

# Company Secretary's Review



TOLLEY'S PRACTICAL BUSINESS FORTNIGHTLY FOR COMPANIES

## Companies Act 2006: Members

*Part 8 of the Companies Act 2006 covers members while Part 9 deals with information rights and the exercise of members' rights by others. In this article Brian McLelland considers the main provisions in these areas.*

### Introduction

Neither parts of the Act are yet in force but on 28 February 2007 the Government announced the commencement timetable for the remaining provisions of the *Companies Act 2006 (CA 2006)*.

Part 9 will come into force on **1 October 2007**. Part 8 will take effect from **1 October 2008** along with all other parts of the Act not already enacted.

### A company's members

CA 2006, ss 113–135 replace sections 352–362 and Schedule 14 of the *Companies Act 1985 (CA 1985)*, which will be repealed. The following are the main changes under Part 8 of CA 2006.

### Definition

The definition in Chapter 1 of who is a member is a restatement of CA 1985, s 352, but by CA 2006, s 112 subscribers to the memorandum become members even if the company fails to enter their

names on the register of members. The same does not apply for later members.

### Register of members

A number of new provisions are included in Chapter 2 regarding the right to inspect or obtain a copy of the company's register of members (CA 2006, s 116).

People seeking to inspect must first give their name and address and explain the purpose for which the information will be used, and, if acting as an agent or nominee, must provide similar details of their principal or nominor.

As before, companies can charge members and non-members a reasonable sum for administration and copying but only non-members may be charged for inspecting the register.

Two new offences are created by CA 2006, s 119 as follows:

◆ It is an offence to knowingly or recklessly make false or misleading statements relating to identity – name or

address and purpose – when making a request for access to a register.

◆ Likewise it is an offence to disclose information acquired from an inspection to a third party whom the discloser knows or suspects will use the information for an improper purpose.

The object of the new provisions is to close a loophole whereby certain extremists in the past used company membership information to threaten or intimidate company shareholders.

It may be prudent for company secretaries to request passport or photographic identification (e.g. driver's licence) together with a recent utility bill in order to 'weed out' undesirables. A record should be kept for future reference of such requests made, together with supporting documentation.

For most companies this will not present an undue burden though whether the loophole will be closed in fact remains to be seen.

Case law will inevitably develop to determine the innocent from the guilty state of mind and to define the nature of an 'improper purpose', which is not defined by the Act and which might leave the bona fide applicant at risk of a criminal offence and court costs for the section 116 application by the company because of this legal uncertainty.

Similarly, whether a company would be acting reasonably in refusing to grant access simply by the refusal or non-conformity of the applicant to the company's request for proof again is an unanswered question, though it could be argued in this age of identity theft that the actions of such a company would be both prudent and appropriate.

Practically, the company need not provide the information immediately but has up to five days to comply with the request (a reduction from the current law of ten days) or to apply to court for relief (*CA 2006, s 117*).

Of note the company has to be proactive here – it cannot refuse and leave it to the shareholder to apply to court, as *CA 2006, s 118* would penalise the company and the officer for such default. As a consequence it is the company and not the applicant who has to go to court, though it is the individual who must pay for this if the court finds in favour of the company by granting it relief.

The company also has a duty to advise anyone inspecting the register or company index of members' names whether or not the information is up to date and, if not, the date to which it has been made up. A breach of this obligation will leave the company and the responsible officer concerned liable to a fine (*CA 2006, s 120*).

#### Further changes

◆ *CA 2006, s 113(5)* – Joint holders of shares are treated as a single member even if all their names are entered in the register so that the register has to show a single address.

◆ *CA 2006, s 114* – The register of members must be kept available for inspection at the company's registered office or at another place specified in *CA 2006, Pt 37*.

◆ *CA 2006, s 121* – The period for which past members must remain on the register is reduced from 20 to 10 years, thereby reducing some administration.

◆ *CA 2006, s 122* – Shares need not be issued initially in a registered form; it is permissible to issue in warrant form to bearer provided the register of members records full details of these.

◆ Repeal of *CA 1985, s 358* that allows a company to close its registers – As a result companies must always have the registers open for inspection during normal business hours.

#### Overseas branch registers

In essence, overseas branches can keep registers of resident members but a safeguard against abuse is provided since a UK register containing the same

information is mandatory (*CA 2006, s 132*).

Therefore, the overseas register can only be an extracted copy effectively of UK held and controlled information. Nevertheless, for expat investors some convenience may be gained by this mechanism.

#### Subsidiaries

Chapter 4 deals with subsidiaries being prohibited from having shares in its holding company, though certain exceptions apply.

*CA 2006, s 136* removes the possibility of a subsidiary being a shareholder in its holding company. The easiest way for companies to rectify this position prior to commencement of the law is to sell these shares/sell back to the holding company, though it should be noted that this prohibition does not apply to personal representatives or trustees.

Chapters 3 and 4 are effectively restatements of *CA 1985, Sch 14* and *s 23*, with the sole substantive change being extra powers given to the Secretary of State for dealing with overseas registers.

#### Exercise of rights

*Part 9* of *CA 2006* creates new rights for information by holders of beneficial interests in shares. The aim here is to foster greater communication between listed companies and their indirect institutional investors by allowing the intermediary broker to decide whether to nominate or not.

By *CA 2006, s 146* where a member is a member of a traded company (where shares are admitted to trading on a regulated market) and he hold shares on behalf of another person, he may nominate the other person to enjoy all the rights he has to receive communications from the company, either rights enjoyed individually or by class. The right to demand copies of accounts and reports under *CA 2006, ss 431* and *432* may be transferred.

Happily for overworked company secretaries this should not result in much additional work as the nomination has to be in entirety; there can be no 'cherry picking' as any such nomination is invalid (*CA 2006, s 146(5)*). The nominor can enforce the rights against the company as if they were rights conferred by the articles of association but *CA 2006*

unhelpfully does not specify whether the nominee can.

Termination of the nomination can be made by either the nominee or the nominor and occurs automatically on the death, bankruptcy, winding up or dissolution of either the member or the nominee (*CA 2006, s 148*). If the nominor errs and makes more nominations than shares owned then all nominations are suspended, though the company has the discretion to act on a suspension or nomination as it thinks appropriate.

Certain powers are granted to the Secretary of State to make regulations extending or restricting the information and nomination rights.

#### Other provisions

◆ *CA 2006, s 145* – Where a company has articles allowing for nomination of rights of a member then, subsequently, anything required or authorised by a member can be done by the nominee instead. That said the nominor retains the right to dispose of the shares owned so this right is not transferred to the nominee.

◆ *CA 2006, s 153* – This allows the nominee to utilise the various provisions under the Act whereby if more than 100 members with an average of £100 paid up share capital request a company to take action it does so. Where the nominee acts in such occasions he must provide name, address and relevant shareholding as nominee. Conversely, where the member is acting as member of his own shareholding and not as nominee, there must be a statement confirming that shares are not owned on behalf of another person or, if so owned, that these persons are not among other persons making the request. In this way the requirement for 100 distinct members is preserved and cannot be circumvented by a combination of nominees and nominors.

#### Conclusion

Taken together many of the provisions are a restatement of existing law but the new information request mechanism and flexibility of communication require companies to rethink existing practices.

*Brian McLelland*  
Business Lawyers Limited  
[www.business-lawyers.org](http://www.business-lawyers.org)