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Red Tape Challenge - Company and Commercial Law Spotlight

This is a written submission by the Company Law Committee of the City of London Law Society in response to the discussion paper published by the Department for Business, Innovation and Skills in January 2012 entitled *'Providing a flexible framework which allows companies to compete and grow: discussion paper.'*

The City of London Law Society represents approximately 14,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi-jurisdictional legal issues. The CLLS responds to a variety of consultations on issues of importance to its members through its 17 specialist committees. This submission has been prepared by the Company Law Committee.

We note that the discussion paper was issued in connection with the Red Tape Challenge and that the BIS wishes to build on existing work and consider whether further improvements can be made to company law which will remove burdens on business and lead to growth.

We do not have specific responses to the eight questions raised in the discussion paper (with the exception of question 1 on company names, see point 3 below) but instead wish to re-emphasise points made previously in the following (copies attached):

- our 20 August 2010 submission on problems and anomalies in the Companies Act 2006 made by this Committee and the Law Society Company Law Committee; and

- our letter to the Minister of State for Business and Enterprise of 11 October concerning the Enviroco decision.

We appreciate that the Red Tape Challenge is principally concerned with cutting the overall burden on companies by reducing the volume of regulation affecting them. Some of the points we have made would achieve that end, but others will satisfy the same ultimate purpose for companies by reducing their costs, providing clarity where there is currently doubt or confusion, and permitting flexibility so they can respond to business needs.

We summarise briefly below the points from those submissions which we see as having a high priority (references are to the Companies Act 2006 unless otherwise indicated) and the reasons why – please see our earlier submissions for full details:

1. **Statement of company's objects (s.31)** – there is no need for s.31(2) and form CC04 which should be deleted as an unnecessary burden on business.

2. **Constitutional limitations: transactions involving directors or their associates (s.41)** – the Explanatory Notes concerning this section do not seem to accord with what s.41(4)(d) says, leading to confusion and potentially serious cost implications.

3. **Company names (ss.66-76 and related regulations)** – the regulations in SI 2009/1085 and SI 2009/2615 are complicated and require streamlining and simplification. Companies should not need to take legal advice before deciding on a name. Name swaps are unnecessarily restrictive, preventing or delaying companies, for no apparent reason, from making unobjectionable name changes.

4. **Duty to avoid conflicts of interest (s.175)** – codification of this duty has increased bureaucracy, added to costs, is widely misunderstood by directors and has produced no tangible benefit. It should be reviewed and replaced.

5. **Directors' loans and quasi-loans** – exception for expenditure on defence proceedings (s.205) – this exception should be relaxed to permit expenditure previously allowed under s.337A, Companies Act 1985, such as defence costs in US litigation and extradition proceedings.

6. **Written resolutions of shareholders** – where Articles require a particular shareholder to be at a meeting for it to be quorate, the statutory written resolution procedure, with its 50% plus and 75% thresholds, appears to override that requirement (this is of particular relevance to private equity and government backed companies).

7. **Power of directors to allot shares etc: authorisation by company (s.551)** – there is a lack of clarity as to whether an indefinite authority to allot shares given under s.80A, Companies Act 1985 remains indefinite or is limited to five years under s.551.

8. **Sub-division or consolidation of shares (s.618)** – sub-section (3) suggests that some further action is required by a company to achieve a sub-division or consolidation of its shares, beyond the passing of a shareholder resolution. This is a (perhaps unintended) change from the Companies Act 1985, with no obvious rationale.

9. **Treatment of reserves arising from a reduction of capital (s.654)** – there is uncertainty as to whether the reduction of a share premium account creates distributable reserves, arising from the wording used in SI 2008/1915.

10. **Duty to cancel shares in public company held by or for the company (s.662)** – a change of wording in s.662(1)(c), when compared with the predecessor provision in the Companies Act 1985, has created uncertainty as to whether it is necessary to go through an unduly onerous procedure for the reduction of share capital.

11. **The authorised minimum (s.763)** – the drafting of the Companies (Authorised Minimum) Regulations 2009, reg. 3(4), seems to contemplate a different treatment for a company that has redenominated all its share capital and one that has, say, redenominated all bar £1, which we do not believe was intended. Section 766 of the Companies Act 2006 was amended by article 28 of the Companies Act 2006 (Consequential Amendments and Transitional Provisions) Order 2011 on 13 May 2011 but this change appears to be an enabling provision only and we are not aware of any substantive change having been made to cure this anomaly.

12. **Distribution in kind: determination of amount (s.845)** – the section does not cater for some transfers between group companies, nor where the acquiring company may potentially be deemed to be making a distribution, resulting in considerable uncertainty and costs.

13. **Meaning of "subsidiary" (s.1159)** - Enviroco case – this case has highlighted an anomaly in the drafting of this section which has the potential of causing unintended consequences in the interpretation of a wide range of commercial contracts. The error can be corrected quickly by secondary legislation.

We believe that by dealing with these points the Government can achieve an effective reduction in unnecessary costs and other burdens affecting UK incorporated companies of all sizes.

We hope these comments are helpful to the Committee. Please contact Martin Webster (martin.webster@pinsentmasons.com), a member of the Company Law Committee, to discuss any aspects of this submission.

3 June 2012

COMPANIES ACT 2006 – PROBLEMS AND ANOMALIES

This submission is made by the Law Society Company Law Committee and the City of London Law Society Company Law Committee, following BIS's expression of willingness to receive comments on perceived errors and anomalies in, and problems arising from, the implementation of the Companies Act 2006 ("**CA2006**") and its attendant legislation.

We have included comments on aspects on which there is a divergence of view or uncertainty amongst at least some of the respective memberships, a feature of our approach being to highlight those areas which are causing difficulties for companies and which would benefit from amendment and or published guidance.

For each problem, we have indicated, as requested by BIS, our assessment of whether it is perceived as a high, medium or low priority, our assessment including whether it has high, medium or low implications in terms of the cost burden on companies. Our assessments have not been fully researched but simply represent a 'best guess', on the basis of our experience, of the likely importance of the problem.

For ease of reference, comments are made by reference to, as the case may be, the provision in the relevant primary legislation or regulation most closely connected with the relevant comment. References to a part, chapter, section or subsection are to the same in CA2006 unless otherwise stated.

PROVISIONS IN CA2006

Unlimited companies (s.3)

S.3 refers to unlimited companies and it is clear from, e.g., s.102 that an unlimited company may have, or may not have, a share capital. However, CA2006 does not specify how an unlimited company with a share capital becomes one without a share capital or vice versa (e.g. passing a special resolution, amending articles as appropriate, filing a statement of capital etc.). It would be helpful if this could be clarified.

Note that the Companies Act 1985 ("**CA1985**"), like CA2006, did not stipulate how an unlimited company with a share capital becomes one without a share capital, or vice versa. However, section 545 CA2006, which is new and does not have a precedent in CA1985, defines a "company with a share capital" as being one that has power to issue shares under its constitution. This question should therefore be read in the context of the problems arising from s.545, which are described below in relation to that section.

Priority: low.

Statement of capital (s.10 and other provisions)

A point not covered in the recent consultation on statements of capital is that in all of the places where CA2006 mentions statements of capital, it asks for "*the amount paid up.... (whether on account of the nominal value of the share or by way of premium*" – emphasis added - to be stated. A problem/confusion lies around whether the underlined wording covers any premium,

including premium not transferred to share premium account - and in particular whether it covers a premium which under s.612 is transferred to a merger reserve instead.

In the recent decision in Re Liberty International Plc [2010] EWHC 1060 (Ch) the court resolved the question and decided that the merger reserve should not be included.

It would be helpful if this could be clarified in the guidance; even if, as a result of the recent consultation, it is decided to remove premium from statements of capital altogether, clarification pending the removal would be helpful.

Priority: low.

Entrenchment provisions (s.22)

We do not comment on this aspect as it is appreciated that BIS is considering what to do following its public consultation on this section, including on its interrelationship with CA2006 provisions on class rights.

Priority: high. Given the uncertainty, a significant number of companies would be affected adversely if s.22(2) were to be introduced in its current form, and there would be significant advisory costs, as well as serious potential litigation costs and consequences if a company adopted a practice which was then challenged or shown by judicial decision to be wrong.

Memorandum (s.28)

1. We understand some practitioners are uncertain as to whether the adoption of new articles of association by a company incorporated under CA1985 (or earlier Acts) is effective in removing from the company's articles the provisions of its memorandum to be treated as provisions of the company's articles by virtue of s.28, and thus whether a special resolution stating that the new articles are adopted "in substitution for and to the exclusion of all existing articles of association of the company" would be effective. We assume that it was the government's intention that adopting new articles (i.e. without an express resolution deleting the provisions of the memorandum) should be sufficient to delete the memorandum provisions (subject to the point mentioned in point 4 below, where those provisions were not amendable immediately prior to 1 October 2009) but, given that there appears to be uncertainty in some quarters, published guidance endorsing this view would be helpful.

Priority: low.

2. Companies incorporated under CA1985 (or earlier Acts) included provisions in their memorandum as to their authorised share capital e.g. "The authorised share capital of the company is £[AMOUNT] divided into [NUMBER] shares of £[AMOUNT] each".

There are differing views as to whether these provisions (treated as provisions of the company's articles as from 1 October 2009 by virtue of s.28) require amendment by special resolution following any change in share capital which makes such statement no longer factually correct (e.g. by an amendment by ordinary resolution as permitted by paragraph 42(2)(b) of the Eighth

Commencement Order or by a reduction of share capital or a subdivision or consolidation of share capital). Published guidance on this would be helpful. If there is need for such an amendment, it would be helpful for the guidance to state whether amendment is only necessary if the change in share capital involves an allotment of shares above the stated maximum created by such a provision (see also paragraph 42 of the Eighth Commencement Order). If there is no need for such an amendment, guidance would still be helpful, including as to whether, after a change to the para. 42 amount, amended articles should be filed under s.26 and/or whether the para. 42 resolution should be filed.

Furthermore, it is not clear how paragraph 42(6) applies to an increase in share capital where the articles contain a blanket authorisation which is updated annually by resolution.

Priority: medium.

3. "Old-style" memoranda: Where a company has, after 1 October 2009, removed the restrictions on its objects and abolished its authorised share capital, the most recent memorandum on its record at Companies House will nevertheless contain a statement of its restricted objects and its authorised share capital. This is potentially confusing (particularly for the layman), and it would be helpful if companies formed under earlier Companies Acts were given the option, but not an obligation, to file a reprinted memorandum reflecting any such changes. Another suggestion is that (if this is feasible) Companies House sets up a system so that any person requesting or accessing a memorandum of association of a pre 1 October 2009 company gets a warning about section 28.

It might be helpful if guidance were to be published as to what pre -1 Oct 2009 companies should they do if someone asks to see their memorandum (as banks lending to companies are still tending to do). This is not currently addressed in BIS or Companies House guidance, although BIS guidance does address what existing companies should do when asked to provide their articles. It seems that one currently adopted approach is to produce a copy of their memorandum which looks like a new style memorandum, and another is to provide their old style memorandum with a covering note to explain the effect of s.28 and the steps, if any, the company has taken to remove or amend any provisions.

Priority: medium.

4. There is uncertainty whether it is possible to delete the imported registered office provision from the articles. Para. 4(1) of Schedule 2 of the Eighth Commencement Order provides as follows: "*The power conferred by section 21(1) of the Companies Act 2006 (amendment of company's articles by special resolution) does not apply – (a) to provisions of the articles of an existing company that were not capable of being so amended immediately before 1 October 2009*".

Para. 4(3) of Schedule 2 provides: "*References in this paragraph to provisions of the articles of an existing or transitional company include provisions of the company's memorandum that are to be treated by virtue of section 28 of that Act as provisions of its articles*".

If these two provisions are read in conjunction, it appears possible to conclude, on a cautious reading, that references to the registered office should be retained in the articles following the operation of s.28, on the basis that this was not a provision that was capable of being amended prior to 1 October 2009. However, this does not seem to be what was intended or what companies are doing.

Priority: low.

Resolutions needing to be filed at Companies House (s.29)

S.29 sets out the types of resolutions and agreements which must be filed with the Registrar of Companies (under s.30) and which form part of the company's constitution (under s.17). S.29(1)(d) is not altogether clear and could be usefully clarified.

Sub-section (d) applies to any "*resolution or agreement that effectively binds all members of a class of shareholders though not agreed to by all those members*".

We think that this is intended to catch resolutions passed by a class of shareholders (excluding any resolutions consented to by all members of the class under the *Duomatic* principle, these being already caught by s.29(1)(c)).

There are two issues. First, resolutions that are not specifically class resolutions may still be said to "bind" the members of the class in the sense that, if the resolution has been validly passed, it cannot be challenged. However, we think it is tolerably clear that s.29(1)(d) is meant to cover only resolutions of a class, although confirmation in the form of guidance would be welcome.

Secondly, we would welcome guidance confirming that the effect of s.629 is not to make the ordinary shares of a company with only one class of shares in issue into a 'class' for the purposes of s.29(1)(d). The concern here is that, whilst we do not think that s.29(1)(d) should be read as requiring all resolutions of ordinary shareholders to be filed where they have not been passed unanimously, it appears open to that interpretation.

Priority: low.

Statement of company's objects (s.31)

1. S.31 provides that unless a company's articles specifically restrict the objects of the company, its objects are unrestricted.

There are differing views as to the effect of this in relation to companies incorporated under CA1985 or earlier Acts:

- One view is that the effect of s.31 is that such a company may engage in activities and have powers other than those listed provided the articles do not specifically refer to that activity or power and restrict it. This is on the basis of the words "*specifically restricts*" in s.31, i.e. there needs to be an express/specific restriction rather than simply an implied restriction.

This is the view held by the Financial Law Committee of the CLLS and at least one member has an opinion from Counsel confirming this. It also seems to be supported by the Explanatory Notes. If this view is correct, one consequence is that a lender which has lent money to a company incorporated before 1 October 2009 and in lending that money has relied on an implied restriction on the company's powers arising from a statement in the memorandum that the company's object was X, will no longer be able to rely on that restriction and so would be well advised to review the constitution and seek to restrict the company's activities contractually or by getting the company to adopt new articles which specifically restrict the company to doing X.

- An alternative view is that a specific list of objects and powers included in the memorandum of such a company (and now deemed to form part of the company's articles) which is not stated to be exhaustive is still to be treated as a "restriction" on such company's ability to engage in activities or exercise powers outside those referred to in the specific list.

A situation illustrating this point is whether a company incorporated under CA1985 which has a long list of objects and powers that do not include a power to give guarantees and no specific restriction in the articles (including the provisions of the memorandum deemed to form part of the articles by virtue of s.28) can give a guarantee. Published guidance about what is intended would be helpful.

Priority: medium.

2. If a company had a statement of its objects in its memorandum, this statement is now deemed to be in its articles. Therefore any change to it would be by way of special resolution required to be submitted for filing to the Companies Registry. We therefore query whether there is any need for s.31(2) / Form CC04. The current requirement to file a separate notice to make the change or removal effective seems an unnecessary trap for the unwary, with potentially serious knock-on effects in terms of directors' liability for breach of duty to act within the objects of the company if the requirement has been overlooked. We understand that in practice there has already been a high level of inadvertent non-compliance with the requirement to file Form CC04, which is evidence of it being a trap. We suggest that the provision be deleted. It is unusual for the filing of a form to affect the validity of a company action (the example of registering charges being the exception to the general rule).

Priority: high, given the serious consequences of non–compliance.

Constitutional limitations: transactions involving directors or their associates (s.41)

Under s.41 a transaction ceases to be voidable if affirmed by the company under s.41 (4)(d). S.41, according to paragraph 127 of the Explanatory Notes, "*restates section 322A of the 1985 Act*."

Under s.322A(5)(d)CA1985 the transaction ceased to be voidable if "*ratified by the company in general meeting*". (The resolution required to ratify was ordinary if it related to an action beyond the board's authority, or special if it related to an action that was beyond the company's capacity).

On the face of it, therefore, because of the omission of the words "*by general meeting*" it appears that the effect of s.41(4)(d) is that the board of directors can affirm the contract on behalf of the company. Given the explanatory note, it is not clear that this change was intended.

If the board can affirm, it is unclear whether the votes of directors (and connected persons) should be included in such an affirmation, whether at a board meeting or at a general meeting. (We note that under s.239 those votes would be excluded at the general meeting).

Priority: High - Although we suspect this only comes up relatively rarely, it is a substantive point, with potentially serious cost implications.

Company names (sections 66 – 76 and related Regulations))

As a general comment, the restrictions on company names in SI 2009/1085 and SI 2009/2615 are quite complicated, and it would be helpful if they could be streamlined (i.e. set out more clearly, ideally in a single set of regulations), if not simplified.

The Company and Business Names (Miscellaneous Provisions) Regulations 2009 are causing problems, especially in the context of name swaps in group reorganisations.

For example, company names (same names) - the list of words to disregard when deciding whether two names are treated as the same has been expanded under CA2006. As a result, where Company A and Company B were formed under CA1985 with names which were not, at the time, treated as the same; their names are treated as the same under CA2006.

Secondly, in deciding whether a company's name is the same as another company's name, some words, expressions, signs and symbols must be disregarded (s66(3)). These are listed in the Regulations. The list is too wide.

Words etc to be ignored include 'Group', 'International', 'Holdings' and the letter 's' at the end of a word. This means that, for the purpose of s66, the name 'ABC Limited' is treated as the same as, e.g., 'ABC Group Limited' and 'ABCS Limited'.

Also, under the Regulations, a company (A) can only adopt a name the "same as" another company's name (B) if B consents AND B is in the same corporate group as A. It does not seem to us that this second condition is required and it is unduly restrictive since A and B may operate in different sectors, so B could, in giving consent, take the view that there is no commercial harm in A, an unconnected company, having the name. There is no facility under CA2006 for a company to consent to the use by a company outside its group of a name which is treated as the same, unlike the position under the pre-CA2006 regime. It would be helpful to have a transitional provision dealing with this particular scenario.

Another difficulty having a real practical adverse effect for companies is that they are not able to re-use names that they would have been able to use under CA1985. For example a listed company client of one of our members which was doing a demerger wanted to use an existing name within its group for the new listed company being formed on the demerger but could not because it was too like a name that belonged to someone outside its group.

Difficulties have been experienced with Companies House over the incorporation of a trading subsidiary of a charity seeking to use the word “Foundation” contained in the charity's name. The proposed subscribers were told that they would have to include specific objects in the trading subsidiary's articles in order to justify the use of the word “Foundation”.

Company names incorporating UK or GB are being allowed in an inconsistent fashion (using brackets) by the Registrar.

There have been difficulties when seeking to use the word “Fund”, which is now a restricted word and permission must be obtained from the FSA before using it. In one member’s experience the FSA has indicated that granting permission could take a number of weeks. If the expanded list of words is to be retained it would be helpful if the legislation could specify a reasonable maximum period in which a decision must be made by the relevant authority.

Also, on a slightly different note, since the integration with Northern Ireland difficulties have been experienced when incorporating companies here with names that are the same as those in Northern Ireland even if those will only operate in Northern Ireland.

Priority: high. Present position adds cost and delay to transactions. We are aware of at least one client having to pay several thousand pounds to someone else in order to obtain their consent to the use of a name that the client had been using for several years.

Requirement to disclose company name etc (s.82)

The Government's power under s.82(3) to include a provision in the trading disclosures regulations to allow companies to use the abbreviation of their registered name (e.g. XYZ Ltd instead of XYZ Limited) has not been exercised. BIS advised in early April 2010 that the failure to exercise the power was an oversight, and that it planned to exercise the power in the following months. This could perhaps be followed up as part of the review.

Priority: medium.

Re-registration as an unlimited company (ss.102 to 104 and s.110)

1. Section 103(2)(a): it would be helpful if Companies House could make available a standard form of assent by members of a private company. Whilst the form of such assent is set out in Schedule 3 to The Companies (Registration) Regulations 2008/3014 it is not apparent why Companies House has not made it available on its website. There was a form under the equivalent section of CA1985 (form CON49(8)(a)). Its absence creates uncertainty as to the need to file a form and whether Companies House would accept the form as set out in the regulations.

Section 110(2)(a): the same point applies in relation to the standard form of assent by members of a public company set out in Schedule 4 to The Companies (Registration) Regulations 2008/3014.

Priority: medium.

2. A question has arisen as to whether or not it is necessary for the company to pass a special resolution to amend its articles to reflect the change in status. The provisions of s.104(4) make it clear that on the issue by the Registrar of Companies of the certificate of incorporation on re-registration, the changes in the company's name and articles take effect. The question has arisen because the wording of ss.102 to 104 does not actually state that a special resolution to amend the articles of association (or adopt a new set of articles) is not required, and s.21 specifies that the articles of association can be amended only by way of special resolution. Admittedly, the corresponding provision in s.50 CA1985 also failed to include such a statement but s.50(2)(b) CA1985 did clarify that, upon issue of the certificate of incorporation on re-registration, the amendments to the articles took effect "as if duly made by resolution of the company". In the absence of such a deeming provision in s.104, it would be helpful to obtain guidance on whether or not a special resolution is required to amend/adopt the articles of association in these circumstances.

Priority: medium.

Re-registration of an unlimited company as a company limited by guarantee (sections 105 and 106)

There appears to be a contradiction between s.105(1)(a), which requires a special resolution, and s.106(3), which requires a statement of guarantee that states that each member undertakes to contribute if the company is wound up while he is a member or within one year from when he ceases to be a member.

Until recently Companies House has interpreted this as requiring each member to sign the statement of guarantee (which is contained in Companies House Form RR06). Form RR06 has recently been amended so that it no longer requires the signature of every member. This has removed the difficulty that had existed of a dissenting member preventing re-registration by refusing to sign the statement of guarantee notwithstanding that a special resolution has been passed.

However, the underlying contradiction between ss. 105 and 105 remains. The concern is as to whether, if some of the members opposed the special resolution, it can really be said that every member has undertaken to contribute.

Priority: medium.

Response to request for inspection or copy of register of members (s.117)

There is a discrepancy between s.117 and the Companies (Company Records) Regulations 2008 (2008/3006) in relation to allowing inspection of the register of members.

S.117 requires a public company to make its register of members available for inspection for two hours on every working day. It provides that, if a private company receives a request from a person to inspect the register of members, it has five working days in which to comply or to apply to court for a direction that the request is not for a proper purpose. However, regulation 4 of the Companies (Company Records) Regulations 2008 provides that the notice required from

a person for inspection of the company records of a private company (including the register of members) is:

- two working days during the period of notice for a general meeting or a class meeting or, during the period in which a written resolution can be passed; and

- in all other cases 10 working days.

Failure to comply with s.117 is an offence, unlike failure to comply with the Regulations. We do not think the interaction of the Regulations and s.117 has been thought through properly and this could be a trap for unwary companies. It would be helpful if the Regulations and the Act could be made consistent to avoid the possibility of a company complying with one but inadvertently not complying with the other. In this context we would suggest BIS reverts to the 10 working day period to comply with the request, which was the period specified in CA1985.

Priority: medium.

Exercise of rights where shares held on behalf of others: exercise in different ways (s.152)

As BIS will recall there was no consultation on the content of this section, which was itself introduced very late on in the preparation of CA2006. We would be grateful if the section could be reviewed. As BIS is aware, there is uncertainty as to how several of its provisions are to work in practice and in relation to other provisions of the Act, for example its provisions on corporate representatives and as to the effect of the words (in s.152(1)) "*on behalf of more than one person*", which arguably preclude the use of s.152 if e.g. a member holds for X who holds for A and B.

Priority: low.

Particulars of directors to be registered: corporate directors and firms (s.164)

Under s.164, the register of directors must identify the national register in which a corporate director is registered. It would be helpful to have some clarification (perhaps in the form of guidance in the appropriate Companies House guidance booklet) as to how the UK register should be referred to in this context.

Priority/ Cost implication: both low.

Resolution to remove a director (s.168)

We think that this section should be amended so as to disapply the requirements of s.168(2) (special notice) and s.169 (director's right to protest against removal) where a company has only a sole member. Most of our members think that the policy reason for these sections, i.e. to allow a director to make his defence to the shareholders, does not really apply in this situation. We note that s.288 does not allow the written resolution procedure to be used to pass a

resolution under s.168. We suggest this should also be changed to permit the use of a written resolution by a sole member. (See below a similar comment on s.510).

Priority: low, since it is possible to include a provision in the articles that would allow the member to remove the director by written notice.

Duty to avoid conflicts of interest (s.175)

Codification of the duty to avoid conflict of interest has had the effect of introducing more paperwork and bureaucracy for many companies without any tangible legal benefit and at considerable cost (including legal costs), which was clearly not the intended effect. Considerable uncertainty arises as to when one might be in breach of duty. We suggest that it might be appropriate to consider repealing the duty to avoid possible conflicts and replacing it with a duty not to act in relation to matters where the director has an (actual) conflict without the approval of either the un-conflicted directors or the members and also providing that so long as a director does not act when he has a conflict, he is not in breach of the duty. If BIS are unable to agree that the above approach may be a sensible way forward then we have many other points on sections 175 and 180.

Priority: high.

Directors' loans and quasi-loans - exception for expenditure on defence proceedings (s.205)

We suggest that the exception at s.205 which permits a company to fund a director's expenditure on defence proceedings be relaxed to cover what was previously permitted by s.337A CA1985.

S.337A(1)(a) CA1985 allowed a company to pay a director's costs incurred "*in defending any criminal or civil proceedings*" of any kind. The subject matter of the proceedings was irrelevant. However s.205(1)(a) CA2006 prevents a company from paying a director's defence costs unless the proceedings "*are in connection with negligence, default, breach of duty or breach of trust by him in relation to the company or any associated company*". This restriction could prevent the exception being applied in one of the main situations it was originally intended for - US litigation combined with threatened extradition to the US (such as in the Christies/ Sotheby's price fixing saga) and could put a board in the invidious position of being unable to approve payment of a director's defence costs where doing so would be both reasonable and in the company's best interests.

Priority: high

Payment in connection with share transfer: requirement of members' approval (s.219)

S.219 (in Part 10) is intended to prevent directors agreeing termination payments for themselves in anticipation of their company's takeover by other entity. The term used in it to refer to takeovers - "*takeover bid*" - is not defined. It would be useful to include a definition.

S.971 contains a definition of "*takeover bid*" that applies to Part 28 only - "*a public offer … made to the holders of the securities of a company to acquire all or some of those securities, whether mandatory or voluntary, which follows or has as its objective the acquisition of control of the offeree company in accordance with national law*" (s.971(1) / Article 1(1) of the Takeovers Directive). This is a narrower concept of "offer" than that in s.314 CA1985 (replaced by s.219 CA2006).

Priority: low.

Records of directors' meetings (s.248) – directors' written resolutions

Companies should be required to keep records of directors' written resolutions for at least ten years. At present, s.248 deals only with minutes of board meetings.

Priority: low.

Qualifications of secretaries of public companies (s.273))

The requirements in s.273 concerning the qualifications of secretaries of public companies do not cater sufficiently for corporate secretaries. A corporate secretary can fall within s.273(2)(a) and (d), but it would be sensible to include an additional qualification along the following lines: "in the case of a corporate secretary, that one or more of its directors, or its secretary, has at least one of the above qualifications".

Priority: low.

Part 13 Chapter 1 - Votes: specific requirements (s.285) and chairman's casting vote aspects

1. There are differing views as to whether the current wording of s.285 in relation to votes of proxies, and in particular the reference to the provision being subject to the company's articles in s.285(5), takes precedence over the provision in s.324, which states that a member is entitled to appoint another person as its proxy to exercise all or any of his rights to attend, speak and vote at a meeting of the company, and thus as to whether either a company can exclude completely a proxy's rights to vote on a show of hands or whether s.324 takes precedence so that a proxy must always have at least the number of votes on a show of hands that his appointer would have. It would be helpful if this aspect could be clarified.

Priority: low

2. There is uncertainty as to how the legislation applies to a vote on a show of hands where the proxy has a discretionary vote.

The basic position for voting by proxies is that on a vote on a show of hands, every proxy present who has been duly appointed by one or more members entitled to vote on the resolution has one vote, but the proxy has one vote for and one vote against the resolution if:

- the proxy has been duly appointed by more than one member entitled to vote on the resolution, and

- the proxy has been instructed by one or more members to vote for the resolution and by other members to vote against it. (s.285(2))

However, if for example, if a proxy appointed by three members is instructed by two members to vote for the resolution and is given discretion as to how to vote by the third, it is not clear whether he may vote for and against the resolution if he chooses. To overcome this, we suggest the inclusion of the words "or exercises a discretion given by" in s.285(2)(b) after "*instructed by*" and "has been instructed or exercises a discretion given" after "*resolution and*".

Priority: low.

3. As a result of the Companies (Shareholders' Rights) Regulations 2009, there is some uncertainty as to the extent to which a chairman of the general meeting of a company can be given a casting vote at general meetings.

Many companies are erring on the side of caution and are not attempting to confer a casting vote unless (a) they are able to take advantage of the saving in paragraph 23A of Schedule 3 of the Third Commencement Order (as inserted by the Fifth Commencement Order), and (b) they are not a traded company. In our view it is not clear what was intended by the government: should the articles of a company be able to give a chairman of the meeting a casting vote or not (whether on a poll or a show of hands)? In our view, it should be allowed (other than for traded companies, where the Shareholder Rights' Regulations may dictate it should not).

By way of illustration of the uncertainty that has arisen, set out below is an analysis of what the answer is thought to be to the question of whether a company's articles can give a non-member chairman a casting vote at a members' meeting.

- For a company incorporated on/after 1 Oct 2007: yes – but only on a show of hands – whether the company is traded or otherwise (s.282(3) and s.284, as amended by The Companies (Shareholders' Rights) Regulations 2009), as the amendment to s.282(3) means that it no longer prevents a casting vote on a show of hands.

- For companies incorporated before 1 October 2007: yes - on a poll and on a show of hands - see paragraph 23A of Schedule 3 to the Companies Act 2006 (Commencement No. 3, Consequential Amendments, Transitional Provisions and Savings) Order 2007 - except for traded companies (reg 22 of The Companies (Shareholders' Rights) Regulations 2009), in which case only on a show of hands.

Priority: medium: the problem is potentially serious but many companies' casting vote provisions are grandfathered under the Third Commencement Order so in practice the problem affects a limited number of companies There is a potentially high cost implication for affected companies if they get it wrong.

Part 13 Chapter 2 - Written resolutions

There is confusion over the interaction between the statutory written resolution procedure and any provisions a company has in its articles in relation to passing written resolutions.

It appears that the statutory regime is intended to be exclusive i.e. is required to be followed rather than any procedure in the articles. This is subject only to the reservation of the *Duomatic* principle.

Therefore for example it would seem that a public limited company is unable to follow a written resolution procedure set out in its articles (see s.281(2)), although some textbooks suggest that this is still possible. It would be more satisfactory if there were a reservation for a procedure in the articles allowing at least a unanimous written resolution to be passed by a public limited company without following the procedure set out in CA2006, or to allow public companies to use the statutory written resolution procedure. There is a view that relying on the *Duomatic* principle is not satisfactory.

Priority: medium.

There is also a lack of clarity about whether, if a company's articles provide for a higher threshold for passing a written resolution, then that higher threshold prevails. This is a question of the interaction between sections 281(3), 288 and 300. There has been some concern that, where a company has a provision in its articles from (or the same as) article 53 of the pre-2007 Table A, this may impose a higher threshold (i.e. unanimity) for the purposes of s.281. A different held view is that it does not because it should be treated as a permissive provision in the articles rather than a requirement; CA2006 prevails as the votes required to pass an ordinary resolution and a special resolution are fixed by it.

Priority: low.

Problems arise also as a result of there being no transitional provision for the CA2006 written resolution procedure. One example of this is where the company's articles provide for a quorum which required a particular shareholder to be at the meeting in order to form a quorum at the meeting (with a written resolution procedure for unanimous resolutions). Now that the written resolution procedure is permitted under CA2006 with the 50% and 75% thresholds, the protection for that member no longer exists because a written resolution can be passed without his vote. This aspect is particularly relevant for companies with private equity investors and also for “government” owned or part owned companies.

Priority: high.

There is also a difficulty with the provisions concerning the circulation of written resolutions to members. S.292 gives members the ability to require the company to circulate a written resolution. S.293 states that a company that is required under s.292 to circulate a written resolution must send it to every eligible member. However, there is no provision which sets out what is to happen if the directors of the company fail to circulate the written resolution on behalf of the company (except that they will have committed an offence under s.293(5)) and no

provision which expressly permits the members of the company to circulate it themselves. This contrasts with s.305(1) which provides that if directors are required under s.303 to call a general meeting, and do not do so, then the members themselves may call the meeting.

This apparent lacuna in the written resolution requisition procedure means that shareholders are nervous of using it in situations where they know that the directors will be unhappy with the requisitioned written resolutions and may well refuse to circulate them on the company's behalf. We suggest BIS considers inserting a provision in Chapter 2 of Part 13 to put it beyond doubt that the members may circulate the written resolution themselves where the directors, on behalf of the company, do not do so.

Distribution of a written resolution by members to other members when the directors have omitted to circulate it does not necessarily constitute an insurmountable problem (subject to costs). The members who want it distributed may in theory simply distribute it. Also, a failure to comply with s.293 does not effect the validity of a written resolution that was proposed by members - s.293(7). Nevertheless we suggest CA2006 should be amended to correct this point.

Priority: low.

Meaning of "the day on which the notice is given" (in the context of s.307)

It is not clear as to what is the correct interpretation of the phrase "*the day on which the notice is given*" in s.360(2)(b) as it applies for the purposes of s.307(1) and (2), s.307A(1), (4), (5) and (7)(b), and s.312(1) and (3).

For instance, in relation to s.307(1) and (2) does the word "*given*" refer to the day a company sends a notice of meeting or the day the members receive or are deemed to have received the notice of meeting? If the latter interpretation is correct (we think it is in view of the use of “sent” in section 1147 and s.562(5)(a) which mean “sent” and (by contrast) in regulation 115 of the old Table A which confirms “given” is “received”), the question arises as to whether companies when applying s.360(2)(b) can rely on provisions in their articles that determine when a notice is deemed to have been given, or, in the absence of such a provision, can rely on s.1147. Unlike the definition of "*clear days*" in Regulation 1 of Table A, s.360(2)(b) does not refer to the day on which the notice is “deemed” to be given. We suggest that the relevant provisions be amended to remove inconsistencies and thus to clarify the position.

It is noted also that s.1147 uses the words “*deemed to have been received*” (not “deemed to have been given”) so it would be helpful if CA2006 used consistent terminology and confirmed that the deeming provisions apply.

Priority: medium.

Notice by newspaper advertisement and director's power to change time/place of meeting (s.308)

S.308 provides that notice of a general meeting can only be given in hard copy form, in electronic form or by means of a website. This is not subject to the company's articles. This means existing provisions in companies' articles permitting a notice of general meeting to be given by newspaper advertisement if a company is unable to convene a general meeting as a result of a postal strike are no longer effective. It seems unnecessary for the Act to be so prescriptive about notices and we suggest s.308 be made subject to the articles (there may need to be a carve-out for traded companies).

Priority: medium.

Quorum for a variation of class rights meeting (s.334(4))

Section 334(4) provides that the quorum for a variation of class rights meeting is two persons present holding at least one-third in nominal value of the issued shares of the class in question (unless it is an adjourned meeting, in which case the quorum is one person holding shares of the class in question).

Although this is not a change from the position under CA1985, it seems unduly prescriptive that the articles cannot specify a different quorum and this may be a trap for many JV's/Private Equity companies.

Priority: medium.

Results of a poll to be made available on a website (s.341(A) and s.353)

S.341(A) requires that where a poll is taken at a general meeting of a traded company, certain poll information must be made available on a website. S.341(B) requires that such information be published within 16 days of the date of the meeting (or, if later, the end of the first working day after the day on which the poll result is declared). However, s.353(4) requires that the results of a poll are made available on a website "*as soon as reasonably practicable*" and kept available for a period of two years. In its "Guidance on the Implementation of the Shareholder Rights Directive" (090729), ICSA suggests that as a matter of good practice poll results should be published earlier than the 16 day deadline.

We suggest it would be helpful to reconcile these provisions to say "as soon as reasonably practicable and in any event within 16 days".

Priority: low.

Computation of periods of notice etc: clear day rule (s.360)

S.360 applies the clear day rule to various sections in Part 13. However, the clear day rule does not apply to provisions in any other Part e.g. s.527 which concerns website publication of audit concerns. The request under s.527(4) must be received at least one week before the meeting

but s.527 is not included in the list in s.360 so the clear day rule would not seem to apply in these circumstances. Is this an oversight that should be corrected?

Priority: low.

Resolution removing auditor from office (s.510)

We suggest that s.510(2) should be amended so that the requirements of s.511 (special notice required for resolution removing auditor from office) are disapplied where a company has only a sole member. Most of our members think that there is no policy reason for special notice in such a case. We note that s.288 does not allow the written resolution procedure to be used to pass a resolution under section 510. We think this should also be changed to permit the use of a written resolution by a sole member.

See above for a similar comment on s.168. However, unlike s.168, it is not possible for the articles to provide a right for the members to remove the auditor by notice (there being no equivalent of s.168(5)(b) in s.510), so the s.510 problem is more of an inconvenience than the s.168 problem, even though directors are probably removed more often than auditors.

Priority: low. The removal of the auditors before the expiry of their appointment is not that common in practice.

Nominal Value of Shares (s.542)

S.542(2) states "*An allotment of a share that does not have a fixed nominal value is void*." We think it would be helpful if Companies House could draw attention to the fact that it may be necessary to specify a share's nominal value in the board (or committee) allotment resolution if not already specified in the shareholder allotment authorities and/or the articles.

Priority: low.

Transferability of shares (s.544)

In relation to transfers of shares in unlimited companies, it might be useful for s.544 to be amended so as to require execution by the transferee (since this is not covered by the Stock Transfer Act). We think that, pending resolution, it would be helpful if this could be flagged in the guidance about how to amend the Model Articles for unlimited companies (or BIS could create model articles for an unlimited company with shares).

Priority: low.

Companies having a share capital (s.545)

S.545 says that references under the Companies Acts to a company having a share capital are to a company that "*has power under its constitution to issue shares*".

1. It would be useful if it could be confirmed in published guidance that compliance with s.545 is satisfied by (private company) Model Article 22(1) (for private companies) and (public company) Model Article 43 (1) (for public companies), or by article wordings having similar effect.

Priority: low.

2. An unlimited company may be formed or re-registered with or without a share capital. Therefore, when an unlimited company is formed or re-registered with a power to issue shares in its constitution it will be treated by virtue of s.545 as being a company with a share capital. Conversely, if an unlimited company with a share capital wanted to cease to have a share capital it would do so by removing the power from its constitution to issue shares and also presumably by cancelling or buying back all of its share capital. S.545 does not require the cancellation of the share capital but it would seem a necessary requirement (so possibly the implications of new s.545 have not been fully thought through). Does a company with shares in issue that (purposefully or accidentally) deletes the power under its constitution to issue further shares cease being a company with a share capital, notwithstanding its issued shares?

Priority: medium.

Power of directors to allot shares etc: authorisation by company (s.551)

S.80A CA1985 enabled shareholders to give directors authority to allot for an indefinite period. CA2006 only allows authority to be given for 5 years under s.551.

Paragraph 45 of Schedule 2 of the Eighth Commencement Order provides that a s.80A CA1985 authority has effect on or after 1 October 2009 as if given under s.551.

There are differing views as to the effect of this. One view is that s.551 means the existing s.80A CA1985 authority continues indefinitely, and another is that that this inherently creates a five year limit for the s.80A CA1985 authority (previously unlimited in time).

We think that the better view is that, as neither the Explanatory Note (see paragraphs 849, 850 and 851) nor the Commencement Order says that they are limited or specifies when the five-year limit would start from, they continue to be unlimited in time. We suggest that the transitional provisions be amended to make the position clear.

Priority: high, if BIS do not agree with the view expressed above.

Sending and supplying hard copy in pre-emptive offer (s.562)

In the context of the required length of the offer period where a pre-emptive offer is made under s.561, where the offer is made in hard copy form, s.562(4) and s.562(5)(a) require that the offer be kept open for acceptance for a period of 14 days from "*the date on which the offer is sent or supplied*". This wording ("*sent or supplied*") leaves it somewhat unclear whether the offer period begins on the date of posting or the date of receipt.

We think that "*sent*" refers to when a hard copy offer is posted; and "*supplied*" refers to when a hard copy offer is delivered by hand. Both forms of delivery are contemplated by para 3 of Schedule 5 CA 2006. While that strikes us as the only sensible conclusion, this uncertainty could be avoided altogether if section were worded more clearly.

Priority: low.

Alteration of share capital (s.617)

1. It would be helpful if BIS could confirm that they agree with the view (which would reflect the position prior to CA2006) that a simple conversion of £1 A shares into £1 B shares (with different rights to the A shares) is not, in itself, subject to the restrictions in s.617 (as there is no alteration to the nominal value of the shares and no alteration to the overall balance sheet level of share capital). Some firms are apparently insisting on going through an artificial consolidation/sub-division because ss. 617-18 do not explicitly permit this kind of conversion.

Priority: medium.

2. Under CA1985 a company sub-divided or consolidated its share capital simply by passing an ordinary resolution (section 121(4)); no further action was necessary.

S.618 suggests that the ordinary resolution will give authority for the sub-division or consolidation but that a further action (presumably to be taken either by the directors or by the shareholders) must be taken to give effect to that authority. Under s. 618(3) of the 2006 Act, "a company may exercise a power conferred by this section only if its members have passed a resolution authorising it to do so". The explanatory notes (887-891) do not mention that a change was intended to the CA1985 regime but seem to conceive of the procedure as one where the directors will exercise the power that has been authorised by general meeting.

We think that many companies will not be aware of this change and we think BIS should consider a return to the CA1985 regime.

Where a company intends to effect the sub-division or consolidation by an ordinary resolution, we would welcome clarification that a resolution to sub-divide/consolidate is per se sufficiently authorised, i.e. to be effective the resolution does not need to say something like "resolves to authorise and hereby does sub-divide/consolidate… ".

Priority: high.

Variation of class rights: companies having a share capital (s.630)

Do BIS agree with the view that the requirements of s.630 apply where a company has only one class of share and wants to convert some, but not all of the class, into shares of a different class, resulting in two separate classes of shares.? We think it would be helpful if this could be clarified in the legislation, as the CA2006 is confusing in this respect. We do not think that the fact it is not mentioned in s.630 should be regarded as a restriction, but greater clarity on how it is done would certainly be helpful.

Priority: high since under s.334(4) if a class meeting is required of the (sole) class of ordinary shares, there is a one third quorum requirement, which differs from the normal general meeting quorum of 2.

Notice required to be submitted to the registrar of particulars of variation of rights attached to shares (ss. 636 and 637)

There is uncertainty as to how widely sections 636 and 637 are to be interpreted, and thus uncertainty as to the requirement to give notice under these sections.

S.636 provides that "*Where a company assigns a name or other designation, or new name or other designation, to any class or description of shares, it must within one month from doing so deliver to the registrar a notice giving particulars of the name or designation so assigned*." Form SH08 is to be used for this notice.

The query that has arisen is in relation to the intended meaning of the words "*to any class or description of shares*".

It seems clear that in circumstances where an entire class of shares are redesignated a form SH08 must be filed. What is less clear is whether notice is required under s.636 if only some of the shares of an existing class are redesignated. For example, if a company has five A shares and five B shares in issue and the company redesignates two of the A Shares as B Shares, is this to be regarded as assigning a "...new name or other designation, to any class or description of shares..." within the meaning of s.636. Guidance on this issue would be welcomed.

S.637 provides that "*Where the rights attached to any shares* [NOTE: not any class of shares] *of a company are varied, the company must within one month from the date the variation is made deliver to the registrar a notice giving particulars of the variation*." Form SH10 is to be used for this notice.

The query here is in relation to the intended scope of "*… the rights attached to any shares… are varied*".

It is clear that where the rights described in the company's constitution as attaching to an entire class of shares are varied, notice giving particulars of the variation is required under s.637. What is less clear is whether notice is required under s.637 where all or some of the shares in an existing class (eg. A Shares) are redesignated as shares of an existing different class (eg. B Shares) which have different rights attaching to them, in this case the rights attaching the two classes of shares (i.e. the A Shares as a class and the B Shares as a class). However, the rights attaching to the shares which have been redesignated have changed. Guidance on whether notice is required under s.637 in these circumstances would be welcomed.

Priority: low.

Treatment of reserve arising from a reduction of capital (s.654)

There is some uncertainty as to whether the reduction of a share premium account creates distributable reserves. S.654 says the reserve arising from a reduction of a company's share capital is not distributable subject to any order by the Secretary of State that the prohibition does not apply and instead the reserve is to be treated as realised profit. The relevant order (the Companies (Reduction of Share Capital) Order 2008 (SI2008/1915)) only disapplies the prohibition and says the reserve is treated as realised profit where it is a reduction of "*share capital*". It would be helpful if the Order expressly included share premium account. Note that, if it is decided to expressly extend the statutory instrument, it should extend to the capital redemption reserve and predomination reserve, as well as the share premium account.

It has been argued (including by the ICAEW in TECH 01/09, footnote 2 to para 2.8A) that the uncertainty is resolved by the conjunction of (i) section 11 of the Interpretation Act 1978 ("*Where an Act confers power to make subordinate legislation, expressions used in that legislation have, unless the contrary intention appears, the meaning which they bear in the Act*") and (ii) s.610(4) which says that "*the provisions of the Companies Acts relating to the reduction of a company's share capital apply as if the share premium account were part of its paid up share capital*".

However, others believe that the wording of s.610(4) - "*the provisions of the Companies Acts apply …*" (emphasis added) - means it does not cover provisions in the statutory instrument. If it had simply said "share capital includes share premium when used in the Companies Acts", only then, they say, it would be clear from the Interpretation Act that it had this meaning in the statutory instrument.

Priority: high.

Duty to cancel shares in public company held by or for the company (s.662)

1. S.662 creates a duty to cancel shares acquired by a company including "*where shares in the company are acquired by it (otherwise than in accordance with this Part [18] or Part 30 (protection of members against unfair prejudice) and the company has a beneficial interest in the shares)*" (emphasis added) (s.662(1)(c)). S.662(4) provides that such cancellation can be effected without having to comply with the requirements of chapter 10 of Part 17 on reductions of capital.

There is uncertainty as to whether the words in s.662(1)(c), underlined above, have a wider scope than the corresponding wording in S.143(1)(c) CA1985 which read: "*otherwise than by any of the methods mentioned in section 143(3)(a) to (d)*" (the equivalent provision of CA2006 to s.143(3)(a) to (d) is s.659(2)).

It is unclear whether the expression "*otherwise than in accordance with this Part*" covers, for example, acquisitions by a company of its shares for no consideration pursuant to s.659(1)? (This might arise where shares are converted and part of the share capital is converted into valueless deferred shares which are then surrendered to the company under its Articles.) As s.659 forms part of Part 18, is the effect that shares acquired for no consideration cannot be

cancelled without going through one of the procedures for the reduction of capital? If so, this could be unduly onerous.

One of our members has had advice from Counsel that s.662(1) had not changed the CA985 position in the case of an acquisition for no consideration, on the basis, inter alia, of the Second Company Law Directive, the Explanatory Notes (note 980), and the fact that it would be difficult to see why a direct acquisition for no consideration should require the company to go through a reduction of capital procedure when, under s.662(1)(d), the company does not have to go through that procedure where a nominee acquires the shares without the company funding the acquisition.

However, it would be clearly better for the matter to be put beyond doubt.

Priority: high.

2. As a separate point, paras 2.8B and 2.8C of TECH 01/09 (and related footnote 4) draw attention to the fact that a reserve arising from a capital reduction under s.662 will not be a distributable reserve and question whether this is an oversight that should be taken up with BIS. While we can see possible arguments for applying a different treatment to s662 reductions than is accorded to other categories of reduction, we would join with the ICAEW in urging BIS to consider this.

Priority: low.

Payment for redeemable shares (s.686) – Payment for purchase of own shares (s.691)

It would be helpful to align payment provisions for buybacks of shares with those relating to redemption of shares, and to consider amending the provisions that specify which methods of payment are permitted and which are not.

For redemptions:

- Payment can be deferred to a date later than the redemption date. However, s.686(2) only allows payment on a date latter than the redemption date and does not allow for that payment to be made on a number of different dates. As it has now been accepted that a company may enter into a commitment to make a payment in the future and can redeem shares and pay for them later, there seems to be no good reason why a company should not be free to enter into a commitment to make several payments on several dates in the future.

- There is doubt, particularly in light of comments made by Park J in the case of BDG Roof-Bond Ltd v Douglas [2000] 1 BCLC 401, as to whether payment can take a non-cash form, so clarity would be highly desirable.

For buybacks:

- Payment must be made on purchase and deferred payment is not allowed (s. 691(2)). It would be helpful for buybacks to have the same flexibility as redemptions.

- There is the same uncertainty as to whether non-cash consideration is permitted as there is in respect of redemptions (see above).

Priority: medium.

Resolution authorising off market purchase: exercise of voting rights (s. 695) – Resolution authorising variation: exercise of voting rights (s. 698)

S.695(2) specifies that where a resolution to approve an off market buyback contract is proposed as a written resolution, a member who holds shares to which the resolution relates is not an eligible member (and therefore cannot sign the written resolution), which has the effect that a sole member cannot authorise a buyback by way of written resolution. If instead the resolution is proposed at a general meeting called at short notice, the sole member can vote those shares which are not the subject of the buyback, but the process is then subject to the s.696 requirement that the buyback contract must be on display for a minimum of 15 days prior to the meeting. It would be helpful if s.695 was subject to an equivalent provision to s.239(6)(a) which permits the voting restriction to be overridden if all the members consent to the resolution. The same issue arises with s.698.

Priority: medium.

Resolution authorising off market purchase: disclosure of details of contract (s.696)

S.696 provides that a copy of a contract for the purchase of own shares must be made available for inspection by members for not less than 15 days ending with the date of the meeting where the purchase is to be approved by a special resolution under s.694. The period of 15 days made sense when a special resolution required 21 days' notice but seems inappropriate now where a special resolution only requires 14 days' notice as logically the inspection period should be no longer than the notice period.

Priority: low.

Registration of allotment of debentures (s.741)

It would be helpful if CA2006 specified how companies are to comply with their obligation under s.741 to register allotments of debentures. One possibility is that, instead of the option of maintaining a register of debenture holders, there should be an obligation to maintain a register of debentures, which would include the required details of allotments together with any other information the company chooses to record.

Priority: low.

The authorised minimum (s.763)

Although not stated specifically in CA2006, it is understood that the authorised minimum (£50,000 or the prescribed euro equivalent) is only required at the time that the company makes an application to the registrar for the issue of a trading certificate under s.761. Thereafter, a public company can redenominate all its share capital, including the authorised minimum, under s.622. What is not clear is the effect of s.650 (public company reducing capital below authorised minimum) on a public company that has redenominated all its share capital; there is no statutory basis for converting the foreign currency-denominated share capital into sterling. It would be expected that the effect of s.650 would be that the company's share capital would be recalculated by reference to the sterling equivalent of the redenominated share capital immediately prior to the date of the court order. Unfortunately, the Companies (Authorised Minimum) Regulations 2009 seem to have this effect only in the case of companies whose share capital is denominated in more than one currency (see regulation 3(4)). Presumably it is not the intention that the position should be different for a company that has redenominated all its share capital and for one that has, e.g., redenominated all bar £1 of its share capital. It would be helpful therefore if this regulation were removed or suitably altered.

Priority: high.

Distribution in kind: determination of amount (s.845)

Difficulties have been in applying the wording of s.845 in the context of large groups. The section looks at the issue from the point of view of a company which is selling or transferring an asset. Sometimes there can be an indirect distribution by companies higher up the chain, for example as a result of a transfer between sister subsidiaries: The section does not cater for the position of those other companies. Also, with the current economic climate, the issue can be that the market value is less than book value so that it is the company acquiring the asset rather than disposing of it that is potentially making a distribution when the transfer is at book value.

Priority: high, as considerable "costs" impact for affected companies.

Meaning of "subsidiary" (s.1159)

The recent Court of Appeal decision in Enviroco Ltd v Farstad Supply A/S [2009] EWCA Civ 1399 concerned the definition of "subsidiary" in a contract, which incorporated the definition of "subsidiary" from the CA1985. The Court felt unable to take a purposive approach to interpreting the wording of sections 736 and 736A CA1985 (which are now replicated in respectively sections 1199 and 1160 CA2006). Evidence was submitted to the Court during the Enviroco case which suggested that Parliament's intention in 1989 was to align s.258 and s.736 CA1985 (now respectively sections 1162 and 1159 CA2006) but some amendments were dropped, possibly accidentally. It might be useful following the outcome of the appeal to the Supreme Court, due to be heard this autumn, for the definition to be reviewed and consulted upon in light of the arguments submitted to, and decision by, the Court of Appeal.

Priority: to be considered following the outcome of the appeal.

INSOLVENCY ACT 1986

1. S.122(1)(e) Insolvency Act 1986 says that a public company can be wound up by the court if the number of members is reduced below two. From 1 October 2009 public companies have been able to have just one member. We understand from BIS that the consequential alteration of s.122 was missed and will be corrected by secondary legislation.

It is noted that the same point applies equally to unlimited companies which may also now be single member companies. It would be useful if the intended correction could cover both public companies and unlimited companies.

Priority: high.

2. The Companies Act 2006 (Consequential Amendments, Transitional Provisions and Savings) Order 2009 (SI 2009/1941) amends s.76(2)(b) Insolvency Act 1986. That amendment has not been done correctly as s76(2)b) still refers to the directors who signed the statutory declaration. There is no longer a statutory declaration but a directors' statement which (according to the Companies (Shares and Share Capital) Order 2009) has to be signed by all the directors.

Priority: low (as “read across”).

THE COMPANIES ACT 2006 (COMMENCEMENT NO.8, TRANSITIONAL PROVISIONS AND SAVINGS) ORDER 2008

Paragraph 42 of Schedule 2 of the Eighth Commencement Order provides that existing provisions in the memorandum of companies incorporated under CA1985 as to authorised share capital are to be treated as from 1 October 2009 as creating a "*maximum amount of shares that may be allotted*".

This has given rise to uncertainty as to whether this an aggregate maximum or a maximum per existing class of share.

For example, a company's authorised share capital on 30 September 2009 was £100 divided into 50 A shares of £1 and 50 B shares of £1. Its issued share capital was £50 represented by 25 A shares and 25 B shares.

On 2 October 2009 the company wanted to issue a further 50 B shares of £1. The question arises as to whether this allotment be within the "maximum" ceiling created by paragraph 42 so that the allotment would be possible without the need to amend or revoke the provision as to authorised share capital (provided the company had an existing allotment authority that was still valid). Published guidance on this aspect would be helpful.

Priority: low.

CROSS - REFERENCING OF TABLE A / MODEL ARTICLES

We note that the BIS guidance on constitutions does confirm that a company incorporated before 1 October 2009 can incorporate the Model Articles or Table A by reference when adopting new articles. It is less clear whether a company formed on or after 1 October 2009 can incorporate Table A by reference. It would be helpful for the guidance to cover this point expressly.

Priority: medium.

THE COMPANIES (MODEL ARTICLES) REGULATIONS 2008

1. Article 25(3)(a) of the Model Articles for public companies requires a notice of appointment or removal of an alternate director to refer to the "proposed alternate". This is confusing given that the notice can also be used for removing an existing alternate. It might be helpful if it were amended to read "identify the person to be appointed or removed as an alternate".

Priority: low (as unlikely to cause problems in practice).

2. In article 26(3) of the Model Articles for public companies, it is not clear whether the proviso in the last sentence applies to the first limb only or both limbs. On the one hand, the proviso refers to being "counted" and "such purposes" which could mean it only applies to paragraph (a) as it mirrors the references to "counted" and "for the purposes". On the other hand, the proviso appears at the end of the article which could mean it applies to both limbs. Whilst we consider it applies clearly to sub – paragraph (a) one can apply it to sub – paragraph (b) as well with some lateral thinking. It would be helpful if the provision could be amended to make its intention clear.

Priority: low.

3. Company seal: .The wording of article 35(2) of the Model Articles for private companies limited by guarantee; of article 49(3) of the Model Articles for private companies limited by shares, and of article 81(3) of the Model Articles for public companies require that, unless otherwise decided by the directors, when the Common Seal is affixed to a document, an authorised person must sign and a witness must attest the signature. We think that the attestation (default) requirement is superfluous.

Priority: low.

Share transfer: The wording of article 25(3) of the Model Articles for private companies limited by shares and of article 63(6) of the Model Articles for public companies do not refer to the requirement for reasons for refusal of the registration of a proposed share transfer to be given under s.771. Whilst this is not an anomaly the omission could be misleading for those running companies.

Priority: low.

PUBLIC COMPANY MODEL ARTICLES

Definition of 'partly paid': There is a missing word in the definition of 'partly paid' – "*in relation to a share means that part of that share's nominal value or any premium at which it was issued that has not been paid to the company*" (emphasis added).

Priority: low.

OTHER COMMENTS

Statements of capital

We do not comment on this aspect as it is appreciated that BIS is currently considering what to do next, BIS's public consultation on financial information in statements of capital having closed.

Overseas Companies (Execution of Documents and Registration of Charges) Regulations 2009

A comment has been received that it would be helpful if Part 2, Regulation 4 of these Regulations could be amended to extend the application of s.47 to overseas companies. The reasoning behind the comment is as follows.

Article 9(3) of the Rome Convention says that, where a contract is concluded by an agent, the relevant law for determining formal validity is the law of the country where the agent acts (i.e. English law where an overseas company appoints an attorney to execute an English law deed in the UK). We are comfortable that an overseas company can appoint an attorney to execute a deed on its behalf (under s.1(2)(b)(i) of the Law of Property (Miscellaneous Provisions) Act 1989). However, we are a bit mystified that s.47 CA2006, which was included in the draft Overseas Companies Regulations 2008, was dropped from the final 2009 Regulations.

On the other hand, we have received comments to the effect that this is a matter to be determined by the law of the jurisdiction in which the overseas company is incorporated.

We think it would be helpful if BIS could explain why s.47 was dropped from the final 2009 Regulations.

Priority: low.

Overseas companies

Companies House advised earlier this year that the obligation for existing overseas companies to file a transitional return by 31 March 2010 (paragraph 13, Schedule 8, Overseas Companies Regulations 2009) applied only where the company had a place of business (as opposed to a branch) in the UK. The basis for this advice was never clear, but on the assumption that it was correct perhaps the relevant FAQ on the Companies House website, which does indeed seem to assume that the obligation to file a return applies only to places of business, could be

expanded to clarify that companies which did not comply with the obligation because they had a branch were not in breach of the regulations.

Priority: medium.

Companies House Form SH01

The SH01 allotment form does not provide for the names of the subscribers of the shares on the allotment. (The previous form used under the CA1985 regime, the Form 88(2), did include this information). This has had an impact in that certificates of good standing obtained from Companies House will not accurately reflect the position in relation to shareholders.

Priority: medium.

Companies House Forms SH10 and SH12

Form SH10 is a little confusing. It says at the top (a) that it is to be used to give notice of particulars of variation of rights attached to shares, but not to give notice of particulars of variation of class rights of members, and (b) that Form SH12 is to be used for notices of the latter variety. This distinction is correct - Form SH12 deals with the rights of members of companies without a share capital - but for the avoidance of any confusion it would be helpful if the wording at the top of Form SH10 specified that it is not to be used to give notice of particulars of variation of class rights of members "of a company without share capital".

Priority: low.

20 August 2010

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Mr Edward Davey MP
Minister of State for Business and Enterprise
Department of Business, Innovation and Skills
1 Victoria Street,
London
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11 October 2011

Dear Minister

I am writing to you on behalf of the City of London Law Society ("**CLLS**") to draw your attention to some of the company law implications which result from the decision of the Supreme Court in the case of *Farstad Supply A/S v Enviroco Limited* (6 April 2011) (the "**Enviroco case**").

The CLLS represents approximately 14,000 London based City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi jurisdictional legal issues.

The CLLS deals with a variety of issues of importance to its members and operates through its 17 specialist committees. In this instance, this letter has been prepared by the CLLS Company Law Committee, the names of whom are set out at the end of this letter.

Introduction

The Enviroco case has highlighted an anomaly in the drafting of legislation passed in 1989 amending the Companies Act 1985 which is now replicated in section 1159 Companies Act 2006. The error, which is described below, has the potential to frustrate the intention of Parliament in the interpretation and application of a number of important statutory provisions as well causing unintended consequences in the interpretation of a wide range of commercial contracts affecting normal businesses.

It is our view that this error needs to be corrected as soon as possible and we believe this can readily be achieved by secondary legislation under the powers contained in section 1160 Companies Act 2006.

The Enviroco case and the Companies Act definition of "Subsidiary"

The detailed facts of the Enviroco case are largely inconsequential.

In brief, the case turned on the meaning of the Companies Act definition of "subsidiary" in the context of a Scottish company, viz Enviroco. Enviroco was a 50:50 owned joint venture company but one of the two joint venture parties, referred to here as "Company A", was its holding company because it controlled a majority of the voting rights in Enviroco. Company A had created and perfected a charge over the shares that it owned in Enviroco in favour of a Scottish bank. The charge being governed by Scottish law, it was necessary, in order for the pledge to create valid security, for the shares to be formally registered in the name of the bank's nominee company pursuant to the charge and the bank's nominee accordingly became the registered member of these shares in place of Company A.

The only issue in dispute in the proceedings was whether Enviroco remained a subsidiary of Company A within the meaning of what is now section 1159(1)(c) Companies Act 2006 following perfection of the share pledge, when Company A ceased to be the registered member of any shares in Enviroco.

That sub-section states:

"A company is a "subsidiary" of another company, its "holding company", if that other company ..... is a member of it and controls alone, pursuant to an agreement with other members, majority of the voting rights in it .....".

It was accepted that Company A continued to control a majority of the voting rights exercisable at Enviroco general meetings. However, to establish that it was Company A's subsidiary, Company A also needed to be *a member* of Enviroco. Under the Companies Acts, a person's name must be "entered in its register of members" in order for it to be a member of a company.

Enviroco argued unsuccessfully that, although Company A was not registered as the holder of any Enviroco shares, Company A should be treated as if it were registered as such. It was instead held that Enviroco was no longer a subsidiary of Company A because Company A had ceased to be a member of it following the transfer of the shares into the name of the bank's nominee. As a result, Enviroco was deprived of the benefit of an indemnity given in favour of Company A and all its subsidiaries to which in all likelihood the parties had expected it would have remained entitled. This was the result, despite the fact that for all practical purposes Enviroco remained under the control of Company A.

The Enviroco case highlighted a small but material change which had been made to the definition of "subsidiary" in the Companies Act 1985 by section 144(1) Companies Act 1989. This change removed a provision previously contained in section 736(4)(b) Companies Act 1985 under which shares held by a nominee for a holding company were treated as held by the holding company. It is generally understood that this change was motivated by a desire on the part of those moving the bill to bring the definition of "subsidiary" into line with the definition of "subsidiary undertaking" which was newly introduced into the Companies Act 1985 by section 20 Companies Act 1989. However, the Enviroco case has shown that the Companies Act 1989 change failed to achieve this.

The Supreme court judges viewed the result in the Enviroco case as (variously) "*unexpected*", "*certainly odd*" and "*possibly absurd*", but they were unable to reach any contrary decision on the wording of the statute since that would "*require from the court...an impermissible form of judicial legislation*" (per Lord Collins). The court did however recognise as a legitimate route to correcting what appeared to them to be an error in the legislation the power given to the Secretary of State to amend by regulation under s1160 Companies Act 2006.

On behalf of our members, we are accordingly writing to ask you to make the necessary change by the introduction of correcting secondary legislation.

As is suggested below, the change needed can be achieved most simply by incorporating into the definition of "subsidiary" in section 1159 Companies Act 2006, by regulation, the same deeming provision that applies in relation to "subsidiary undertakings" that is contained in section 1162 (3) Companies Act 2006.

Reasons for requesting this change - statutory loophole

The definitions in the Companies Act 2006 of "*holding company*", "*associated company*" and "*associated body corporate*" rely on the "*subsidiary*" definition. Most of the 2006 Act's provisions that use these defined terms impose restrictions and obligations on one or more of a range of persons in relation to a company that is or has a subsidiary. These persons include the company itself, its directors, persons connected with its directors, its holding company and other associated companies, their directors and persons connected with their directors.

The Enviroco case illustrates that the intention of Parliament can readily be frustrated and the prescriptive requirements of these provisions easily circumvented by structuring the ownership of shares in such a way as to avoid the creation of a statutory "subsidiary". All that is required, by way of example, is to replicate the structure of the Enviroco joint venture arrangements with appropriate adjustments, eg:

Step 1: the parent company (Holdco) finds an amenable third party that is not its associated company (or its secured lender);

Step 2: Holdco transfers 50% of its shares in Subco to the third party on terms under which the third party is free to exercise the voting rights without the consent or concurrence of Holdco;

Step 3: Holdco and third party enter into mutual put and call options allowing Holdco to re-acquire these shares at some time in the future ; and

Step 4: Holdco transfers the remaining 50% of its shares in Subco to its own nominee,

with the result that for the duration of this arrangement:

(i) neither Holdco nor its nominee holds a majority of the voting rights [**s.1159(1)(a)/ schedule 6, para 6(i)**];

(ii) the third party avoids becoming Holdco's nominee [**under schedule 6 para 6(2)**];

(iii) Holdco is not a member of Subco [**s.1159(1)(b) + (c)**];

(iv) Subco is not Holdco's subsidiary within the meaning of s1159 Companies Act 2006; and yet

(v) Holdco retains the right to re-acquire control of Subco and in the meantime is able to prevent the third party from undertaking transactions detrimental to Holdco's interests;

These steps would release Holdco and its directors from many of their statutory restrictions and obligations in relation to its associated companies. Conversely, these steps also release the associated companies and their directors from corresponding restrictions and obligations in relation to Holdco.

A single example will serve to illustrate the point: section 678(1) Companies Act 2006 prohibits the subsidiary of a public limited company (plc) from giving financial assistance for the acquisition of shares in the plc. Contravening this prohibition is an offence. However, if the company ceases to be the plc's subsidiary, it ceases to be subject to section 678(1). So it would seem that the prohibition in section 678(1) can be circumvented merely through replicating the Enviroco structure.

It would similarly follow from the Supreme Court decision that a subsidiary undertaking that is not a "subsidiary" within the strict meaning of s 1159 Companies Act 2006 is seemingly not prohibited from making political donations or incurring political expenditure without the approval of the members of its "relevant holding company" (under s366 (2) Companies Act 2006), nor is it prohibited from being a member of its parent company (s136).

The Supreme Court commented on the fact that no evidence had been adduced in the Enviroco case to support the view that advantage had been taken of the statutory loophole (as so described) in order to evade the statutory regime. That might have been the position to date, when commentary on the anomaly was largely confined to academic debate but the wide publicity given to the Enviroco case and the Supreme Court decision might be expected to result in the anomaly receiving much closer scrutiny by practitioners and those seeking to circumvent the legislative intent.

Other reasons for change

Left unaltered, the consequences of the decision in the Enviroco case are potentially more far reaching and affect the interpretation of contracts and statutory provisions which import or rely on the Companies Act definition of "*subsidiary*".

Other provisions of the Companies Act 2006
The Companies Act 2006 itself contains a number of other provisions intended to protect or benefit the directors of a company with "*subsidiary*" or "*associated company*" status. These benefits and protections would be lost if the company loses that status.

Provisions in the Companies Act 2006 which rely on the "subsidiary" definition include, for example:

Part	Chap	Section	Title
4	-	41	constitutional limitations: transactions involving directors
84	-	136-144	prohibition on subsidiary being a member of its holding company
10	2	176	duty not to accept benefits from third parties
10	4	188-226	transactions with directors requiring approval of members
10	5	227-230	directors' service contracts

Other statutory provisions
The Companies Act definition of "*subsidiary*" is used in a large number of other statutes also.

Among a long list of other statutes which import this definition are:
- the Transport Act 2000 section 65,
- the Enterprise Act 2002 section 223,
- the Energy Act 2004 section 196,
- the Utilities Act 2000 paragraph 12, Schedule 7,
- the Planning (Hazardous Substances) Act 1990 section 39(3), and
- the Counter-Terrorism Act 2008 paragraph 9, Schedule 7.

Contractual provisions
Furthermore, it has for long been accepted as common practice for contracts and other documents to import the Companies Act definition of "*subsidiary*". The Enviroco case itself is an example of this.

A particularly common example is to be found contained in a typical property lease which might ordinarily prevent alienation other than intra group ("group" for this purpose being defined by reference to the definitions of "subsidiary" and "holding company" contained in section 1159 Companies Act 2006 or the equivalent provisions in the earlier Companies Act 1985).

Numerous other examples are to be found in the context of commercial contracts, finance documents, contracts of employment or share scheme documentation, and in corporate constitutional documents (like articles of association), where typically the definition may be relevant to the interpretation of change of control clauses contained in termination provisions, in confidentiality undertakings and/or restrictive covenants, in assignment or alienation provisions, and in the wording of indemnities or warranties, etc.

If left unchanged, the error now identified in the legislation can be expected to cause particular problems in relation to the creation of legal charges over shares in Scotland (as was the situation in the Enviroco case itself), where the charged shares have to be registered in the name of the chargee or its nominee in order to create valid security, and so potentially cause the chargee to be de-grouped from its parent, thereby creating a variety of significant but unintended consequences.

Required remedial action

As indicated above, it is relatively straightforward to correct the anomaly, by applying the provisions of section 1162(3) Companies Act 2006 to the definition of "subsidiary". We respectfully concur with the views of the Supreme Court that an amendment of this type can be made pursuant to the powers contained in section 1160 Companies Act 2006.

We would welcome a meeting with you or your officials to discuss the matter further once you have had the chance to consider this letter. If in the meantime you wish to discuss any of the above points, please feel free to contact Keith Stella of Berwin Leighton Paisner LLP on 020 3400 1000 or at keith.stella@blplaw.com.

Yours sincerely

Keith Stella

THE CITY OF LONDON LAW SOCIETY
COMPANY LAW COMMITTEE

Individuals and firms represented on this Committee are as follows:

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R. Brown (Hogan Lovells LLP)

M. Curtis (Simmons & Simmons)

L. Fergusson (Linklaters LLP)

S. Griffiths(Addleshaw Goddard LLP)

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