative Arrangements and Miscellaneous

70. Article 49 seeks to adopt the advantages of electronic communication to the extent possible under the Companies Acts.
71. Articles 54 modernises and enlarges upon the provision for byelaws in the current articles. It enables the adoption of Codes of Conduct for members and for 'visitors' to the Waterway. In law, a 'visitor' is any person on private property by invitation, explicit or implied and therefore includes any member of the public on land of the Trust who does not have a legal right to be there other than the permission of the Trust.

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Appendix

General Meetings (including the AGM) – Some useful points to note

Notices and nominations

- Under the proposed new Articles notices of General Meetings can additionally be by electronic means (in accordance with the Companies Act 2006). Longer notice has to be given for an AGM to allow time for member nomination of candidates to act as Trustees to be given.
- All candidates for election as a trustee either have to (a) be nominated by [X] members (excluding the candidate); or (b) recommended by the existing trustees; or (c) be an existing trustee retiring by rotation.
- Under the recently revised Code for Charity Governance, it is recommended good practice that trustees ensure there is the right mix of skills, knowledge and experience on the trustee board to deliver the charity's purposes. It is therefore standard practice in charities for existing trustees to be able to recommend candidates and (subject to limitations) co-opt a member as a trustee temporarily (until the next AGM).

Retirement by Rotation

- One third of existing trustees have to retire by rotation at every AGM and, if they wish to continue to serve as a trustee, offer themselves for re-election.
- There are detailed rules in the proposed new Articles for deciding who retires. The basic rule is that the longest serving retire and the one third is calculated only by reference to the number serving immediately before the holding of the AGM (i.e. no account is taken of any vacancies created by any trustees leaving office during the prior year).
- Also trustees that were co-opted to the Board in the year leading up to the AGM are not taken into account in calculating the one third and have to stand for election if they wish to continue to serve (by being recommended by the trustees or nominated by members).

Voting

- Every member with a right to vote can only ever have one vote – whether the member is an individual or a corporate member.
- Voting at general meetings is either by 'show of hands' or by 'poll'. A show of hands is an impressionistic demonstration of the weight of opinion at a meeting and not a formal count of votes.
- A poll is a formal count of votes and may be demanded for any decision to be voted upon in advance of the meeting, or before or immediately after a vote on a show of hands is taken. The chair of the meeting, the trustees collectively, ten or more members, and proxies exercising ten or more votes (or a mixture of members and proxies exercising ten or more votes) may demand a poll.
- The rules for voting by proxies on a show of hands and on a poll, are different.

Proxies

- Any member who is unable to attend a meeting (or anticipates they will not) may appoint another person (who need not be a member) to vote on their behalf. That other person is known as a proxy.
- A person may be a proxy for more than one member.
- Any person attending a general meeting as either a member, a proxy, or as both has only one vote on a show of hands (regardless of the number of proxies held or whether present in a dual capacity). In other words, anyone attending a general meeting with a right to exercise a vote may, on a show of hands only hold up one hand once.
- On a poll, every eligible vote is counted – so (for example) a member attending a meeting and holding five proxies for other members not present, may exercise six votes in total.
- When appointing a proxy, a member can either instruct the proxy how to vote on any question, or can leave it to the discretion of the proxy. If instructed to vote a particular way, the proxy must comply with that instruction.

Counting of votes

- It is the responsibility of the chair of the meeting to decide how and when this is done. Scrutineers may be appointed (who need not be members) and the counting may take place after the meeting (if, for example, voting slips have been used and there is a large number to be counted). The remainder of the meeting may continue and conclude with the result being announced later.
- Normally however, simple counts can be taken, and a result announced, in the course of a meeting.
- For votes cast at a general meeting, the required majorities (a bare majority for an ordinary resolution to be passed, or a 75% majority for a special resolution to be passed) are determined by reference to the number of votes cast.

Written Resolutions

- As a completely separate exercise from general meetings, under the proposed new Articles, decisions may be made by members by written resolution – in effect by ‘postal’ vote, although it can also be done electronically.
- A written resolution passed in accordance with the new Articles will have the same effect as if were passed at a general meeting.
- Note however that for a written resolution the required majorities (a bare majority for an ordinary resolution to be passed, or a 75% majority for a special resolution to be passed) are determined by reference to the total number of members able to vote on the resolution.