

The Academies Act 2010

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In the Queen's speech of 25 May 2010, legislation enabling more schools to achieve academy status and to afford such schools greater management freedom was announced. The Academies Bill was introduced into the House of Lords the following day and received Royal Assent on 27 July.

The new academies regime aims to give selected schools the opportunity to innovate and to raise standards by giving them greater freedom to control the way in which their affairs are managed. In particular, academies:

- are given independence from local authority control;
- are given the freedom to set their own pay and conditions for staff;
- are not required to follow the National Curriculum;
- are able to set the length of the school day and term; and
- are given control of admissions (in compliance with existing law).

At present, schools which are 'performing well' are eligible to convert into academies. All other schools can also apply to convert provided that they are in formal partnership with a school that is performing well.

Whether or not a secondary school is performing well will be assessed by reference to the following matters:

- the school's three year exam result trajectory (results should be stable or improving);

- the school's exam performance relative to local and national standards;
- the school's latest Ofsted report (with a specific focus on capacity to improve, outcomes and leadership and management);
- any other matters which the school may rely on to demonstrate that it is performing well.

The Department for Education (the **DfE**) will use any available data on pupil attainment and progress when assessing schools which do not collect the data outlined above, including infant schools.

A converting school's likely needs

At the heart of the conversion process is the incorporation by the school's governing body of an academy trust (the **Academy Trust**). The Academy Trust is to be a company limited by guarantee (i.e., without a share capital) which has charitable objectives. The Academy Trust will have overall responsibility for the running of the academy and will have control over the land and other assets of the academy. The day-to-day management of the affairs of the academy will be delegated by the Academy Trust to the academy's governors.

It will be for the members of the existing governing body of the school to decide and to agree, in discussion with the Secretary of State for Education (the **SoSE**), who the members and directors (or 'governors') of the Academy Trust should be (though membership and governorship are not mutually exclusive).

The incorporation of the Academy Trust will involve drafting and finalising its memorandum and articles of association (its

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Constitutional Documents). The articles of association will form a contract between the members of the Academy Trust and will regulate the conduct of such members' affairs. For example, the articles of association will govern who can become a governor of the Academy Trust, how frequently the governing body of the Academy Trust is to meet and what, if any, remuneration the members or governors of the Academy Trust can pay to themselves.

It is very important that the Constitutional Documents of the Academy Trust are drafted in a manner which ensures that charitable status is obtained pursuant to section 12 of the Academies Act 2010.

As a company, the Academy Trust will be registered with the Registrar of Companies (the **Registrar**) and will need to comply with the provisions of the Companies Act 2006 (as well as the provisions of the Charities Act 2006). This means that, among other things, the Academy Trust will need to make annual returns to the Registrar and produce annual accounts which comply with companies legislation (and which will be in a completely different form to the accounts prepared by the school prior to conversion).

Funding agreement

In order to obtain funding for the academy, the Academy Trust will enter into a funding agreement with the SoSE. The funding agreement will set out a series of requirements with which the Academy Trust must comply. These requirements relate, among other things, to:

- the academy's admissions policy;

- compliance with the independent schools standards set out in section 157 of the Education Act 2002; and
- the contents of the teaching curriculum.

Provided that the Academy Trust complies with such requirements, the SoSE will provide the Academy Trust with a number of grants towards the academy's capital and recurrent expenditure. A conversion grant, typically in the amount of £25,000, is also available to converting schools in relation to costs incurred in the conversion process (for example legal expenses and the costs of new signage and stationery). The DfE expects that the cumulative effect of such grants will be that schools converting to academy status will be no worse off financially than under the existing funding regime.

We recommend that formal legal advice be obtained in connection with the preparation, negotiation and agreement of the funding agreement.

Commercial transfer agreement

The commercial transfer agreement will record the terms on which the 'business' of the school will be transferred to the Academy Trust. It records which of the assets will transfer to the Academy Trust as part of the conversion process (as well as which assets will not). This agreement also addresses the transfer of information to the Academy Trust and includes provisions relating to the transfer of responsibility for staff pensions (in relation to which, see below).

The commercial transfer agreement will include a number of provisions which may have the effect of imposing liability on the

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school's governing body. For example, the governing body will be expected to give warranties (in other words, to confirm the accuracy of certain statements which will appear in the commercial transfer agreement) to the Academy Trust and will be expected to make good any loss or damage which the Academy Trust suffers should such warranties be inaccurate or misleading. It follows that the commercial transfer agreement should be carefully prepared so as to limit the potential liability of the school's governing body whilst ensuring that the Academy Trust obtains the benefit of the information, assets and contracts which it will need in order to effectively manage the academy's affairs after conversion.

Land and buildings

Voluntary aided/foundation schools

The land and buildings occupied by voluntary aided and foundation schools are owned by the relevant school's governing body. Once the Academy Trust has been incorporated, the freehold title such the land and buildings will need to be transferred into the ownership of the Academy Trust. Filings with the Land Registry and with HM Revenue and Customs will need to be made in order to record this transfer.

Even though the governing body of such schools owns the land and buildings used by the school, however, security or other forms of third party rights may have been created in favour of other parties over some or all of such land and buildings (perhaps in relation to buildings or sports facilities which have been financed in part by Sport England or National Lottery grants). In these circumstances, the consent of the relevant third party will be required before

the relevant freehold transfer or lease can be finalised.

Other schools

In relation to other schools, the DfE intends that the relevant local authority will typically grant a 125 year long lease to the Academy Trust on a peppercorn (i.e., nominal) rent (as at present). However, the SoSE has the power to make a scheme for the transfer of the freehold title of the relevant land and buildings to the Academy Trust.

The DfE has indicated that, before it will give its formal legal approval to the conversion of a school into an academy, it will require that there is clarity relating to the arrangements for the occupation by the academy of the relevant land and buildings post-conversion.

Employees

In circumstances where a school converts to an academy, the employment of the staff of that school will ordinarily transfer to the Academy Trust pursuant to the Transfer of Undertakings (Protection of Employment) Regulations 2006 (**TUPE**). Staff can object to the transfer but are likely to have few rights against their former employer (or indeed the Academy Trust) if they do so. In almost all respects, transferring staff are entitled to transfer to the Academy Trust with the benefit of the same terms and conditions of employment as they had before the transfer; and unilateral attempts to change such terms prior to, on or after such transfer will be void and may entitle the relevant member of staff to treat themselves as having been unfairly dismissed.

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Whilst the transfer of employees to the Academy Trust takes place automatically, the school will need to provide those employees (and any unions representing those employees) with certain information in relation to the transfer. Also, consultation will need to be undertaken on a collective basis with the staff on any 'measures' (see below) which are being contemplated following the transfer. The Academy Trust and the local authority will need to liaise closely in relation to this transfer and the Academy Trust must take great care to ensure that it is protected from significant financial liability for any breach of TUPE and from any liability for any breach of employment law or a transferring employee's contract of employment which occurred prior to the conversion of a school. Normally, information provision and consultation ought to commence long enough before any transfer to allow meaningful consultation to take place. Even if TUPE consultation is not required because no 'measures' are envisaged, staff relations best practice dictates that voluntary consultation should be commenced in earnest with the staff to generate enthusiasm for the conversion.

Only once the conversion has been completed can the Academy Trust consult with employees with a view to reaching agreement regarding any changes ('measures') to the terms of their employment (such as changes to the length, and number, of teaching terms and changes to working hours), which are not changes by reason of the TUPE transfer itself but are for economic, technical or organisational reasons.

Pensions

As the employer of the academy's staff, the Academy Trust will become responsible for the administration of staff pensions following conversion and for remitting contributions to the relevant pensions schemes. Accordingly, the Academy Trust will need to register with the Teachers' Pensions Scheme in respect of its teachers' pensions entitlements. Employers have a large number of obligations under the Teacher's Pension Scheme. Employers who fail to carry out their obligations in a timely fashion face the risk of referral to the Pensions Ombudsman.

Non-teaching staff at schools fall within the scope of the Local Government Pension Scheme (**LGPS**). The Academy Trust, as the relevant employer, will be obliged to offer LGPS membership to staff and to make the requisite employer contributions, which could be significant in order to reduce any funding deficit in the scheme.

The DfE's current position in relation to the transfer of pensions responsibility is that the Academy Trust will inherit responsibility for any LGPS funding deficit which relates to the transferring school staff. Careful analysis of the likelihood of such a funding deficit (and, if relevant, the size of such deficit) will be required to ascertain whether these proposals will be acceptable in the case of the conversion of the school.

Contracts

As part of the conversion process, which will give the school independence from the local authority, many of the services provided to the school by the local authority will fall away. Accordingly, the Academy Trust will need to enter new contracts for

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the provision of these services (even if it is proposed that, for reasons of its superior purchasing power or otherwise, the local authority will continue to provide such services).

The contracts pursuant to which other goods and services are provided to the school (i.e. goods and services provided otherwise than by the local authority) will also need to be reviewed. As the Academy Trust, a newly incorporated company, will be responsible for the management of the school's affairs after the conversion process has been completed, existing contracts will need to be assigned to the Academy Trust or, where this is not possible (owing to the nature of the goods or services provided or the terms of the relevant contract), replaced.

In addition, the Academy Trust will have to contract for a number of services which it did not require prior to conversion, including the services of an auditor (which will review the Academy Trust's annual accounts before they are submitted to the Registrar).

Conclusion

The process of conversion involves a number of complex steps. Whilst the DfE has confirmed that it will provide administrative support in connection with the conversion process, and that converting

schools will have the benefit of a named case-worker to assist them, specialist legal advice will be required at certain stages of the conversion process. Ensuring that the conversion is completed properly will help to safeguard the future of the school and to protect the school's governing body against avoidable risks. Thomson Snell & Passmore has the expertise to assist converting schools in relation to:

- the incorporation of the Academy Trust;
- the drafting, negotiation and agreement of the funding agreement;
- the drafting, negotiation and agreement of the commercial transfer agreement;
- the transfer or lease of land and buildings to the Academy Trust;
- the transfer of staff to the Academy Trust; and
- the assignment and renewal of contracts.

Please refer to your usual contact at Thomson Snell & Passmore for further information. Alternatively, please e-mail Joel Kelly at joel.kelly@ts-p.co.uk or call him on 01892 701146.