

Corporate Update

The Companies Act 2006:

Issues for public and/or quoted companies

The Companies Bill (formerly the Company Law Reform Bill) received Royal Assent on 8 November 2006 as the Companies Act 2006 (2006 Act). It re-enacts and consolidates several pieces of legislation including the vast bulk of the 1985 and 1989 Companies Acts. It will come into force in stages, with all of the Act coming into force by October 2008.

Although the 2006 Act is now over 1,200 clauses in three volumes, it makes few substantive changes to the first draft of the Bill (published in November 2005) and we do not expect the 2006 Act to have a substantial impact on companies, although certain issues will arise in practice.

This is one of a series of three updates we have prepared on different topics, highlighting what in the 2006 Act may be of particular relevance to you. The other updates in the series cover the 2006 Act's relevance to private companies and to directors, and are available on our website at www.ashurst.com.

Summary

Although the 2006 Act will make a significant number of administrative and procedural changes for the daily running of public and quoted companies (see below for a summary of the main changes), contrary to many reports, it is unlikely that any will have a major impact. The more significant changes are the expanded business review and the new rights of beneficial holders of shares to receive company communications.

Business review

As you will be aware, in January 2006 the Government abolished without consultation the statutory requirements for quoted companies to publish an operating and financial review (OFR). The move attracted considerable criticism, including the threat of judicial review from Friends of the Earth. It left behind in the 1985 Companies Act the statutory requirement for a business review which applies to all

companies other than small companies for financial years beginning on or after 1 April 2005. The business review is perceived as not being as rigorous as the OFR, and accordingly the 2006 Act includes a requirement for an expanded business review for quoted companies. The expanded business review will include information about the environment, the company's employees and social and community issues, as well as suppliers.

The requirement for information about suppliers was included in the 2006 Act as a result of a very late Government amendment and has attracted much comment, particularly from organisations such as the CBI, which has said that it will increase costs for quoted companies. Although the new wording has been publicised as requiring information about suppliers, it actually requires "information about persons with whom the company has contractual or other arrangements which are essential to the business of the company". It will be for the directors to decide whether there are any arrangements which are "essential" to the company. It is unlikely that there are many companies with such arrangements which have not already been referred to in the directors' report. The Government also included a very late concession which provides that information about a person does not need to be disclosed where disclosure would be "seriously prejudicial to that person and contrary to the public interest". This is intended to deal with concerns about animal rights activists.

Following consultation after the abolition of the OFR, the Government introduced a safe harbour into the 2006 Act which restricts directors' civil liability for the content of directors' reports and directors' remuneration reports (or summaries). The safe harbour provides that the director will be liable to the company for any loss it suffers as a result of any untrue or misleading statement in a report, where the director knew or was reckless as to whether the statement was untrue or misleading, or an omission from a report of anything required to be included in it which the director knew to be dishonest concealment of a material fact. In addition, a director will not be liable to third parties (for

example, a shareholder) regarding the content of the reports and summaries, although this does not affect any potential criminal liability or civil penalty.

Codifying directors' duties

The 2006 Act will codify, but not materially change, the general duties which are owed by directors to the company. For further details, please see the Ashurst update entitled "The Companies Act 2006: Directors' duties".

Enhancing shareholder engagement

To improve governance and facilitate responsible shareholder engagement including enfranchising indirect investors, among other measures, the 2006 Act includes provisions concerning:

- **nomination rights** - registered holders of shares in companies whose shares are admitted to trading on a regulated market will have the ability to nominate the beneficial holder of the shares to receive copies of shareholder notices, circulars and accounts. Notices of meetings must alert the recipient to the fact that he may (depending on the agreement between the nominee and that person) have rights to be appointed proxy by the nominee or to instruct the nominee how to exercise its votes;
- **communications with shareholders** - there are new provisions relating to Companies Act communications by way of email or website. In order to take advantage of them, individuals need to give the company consent (or deemed consent in the case of website communications). These provisions are expected to come into force in January 2007. However, companies wishing to use them will need to amend their articles or obtain shareholder approval (both of which will require a shareholder meeting). Companies may therefore wish to pass the appropriate resolution at their 2007 AGMs;
- **proxies** - enhanced powers so that proxies may speak at general meetings (currently, statute only provides for proxies to speak at general meetings of private companies) and vote on a show of hands as well as on a poll, coupled with supporting provisions, such as recognition that companies may confer more extensive rights in their articles of association on members and proxies. The aim is that indirect investors nominated as proxies by the registered holder be able to exercise all participation rights that would otherwise only be available to the registered holder;

- **circulation of members' resolutions at AGMs** - for public companies, where before the end of the financial year preceding the AGM, sufficient members request circulation of resolutions (that may properly be put) at the AGM, a new provision that circulation be at the cost of the company rather than the requisitioners; and
- **independent reports on polls** - a new right for shareholders of quoted companies, if a certain specified minority so request, to require an independent report by an independent assessor on any poll taken, or to be taken, at a general meeting. The report, which must cover specified matters, must be disclosed on the company's website.

The only one of these measures which is likely to impact companies in practice is the ability of the registered shareholder to nominate beneficial shareholders to obtain company communications. To date institutional registered holders have been reluctant to pass shareholder communications to the clients for whom they hold shares because of the administrative burden. These new provisions enable that burden to be passed to the company.

Legal and administrative changes

- **Directors' home addresses** - new directors will be permitted to provide a service address with home addresses being kept on a separate list to which restricted access will be given. Currently, only directors at serious risk of violence and intimidation can have their home addresses kept off the public record, which may deter some people from becoming directors. This new provision will not apply to existing directors who already have their home addresses registered with Companies House as Companies House.
- **Shareholders' register** - anyone who wants to look at a company's shareholders' register must provide the company with a written request explaining who they are, the purpose for which they will be looking at the information and whether it will be disclosed to a third party. If the company does not wish to grant the request it will then apply to the court for the court to review the request. It will be a criminal offence for a person to provide a request knowingly or recklessly that is misleading, false or deceptive in a material particular which offence will be punishable by up to two years' imprisonment or a fine. These new provisions are aimed at safeguarding members' names and addresses amid concerns regarding animal rights activists.
- **Changes to the memorandum and articles** - a number of the more technical changes not detailed in this

update (such as changes to share capital) may require companies to amend their articles of association. The Government has not yet stated how the 2006 Act will apply to existing companies so we are not yet able to advise you on the necessary detailed changes.

Improving company reporting

The 2006 Act includes, among others, provisions concerning:

- **AGMs and periods for filing accounts** - public companies to hold their AGMs and file their accounts with the registrar within six months of their financial year-end (this is a change to the seven-month period in the 1985 Companies Act, although it reflects in practice what quoted companies do in any event); and
- **website publication** - quoted companies to publish their preliminary announcements of annual results and their full accounts and reports on their websites (or a website maintained on their behalf) as soon as reasonably practicable and also to disclose on such websites specified details concerning the results of polls at general meetings. Most quoted companies already do this as a matter of good practice.

Share capital

In advance of amendments to EU legislation, the Government has decided, at this stage, not to make major changes to the capital maintenance regime for public companies (the prohibition on financial assistance will be abolished for private companies - see the Ashurst update entitled "The Companies Act 2006: Issues for private companies"). That said, the 2006 Act contains a number of provisions which will simplify or introduce flexibility into current share capital provisions that will affect public and/or quoted companies. These include:

- **redenomination of share capital into another currency** - introducing a simplified procedure to enable companies easily to convert their share capital from one currency to another (without having to cancel or buy back their shares and issue fresh shares in another currency) and, after conversion, to achieve round nominal share values; and
- **paper-free transfer and holding of securities** - while acknowledging that more work needs to be done as to the costs and benefits of a paper-free approach, to include a power whereby the Secretary of State may

make regulations requiring, as well as permitting, paper-free holding and transfer of quoted company shares.

Political donations and expenditure

As to the requirements for shareholder authorisation of political donations and expenditure, many of the current uncertainties will remain but the following changes will be made:

- **trade unions** - to make it clear that a donation to a trade union (other than its political fund) is not a political donation (so, for example, the provision of a meeting room for trade union officials is not caught by the requirement for shareholder approval); and
- **form of resolution** - to allow companies greater procedural freedom for the necessary shareholder authorisation, for example, by permitting them to seek separate authorisation for donations to political parties and for donations to other political organisations, and by permitting a holding company to use one resolution to cover both the holding company and one or more subsidiaries.

Auditors

With the aim of boosting audit quality and also tackling auditor liability issues, the 2006 Act contains new clauses, among others, as regards:

- **auditor liability** - to allow auditor liability limitation agreements (reflecting a fair and reasonable apportioning of liability) to be entered into between companies and their auditors, subject to shareholder approval. The attitude of the institutional investor community will determine whether these agreements are entered into by quoted companies; and
- **new auditor offence** - to make it a criminal offence (by way of fine) for an auditor to knowingly or recklessly cause an audit report to include any matter that is misleading, false or deceptive in a material respect.

Further information

For further information, please speak to your usual Ashurst contact. In February 2007, the Government will be explaining in further detail how the 2006 Act will be implemented and we will provide you with further information at that time.

Brussels

Avenue Louise 489
1050 Brussels
Belgium
Tel +32 (0)2 626 1900
Fax +32 (0)2 626 1901

Dubai

Level 42 Emirates Towers
Sheikh Zayed Road
PO Box 119974
Dubai
United Arab Emirates
Tel +971 (0)4 319 7530
Fax +971 (0)4 319 7546

Frankfurt

Oberlindau 54-56
60323 Frankfurt am Main
Germany
Tel +49 (0)69 97 11 26
Fax +49 (0)69 97 20 52 20

London

Broadwalk House
5 Appold Street
London EC2A 2HA
UK
Tel +44 (0)20 7638 1111
Fax +44 (0)20 7638 1112

Madrid

Alcalá, 44
28014 Madrid
Spain
Tel +34 91 364 9800
Fax +34 91 364 9801/02

Milan

Via Sant'Orsola, 3
20123 Milan
Italy
Tel +39 02 85 42 31
Fax +39 02 85 42 34 44

Munich

Prinzregentenstraße 18
80538 Munich
Germany
Tel +49 (0)89 244 421 100
Fax +49 (0)89 244 421 101

New Delhi Liaison Office

6 Aurangzeb Road, D-1
New Delhi 110011
India
Tel +91 11 2301 4054
Fax +91 11 2301 4089

New York

712 Fifth Avenue
New York, NY 10019
USA
Tel +1 212 245 4540
Fax +1 212 245 4335

Paris

18, square Edouard VII
75009 Paris
France
Tel +33 (0)1 53 53 53 53
Fax +33 (0)1 53 53 53 54

Singapore

6 Battery Road
#15-08
Singapore 049909
Tel +65 6221 2214
Fax +65 6221 5484

Tokyo

Shiroyama Trust Tower, 30th Floor
4-3-1 Toranomom
Minato-Ku
Tokyo 105-6030
Japan
Tel +81 3 5405 6200
Fax +81 3 5405 6222