

Corporate Update

The Companies Act 2006:

Issues for private 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 public and/or quoted 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 private companies (see below for a summary of the main ones), it is unlikely that any will have a major impact. The more significant changes are the codification of directors' duties and those changes requiring articles of association to be amended.

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".

Changes to legal and administrative procedures

Set out below are a number of changes to the legal and administrative procedures for private companies. A number

of the more technical changes will require companies to amend their articles of association. However, the Government has not yet stated how the 2006 Act will apply to existing companies so until then we are not able to advise in detail:

- **abolition of authorised share capital** - there will no longer be a requirement to include in the constitution a ceiling on the number of shares which may be issued;
- **abolition of unanimity requirement for the statutory written resolution procedure** - the consent level is instead to be the same as for passing an ordinary or special resolution (as appropriate) in a general meeting. The practical effect of this for most private companies will be that all shareholder decisions will be made by way of written resolution;
- **change of name** - the articles may provide that the company's name may be changed other than by way of special resolution (e.g. by board resolution);
- **abolition of requirement for a company secretary** - the current legal requirement to appoint a company secretary is abolished although private companies will still be able to appoint a company secretary if they so wish;
- **at least one director to be a natural person** - to date it has been possible to have entirely corporate directors;
- **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. This new provision will not apply to existing directors who already have their home addresses registered with Companies House;
- **shareholders' register** - anyone who wants to inspect a company's shareholders' register will have to provide the company with a written request explaining who they are, the purpose for which they want 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;

- **standardisation of the notice periods for meetings of private companies** - to 14 days for all meetings (subject to the right to call a meeting on short notice);
- **holding meetings on short notice** - shareholders holding 90 per cent (or such higher percentage not exceeding 95 per cent as may be specified) of the voting rights may agree to hold a meeting on short notice;
- **abolition of requirement to hold AGM** - private companies need not hold AGMs, lay accounts in general meeting or appoint auditors annually unless they positively opt to do so (applying by default the present "elective" regime, which private companies currently have to opt to put in place);
- **section 80 of the Companies Act 1985** - this section currently requires directors to be authorised by ordinary resolution to allot relevant securities. The equivalent section in the 2006 Act will not, unless the articles otherwise provide, apply to private companies unless the company has (or will have after a proposed issue) more than one class of share. We would expect the articles of non-wholly owned subsidiaries to require shareholder approval thus negating the practical impact of this change;
- **simplification of the procedure by which redeemable shares are issued** - this has been achieved by the amendment to the current section 159 resulting in the removal of the requirement for prior authorisation to allot redeemable shares in the articles;
- **modernisation of the procedure to form a company** - it is intended to remove obstacles to company formation online;
- **company objects** - unless the company's constitution specifically states otherwise, a new company's objects will be unrestricted;
- **ability to entrench articles** - a company's articles may prohibit certain provisions in them being altered or removed (in the absence of members' unanimous agreement) or require certain conditions to be met or procedures followed (which must be more restrictive

than in the case of a special resolution) before such provisions can be altered or removed. The decision to entrench provisions of the articles can only be made on formation of the company or with the consent of all members; and

- **shortening of the time period to file accounts** - this will be shortened from ten to nine months.

Capital maintenance


The changes include:

- **abolition of the rules prohibiting financial assistance in relation to the acquisition of private company shares** - however, it will remain unlawful for a public company that is a subsidiary of a private company to give financial assistance directly or indirectly for the purpose of the acquisition or to reduce or discharge any related liability. The financial assistance rules will remain (unamended) for public companies;
- **alternative procedure for capital reductions** - there will now be an additional ability to undertake a capital reduction without the need for court approval by means of a members' resolution and a directors' solvency statement. This will be particularly useful where companies wish to reduce their share premium account to create distributable reserves as this is one of the most common reasons for undertaking a capital reduction; and
- **payment of dividends** - clarification of the application of the distribution rules (i.e. the ability of a company to pay dividends) in relation to distributions in kind (this will be especially relevant to intra-group transfers albeit that it confirms the position as it was generally believed to be).

Auditor concerns

With the aim of boosting auditor 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. While the attitude of the institutional investor community will determine whether these agreements are entered into by quoted companies, it is expected that the auditing firms will be making every effort to



persuade their private company clients to agree to them; and

- **new auditor offence** - to make it a criminal offence (by way of a 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.



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