These notes refer to the Companies Act 2006 (c.46)
which received Royal Assent on 8 November 2006

COMPANIES ACT 2006

EXPLANATORY NOTES

EXISTING LAW

England and Wales or Northern Ireland

484. In England and Wales, it is possible as a matter of common law for a member to bring an action, in certain circumstances, on behalf of the company of which he is a member. This is known as a derivative claim. As noted above, a member may bring such an action to enforce liability for a breach by one of the directors of his duties to the company.

485. The law relating to the ability of a member to bring proceedings on behalf of the company is not written down in statute. The general principle – commonly known as the rule in *Foss v Harbottle* – is that it is for the company itself to bring proceedings where a wrong has been done to the company. However, where there has been conduct amounting to a "fraud on the minority", an exception may be made to the rule, so that a minority shareholder may bring an action to enforce the company's rights (for example, where there has been an expropriation of company property or dishonest behaviour by a director, and the company is improperly prevented from bringing proceedings against the director by the majority shareholders, perhaps because the wrongdoing director controls the majority of votes).

486. Under the current law, if a wrong has been effectively ratified by the company, this will be a complete bar to a derivative claim. In addition, if a wrong is capable of being ratified, then even if there has been no formal ratification, it may not be possible for a minority shareholder to bring a derivative claim.

487. The law in Northern Ireland in this area is the same as that in England and Wales.

Scotland

488. Under Scots law, the member's right to raise an action is conferred by substantive law. Accordingly, a member has title as a matter of substantive law to raise proceedings in respect of a director's breach of duty to obtain a remedy for the company. The action is raised in the name of the member but the remedy is obtained for the company and the rights which the member can enforce against a director or third party are those of the company.

489. The member's right arises where the action complained of is fraudulent or ultra vires and so cannot be validated by a majority of the members of the company. This remedy is not available if the majority of members acting in good faith have validated or may validate the act complained of.

490. Two rules of substantive law apply to actions brought by the member to protect the company's interests (as well as to actions brought to protect the shareholder's personal interests such as enforcement of rights in the articles of association). First, the directors of a company owe duties to the company and not to the members. Second, the court will not interfere in matters of internal management which may be sanctioned by a majority

of the members. The effect of these rules is similar to the first two legs of the rule in *Foss v Harbottle*.

Chapter 1: Derivative Claims in England and Wales Or Northern Ireland

491. The sections in this Part do not formulate a substantive rule to replace the rule in *Foss v Harbottle*, but instead reflect the recommendation of the Law Commission that there should be a "new derivative procedure with more modern, flexible and accessible criteria for determining whether a shareholder can pursue an action" (*Shareholder Remedies*, paragraph 6.15). In line with the recommendations of the Law Commission, the derivative claim will be available for breach of the duty to exercise reasonable care, skill and diligence, even if the director has not benefited personally, and it will not be necessary for the applicant to show that the wrongdoing directors control the majority of the company's shares.

492. The sections in Chapter 1 of this Part introduce a two-stage procedure for permission to continue a derivative claim. At the first stage the applicant will be required to make a *prima facie* case for permission to continue a derivative claim and the court will be required to consider the issue on the basis of the evidence filed by the applicant only, without requiring evidence from the defendant. The courts must dismiss the application if the applicant cannot establish a *prima facie* case. At the second stage – but before the substantive action begins – the court may require evidence to be provided by the company. The sections set out a list of the matters which the court must take into account in considering whether to give permission and the circumstances in which the court is bound to refuse permission.

493. The sections will be supplemented by amended Civil Procedure Rules.

Section 260: Derivative claims

494. This section sets out the key aspects of a derivative claim.

- *Subsection (1)* defines what is meant by a derivative claim. There are three elements to this: the action is brought by a member of the company; the cause of action is vested in the company; and relief is sought on the company's behalf. (A "member" is defined in section 112. *Subsection (5)* provides that references to a member in this Chapter include a person who is not a member but to whom shares in the company have been transferred or transmitted by operation of law, for example where a trustee in bankruptcy or personal representative of a deceased member's estate acquires an interest in a share as a result of the bankruptcy or death of a member).

- *Subsection (2)* provides that the claim may only be brought either under this Chapter or in pursuance of an order of the court in proceedings under section 994 (proceedings for protection of members against unfair prejudice).

- *Subsection (3)* provides that a derivative claim "may be brought only in respect of a cause of action arising from an actual or proposed act or omission involving negligence, default, breach of duty or breach of trust by a director of the company". As such, a derivative claim may be brought in respect of an alleged breach of any of the general duties of directors in Chapter 2 of Part 10, including the duty to exercise reasonable care, skill and diligence (section 174).

- *Subsection (3)* also provides that the cause of action may be against the director or against a third party, or both. Derivative claims against third parties would be permitted only in very narrow circumstances, where the damage suffered by the company arose from an act involving a breach of duty etc on the part of the director (e.g. for knowing receipt of money or property transferred in breach of trust or for knowing assistance in a breach of trust).

- *Subsection (4)* provides that a derivative claim may be brought by a member in respect of wrongs committed prior to his becoming a member. This reflects the fact that the rights being enforced are those of the company rather than those of the member and is the position at common law.

- Under *subsection (5)*, the reference to a director in this Chapter includes a former director; and a shadow director is treated as a director.

Section 261: Application for permission to continue derivative claim

495. This clause provides that, once proceedings have been brought, the member is required to apply to the court for permission to continue the claim. This reflects the current procedure in England and Wales under the Civil Procedure Rules. The applicant is required to establish a *prima facie* case for the grant of permission, and the court will consider the issue on the basis of his evidence alone without requiring evidence to be filed by the defendant. The court must dismiss the application at this stage if what is filed does not show a *prima facie* case, and it may make any consequential order that it considers appropriate (for example, a costs order or a civil restraint order against the applicant). If the application is not dismissed, the court may direct the company to provide evidence and, on hearing the application, may grant permission, refuse permission and dismiss the claim, or adjourn the proceedings and give such directions as it thinks fit. This will enable the courts to dismiss unmeritorious claims at an early stage without involving the defendants or the company.

Section 262: Application for permission to continue claim as a derivative claim

496. This section addresses the possibility that, where a company has brought a claim and the cause of action on which the claim is based could be pursued by a member as a derivative action:

- the manner in which the company commenced or continued the claim may amount to an abuse of process (e.g. the company brought the claim with a view to preventing a member bringing a derivative claim);

- the company may fail to prosecute the claim diligently; and

- it may be appropriate for a member to continue the claim as a derivative claim;

497. The section provides that, in these circumstances, a member may apply to the court to continue the claim as a derivative action.

Section 263: Whether permission to be given

498. This section sets out the criteria which must be taken into account by the court in considering whether to give permission to continue a derivative claim.

499. *Subsection (2)* provides that the court must refuse leave to continue a derivative claim if it is satisfied that:

a) a person acting in accordance with the general duty of directors to promote the success of the company (section 172) would not seek to continue the claim; or

b) the act or omission giving rise to the cause of action has been authorised or ratified by the company. Section 180(4) preserves any rule of law enabling the company to give authority for anything that would otherwise be a breach of duty. Section 239 preserves the current law on ratification of acts of directors, but with one significant change. Any decision by a company to ratify conduct by a director amounting to negligence, default, breach of duty or breach of trust in relation to the company must be taken by the members, and without reliance on the votes in favour by the director or any connected person.)

500. *Subsection (3)* sets out the criteria which the court must, in particular, take into account in considering whether or not to grant permission for the derivative claim to be continued.

501. *Subsection (4)* provides that, in considering whether to give permission, the court must have particular regard to any evidence before it as to the views of independent members of the company i.e. members who have no personal interest, direct or indirect in the matter.

502. *Subsection (5)* confers on the Secretary of State a power to make regulations with regard to the criteria to which the court must have regard in determining whether to grant leave to continue a derivative claim and where leave of the court must be refused. *Subsection (6)* provides that, before making any such regulations, the Secretary of State must consult with such persons as he considers appropriate. The power reflects a recommendation by the Law Commission in its 1997 report on shareholder remedies in respect of analogous shareholder actions in Scotland. Under *subsection (7)*, the regulations will be subject to the affirmative resolution procedure.

Section 264: Application for permission to continue derivative claim brought by another member

503. This section addresses the possibility that, where the court has already decided that there is an appropriate case for a derivative claim and a member has commenced or continued a claim:

- the manner in which the member commenced or continued the claim may amount to an abuse of the court (e.g. the member brought the claim with a view to preventing another member from bringing the claim);
- the member may fail to prosecute the claim diligently;
- it may be appropriate for another member to continue the claim (e.g. because the member who brought the claim has become very ill).

504. The section provides that, in these circumstances, another member may apply to the court to continue the claim as a derivative action.

Chapter 2: Derivative Proceedings in Scotland

505. Sections 265 to 269 seek to ensure maximum consistency between the position in England and Wales and Northern Ireland and the position in Scotland (although the clauses reflect the different procedural requirements which apply where proceedings are commenced in the Scottish courts, in particular the fact that the leave of court must be obtained before derivative proceedings may be raised). In view of this, they also put the rights of the member to raise actions on behalf of the company on a statutory footing.

506. Section 265 differs from section 260 in its approach in that it confers the right to bring the proceedings in the first place, and then, in the clauses which follow, regulate the proceedings. (By contrast, the sections relating to proceedings in England and Wales and Northern Ireland assume that there is already a right to bring such proceedings in England and Wales and Northern Ireland; they therefore regulate the proceedings rather than confer the right to bring them.)

507. *Subsections (4) to (6)* of section 268 confer on the Secretary of State a parallel power to that in section 263 to make regulations with regard to the criteria to which the court must have regard in determining whether to grant leave to continue a derivative claim and where leave of the court must be refused.

Part 12: Company Secretaries

Section 270: Private company not required to have secretary

508. This section replaces section 283(1) of the 1985 Act insofar as it applies to private companies. It implements the CLR recommendation (Final Report, paragraph 4.7) that the requirement for a private company to have a secretary be abolished. It defines a private company "without a secretary" for the purposes of the Act as a company which has taken advantage of the exemption provided by *subsection (1)* as opposed to one which normally has a secretary but for some reason (for example the death of the office holder) is without a secretary at a given time.*Subsection (3)* makes provision for private companies without a secretary.

Section 271: Public company required to have secretary

509. This section replaces section 283(1) of the 1985 Act insofar as it applies to public companies. It retains the requirement that a public company must have a secretary. The secretary may also be one of the directors.

Section 272: Direction requiring public company to appoint secretary

510. This section is a new provision, enabling enforcement of the continuing requirement for a public company to have a secretary. It does not apply to private companies. Where it appears that a public company does not have a secretary, the Secretary of State may give a direction to the company. The company must comply with the direction (by making the appropriate appointment and giving notice of it) within the period specified in the direction. The section provides for an offence for failure to comply with a direction.

Section 273: Qualifications of secretaries of public companies

511. This section updates section 286 of the 1985 Act. It makes it the duty of the directors of a public company to ensure that the secretary has both the necessary knowledge and experience and one of the qualifications listed in *subsection (2)*. The qualifications specified in this section are the same as in the 1985 Act except that:

- they do not include the qualification of having held the office of the company's secretary (or assistant or deputy secretary) on 22 December 1980;
- in *subsection (3)(f)*, "Chartered Institute of Management Accountants" replaces "Institute of Cost and Management Accountants" as the Institute changed its name in 1986.

There is no requirement for the company secretary to be a natural person. (Compare the requirement in section 155 that a company must have at least one director who is a natural person.)

Section 274: Discharge of functions where office vacant or secretary unable to act

512. This section replaces section 283(3) of the 1985 Act. It provides for the situation where the office of secretary is vacant or there is no secretary capable of acting for any other reason. In these circumstances, if the company has an assistant or deputy secretary, then that person may fill the position of secretary; if not, any person authorised by the directors may do so. This section differs from section 283(3) of the 1985 Act by permitting the directors to authorise any person to act as secretary, rather than only an officer of the company.

Section 275: Duty to keep register of secretaries

513. This section replaces the requirement in section 288 of 1985 Act. It requires every company to keep a register of its secretaries containing specified details. *Subsection (3)* provides that the register must be kept available for inspection either at the company's

registered office or at a place specified in regulations made under section 1136. *Subsections (5) to (8)* retain the public right of inspection, sanctions and means of enforcement of the right of inspection.

Section 276: Duty to notify registrar of changes

514. This section replaces the requirement in section 288(2) of the 1985 Act. It requires notification to the registrar within 14 days of any change in the company's secretary or any change in the particulars contained in the register of secretaries. The consent of the person having become a secretary or joint secretary of a company must accompany the notice. The section retains the existing sanction and ensures that the public record is kept up to date as regards the secretary of every company.

Section 277: Particulars of secretaries to be registered: individuals

515. This section replaces section 290 of the 1985 Act insofar as it applies to secretaries who are individuals. It requires a company to enter in its register of secretaries the name and address of any individual who is its secretary. The definition of name is the same as for directors (see section 163): in particular, the register must include any name used or in use for business purposes since the age of 16. The section retains an exception relating to the former names of peers but, as recommended by the CLR, not that for the former names of married women. The address to be registered is a service address: this implements the CLR recommendation (Final Report, paragraph 11.46) that the requirement for home addresses for company secretaries be abolished.

Section 278: Particulars of secretaries to be registered: corporate secretaries and firms

516. This section replaces section 290 of the 1985 Act insofar as it applies to secretaries who are not individuals. It sets out the details which must be registered where the secretary of a company is either a body corporate or a firm which is a legal person under the law by which it is governed. The requirements that apply in the case of an EEA company follow the recommendations of the CLR (Final Report, paragraph 11.39).

517. The section also makes provision about the details which must be registered where all the partners in a firm are joint secretaries.

Section 279: Particulars of secretaries to be registered: power to make regulations

518. This section is a new provision. It provides a power for the Secretary of State to make regulations that add or remove items from the particulars that have to be entered in a company's register of secretaries. A similar power is provided by section 166 for directors' particulars.

Section 280: Acts done by person in dual capacity

519. This section replaces section 284 of the 1985 Act. It provides that where a provision requires or authorises a thing to be done by or to both a director and a secretary of a company it will not be not be satisfied if done by the same person acting in both capacities.

Part 13: Resolutions and Meetings

520. The provisions in this Part replace most of Chapter 4 of Part 11 of the 1985 Act on meetings and resolutions. The changes in the law derive principally from the CLR's consultation on "Company General Meetings and Shareholder Communications" and recommendations from Chapters 2, 6 and 7 of their "Final Report", together with two subsequent consultations; the Modernising Company Law White Paper of July 2002 and the Company Law Reform White Paper of March 2005.

521. In addition to implementing detailed policy changes, Part 13 implements two general changes.

- First, the law makes the current "elective" regime the default for private companies. This means, for instance, that private companies will no longer need to "elect" to dispense with the Annual General Meeting (AGM): they will not be required to hold an AGM in the first place.
- Second, the current law is drafted on the basis that the main way in which shareholder decisions are taken is in general meetings. The new provisions proceed on the basis that in future this will not be the case for many private companies. Private companies will not be required in future to hold general meetings; instead provision is made for new procedures for decisions to be taken by written resolution.

522. The law relating to decisions has been restated in a way that deals first with private companies. Additional layers of requirements for public and quoted companies holding general meetings follow in subsequent provisions. There are provisions at the end of the Part about record keeping. In general, where this Part imposes an obligation or confers a power, it will apply notwithstanding anything in the articles unless otherwise indicated.

Chapter 1: General Provisions about Resolutions

Section 281: Resolutions

523. This section provides that members' resolutions can only be passed in accordance with the provisions of this Part. There is no equivalent in the current legislation. *Subsection (1)* allows a private company to pass a resolution either as a written resolution or at a meeting of the members. *Subsection (2)* allows a public company to pass a resolution only at a meeting of the members. *Subsection (3)* ensures that where a resolution is required but the type of resolution is not specified, the default will be an ordinary resolution unless the articles require a higher majority. When a provision specifies that an ordinary resolution is required, the articles will not be able to specify a higher majority. *Subsection (4)* preserves the common law unanimous consent rule.

Section 282: Ordinary resolutions

524. This section provides a definition of an ordinary resolution, whether of the members generally or of a class of the members and whether as a written resolution or as a resolution passed at a meeting. A simple majority – that is, over 50% – is required.

Section 283: Special resolutions

525. This section provides a definition of a special resolution, whether of the members generally or of a class of the members and whether as a written resolution or as a resolution passed at a meeting. A 75% majority is required. If a resolution is proposed as a special resolution, there is a requirement to say so, either in the written resolution text or in the meeting notice. Where a resolution is proposed as a special resolution, it can only be passed as such. The main difference from the existing definition in section 378(2) of the 1985 Act is that there is no longer a requirement for 21 days' notice where a special resolution is to be passed at a meeting. The subject matter of section 378(3) of the 1985 Act is now dealt with *in* section 307(4) to (6) (notice required of general meeting), while the subject matter of section 378(4) and (6) is dealt with in sections 320 and 301 respectively.

Section 284: Votes: general rules

526. This section sets out the general rules on votes of members taken by written resolution, on a show of hands at a meeting or on a poll taken at a meeting. These are adapted

from section 370 of the 1985 Act and the default regulations in Table A. *Subsection (4)* allows these general rules to be varied by the company's articles.

Section 285: Votes: specific requirements

527. This section sets out specific requirements on votes of members, which the company's articles may not override.*Subsections (1) and (2)* provide for entitlement to vote where proxies have been appointed and ensure that the articles do not disadvantage a member voting by proxy or proxies. *Subsection (3)* makes new provision for voting rights on written resolutions, reflecting the fact that they will no longer need to be passed unanimously. A member will have the same number of votes whether passing a resolution on a poll in general meeting or on a written resolution.

Section 286: Votes of joint holders of shares

528. This section puts on a statutory footing what was a default regulation under article 55 of Table A on votes of joint holders of shares. The person whose vote counts is the "senior" holder, the joint holder whose name appears first in the register of members

Section 287: Saving for provisions of articles as to determination of entitlement to vote

529. This section makes new provision to preserve the right for a company to require objections to votes to be made in accordance with procedures in their articles. If an objection is overruled, the decision will be final except in cases of fraud and certain other kinds of misconduct detailed in case law where a court may intervene. This provision preserves the current law. The provision ensures, on the one hand, certainty for company by enabling the chairman to settle matters relating to the admissibility of votes in accordance with the articles and, on the other hand, sufficient remedies for members to challenge a decision if they have suffered unfair prejudice.

Chapter 2: Written Resolutions

530. The provisions of this Chapter replace the present rules on written resolutions of private companies. A key change (apparent from sections 282 and 283) is that where the statutory procedure under the 1985 Act requires unanimity, the procedure in this Act does not. Consequently, the sections are more detailed than sections 381A to 381C of the 1985 Act and set out the procedures for decisions taken outside of a general meeting framework. The use of the expression "written resolution" does not mean that there is a requirement for "writing" in the sense of hard copy.

General provision about written resolutions

Section 288: Written resolutions of private companies

531. This section introduces the written resolution provisions of this Chapter. They apply to private companies only. *Subsection (2)(a) and (b)* reproduce the two exceptions currently provided for in Part 1 of Schedule 15A to the 1985 Act: a resolution to remove a director or an auditor before the expiration of his term of office may not be passed as a written resolution. These are the only two exceptions to a private company's right to pass resolutions using the written resolution procedure.

Section 289: Eligible members

532. The eligibility of members to vote on a written resolution is fixed on the day the resolution is circulated. *Subsection (2)* ensures that the same shares cannot be voted more than once on the same written resolution. If the person entitled to vote changes during the course of that day, the eligible member is the person entitled to vote at the time that the first copy of the resolution is sent or submitted to a member for his agreement.

Circulation of written resolutions

Section 290: Circulation date

533. This section provides that the circulation date of a written resolution means the date on which copies are sent or submitted to members (or if copies are sent on different days, the first of those days.

Section 291: Circulation of written resolutions proposed by directors

534. This section provides for the circulation of written resolutions by directors of the company. A company must circulate a written resolution either by sending it to all eligible members at the same time or, if it can be done without undue delay, submitting the same copy of the resolution to each eligible member in turn or a combination of these. The latter two options allow companies to pass round a document or email rather than sending out several copies.

Section 292: Members' power to require circulation of written resolution

535. This section enables members to require a written resolution to be circulated. They may also require circulation of a statement about its subject matter. Like the members' right to require a resolution to be moved at an AGM, the percentage needed is 5% of the total voting rights (or lower if specified in the company's articles). *Subsection (2)* specifies some limits on the kind of resolution that may be circulated in this way, designed to stop the power being abused.

Section 293: Circulation of written resolution proposed by members

536. This section specifies what a company has to do when it is required under section 292 to circulate a resolution and accompanying statement. It must circulate the resolution and statement by sending it to all eligible members at the same time or, if it can be done without undue delay, by submitting the same copy of the resolution and statement to each eligible member in turn or a combination of these. The latter two options would allow companies to pass round a document or email rather than sending out several copies. *Subsection (3)* requires that the members' written resolution be circulated within 21 days of the company being requested to do so by those members, except that if the written resolution is circulated to members on different days, then the *first* copy should be dispatched not more than 21 days after the request to circulate the resolution.

Section 294: Expenses of circulation

537. This section provides that the expenses of complying with section 293 are to be paid by the members who requested the circulation of the resolution unless the company resolves otherwise. The company can require the deposit of a sum to meet its expenses before it circulates the resolution, again subject to any resolution to the contrary.

Section 295: Application not to circulate members' statement

538. This section enables the court, on application by the company or other aggrieved person, to relieve the company of an obligation to circulate a members' statement under section 293 if in the court's view the right to require circulation is being abused. This mirrors section 317 in the context of general meetings.

Agreeing to written resolutions

Section 296: Procedure for signifying agreement to written resolution

539. Under this section, a member may signify agreement to a written resolution in hard copy or electronic form, although if the company does not permit electronic form communications, or is not deemed to do so by virtue of section 298, the member

will have to signify his consent in hard copy (see paragraph 6 (conditions for use of communications in electronic form) of Schedule 4 (documents and information sent or supplied to a company). Once a member has signified agreement to a written resolution, he cannot withdraw his agreement. This provides certainty for the company as to when the required majority of eligible members needed to agree the resolution has been reached.

Section 297: Period for agreeing to written resolution

540. This section puts a time limit of 28 days for passing a written resolution, unless the company's articles specify a different period. This means that there will be a definite point when the company can say that a resolution with insufficient support has not been passed.

Supplementary

Section 298: Sending documents relating to written resolutions by electronic means

541. This clause needs to be read together with the provisions about electronic communications to companies in Part 3 (communications in electronic form) of Schedule 4. Taken together, these provisions allow a member to communicate with the company by electronic means where the company has given an electronic address in a document containing or accompanying a proposed written resolution.

Section 299: Publication of written resolution on website

542. This section should be read in conjunction with the provisions about communications by means of a website by a company other than a traded company in Part 4 (communications by means of a website) of Schedule 5 (communications by a company). This clause, together with those provisions, allow a company, provided certain conditions are met, to publish a written resolution on a website rather than send it to a member individually.

Section 300: Relationship between this Chapter and provisions of company's articles

543. This section ensures that the company's articles cannot remove the ability of a private company and its members to propose and pass a statutory resolution using the statutory written resolutions procedures of this Chapter.

Chapter 3: Resolutions at Meetings

544. This Chapter replaces sections 368 to 377, 379 and 381 of the 1985 Act and makes provision about resolutions passed in general meeting. The provisions apply equally to private and public companies. The new provisions reflect the fact that private companies will no longer have to hold AGMs. For example, the provisions about circulation of statements in sections 376 and 377 of the 1985 Act have been separated from the provisions on circulation of resolutions prior to an AGM – which are in Chapter 4. The Act repeals section 367 of the 1985 Act which gives the Secretary of State a power to call a meeting where there is no AGM.

General provisions about resolutions at meetings

Section 301: Resolutions at general meetings

545. This is a general provision about the circumstances in which resolutions at meetings are validly passed. It extends to all resolutions the principle in section 378(6) of the 1985 Act relating to special resolutions: that passing a resolution in a meeting is not just a question of obtaining the right majority but of using the correct procedures. An important difference from the position under section 378(6) is that, under this section,

a resolution must be passed in accordance with the relevant provisions of the Bill and any additional requirements imposed by the company's articles. So, where there are mandatory provisions in the Bill (like those about proxies' rights to vote) these cannot be avoided by making alternative provision in the articles; and where provision is made about meetings in a company's articles, these must also be complied with.

Calling meetings

Section 302: Directors' power to call general meetings

546. This section puts into statute part of the default regulation at article 37 of Table A which allows the directors to call a general meeting. The company's articles will set out how the directors act collectively.

Section 303: Members' power to require directors to call general meeting

547. This section, together with sections 304 and 305 make provision similar to that in section 368 of the 1985 Act requiring the directors to call a general meeting if requested by the members. There are three main changes.

548. First, there is a change in the threshold required for a meeting request. For public companies this remains members with voting rights holding at least 10% of the paid-up capital. For private companies the threshold is 5% or 10% of the paid-up capital (or, in a company with no share capital, 5% or 10% of the total voting rights) depending on when there was last a meeting in advance of which members had a right – equivalent to the right under this clause (see below) – to circulate resolutions. The threshold is lower if there has been no such meeting in the last twelve months. Second, as indicated above, *subsection (4)(b)* extends the provisions of the 1985 Act by enabling members to include the text of a resolution to be moved at the requested meeting. *Subsection (5)* defines what type of resolution may be properly moved. For example, if the resolution would have no effect, then it cannot be properly moved. Third, requests in electronic form are permitted.

Section 304: Directors' duty to call meetings required by members

549. This section sets time limits within which the directors must call and hold a meeting required by members. *Subsection (2)* requires that if the members' request identifies a resolution to be moved at the meeting, notice of this resolution should be included in the notice of the meeting.

Section 305: Power of members to call meeting at company's expense

550. This section enables the members to call a meeting at the company's expense in the event that the directors fail to call a meeting on the members' request. *Subsections (6) and (7)* provide for members to be reimbursed appropriately and that the directors are penalised directly by the reimbursement being taken out of the fees or other remuneration due to them.

Section 306: Power of court to order meeting

551. This section reproduces the effect of section 371 of the 1985 Act and gives the court power to order a meeting of the company and to direct the manner in which that meeting is called, held and conducted.

Notice of meetings

Section 307: Notice required of general meeting

552. This section replaces part of section 369 of the 1985 Act. It retains the current minimum notice period requirement of 21 days for public company AGMs, with 14 days' notice

required for all other general meetings (whether public or private company general meetings). A general meeting may be called on shorter notice if the requisite majority of members agree. The key substantive change from the position under existing legislation is that the requisite majority required to agree a short notice period has been reduced for private companies from 95% to 90% of the voting rights, although the articles may specify up to 95% if the company wishes. For public companies, the majority required to agree a short notice period remains at 95% of the voting rights.

Section 308: Manner in which notice to be given

553. This section should be read in conjunction with the general requirements for companies in sending and supplying information as set out in Part 37 and Schedule 5.

Section 309: Publication of notice of meeting on website

554. This section contains some specific provisions on communications by means of a website and needs to be read with the general provisions on communications referred to above. The overall effect is similar to that of the website provisions in the current section 369 of the 1985 Act.

Section 310: Persons entitled to receive notice of meetings

555. This section puts into statute part of article 38 of Table A. The new provision ensures that notice of meetings must be sent to all members, directors and any person entitled to a share as a consequence of the death or bankruptcy (or the equivalent in Scots insolvency law) of a member. The provision is subject to any enactment and to any provision in the articles. This means that a company may, for example, make provision in its articles to stop sending notice of meeting to members for whom the company no longer has a valid address.

Section 311: Contents of notices of meetings

556. This section puts into statute another part of article 38 of Table A. The new provision ensures that the notice of meeting must include the time, date and place of the meeting and, subject to the articles, the general nature of the business to be conducted at the meeting.

Section 312: Resolution requiring special notice

557. This section replaces section 379 of the 1985 Act setting out the requirements for special notice resolutions. It makes provision only in relation to resolutions passed at meetings. This is because the resolutions for which special notice is required are either resolutions that are not capable of being passed as written resolutions (in the case of sections 168 and 510) or in relation to which written resolutions have their own special procedure (see sections 514 and 515).

558. There is no change from the existing law whereby at least 28 days' notice must be given to the company of the intention to move a resolution requiring special notice. Where it is not practicable for the company to give members notice of such a resolution at the same time as it gives notice of the meeting at which the resolution is to be moved, the company must in future give at least 14 days' notice either by newspaper advertisement or by any other manner allowed by the articles.

Section 313: Accidental failure to give notice of resolution or meeting

559. This section expands on article 39 of Table A. It contains the rule that an accidental failure to give notice of a resolution or a general meeting is generally disregarded. Under *subsection (2)*, this rule can be altered by the articles in some but not all cases.

Members' statements

Section 314: Members' power to require circulation of statements

560. This section, together with section 315, replaces sections 376 and 377 of the 1985 Act and provides a right for members to require the company to circulate a statement of up to 1,000 words. The key policy change is that where the statement relates to a resolution or other matter to be dealt with at a public company's AGM and is received before the company's financial year-end, the shareholders are not required to cover the costs of circulating the statement. There are two other notable changes. The first is that the shares relied on to trigger the circulation of a statement must in each case carry rights to vote on the relevant resolution rather than just at the meeting. The second is that requests in electronic form are permitted.

Section 315: Company's duty to circulate members' statement

561. This section replaces the remainder of sections 376 and 377 of the 1985 Act and specifies what the company is to do when it is required to circulate a members' statement. The statement must be circulated in the same manner as notice of the meeting and at the same time, or as soon as reasonably practicable, after the company gives notice of the meeting. Where the company fails to comply with the provisions of this section an offence is committed by every officer of the company who is in default.

Section 316: Expenses of circulating members' statement

562. This section provides that the expenses of complying with section 315 need not be paid by the members if the meeting to which the request relates is a public company AGM and a sufficient number of requests are received before the company's year-end. Otherwise the company's expenses will have to be met by the members who requested the circulation of the statement unless the company resolves otherwise. In this case, the members requesting the statement must deposit a sum to cover the company's costs (unless the company has resolved otherwise).

Section 317: Application not to circulate members' statement

563. This section replaces section 377(3) of the 1985 Act. It enables the court on application to relieve the company of an obligation to circulate a members' statement if in its opinion the right to require circulation is being abused.

Procedure at meetings

Section 318: Quorum at meetings

564. This section replaces sections 370(4) and 370A of the 1985 Act. It sets a quorum for a meeting of one "qualifying person" in the case of a single member company and – as a default – two "qualifying persons" in any other case. *Subsections (2) and (3)* ensure that a member, corporate representative or proxy present at the meeting may all be "qualifying persons", but excludes the possibility of two or more corporate representatives or proxies of the same member comprising a quorum. Under these provisions, proxies and corporate representatives do not count towards a quorum in companies with more than one member.

Section 319: Chairman of meeting

565. This section reproduces the effect of section 370(5) of the 1985 Act and provides a default provision where the company's articles are silent, allowing any member to be elected as chairman of a general meeting by a resolution of the company passed at the meeting.

Section 320: Declaration by chairman on a show of hands

566. This section replaces section 378(4) of the 1985 Act and part of article 47 of Table A. This provision ensures that the chairman's declaration of a vote taken on a show of hands is conclusive evidence of the resolution being passed or lost without further proof being provided, unless a poll is demanded on the resolution. There are two main differences from section 378(4), both of which are drawn from Table A. First, if the demand for a poll is withdrawn, then the chairman's declaration will stand. Second, the minutes of the meeting also provide conclusive evidence of the chairman's declaration. This section is intended to provide certainty by preventing members from challenging a declaration of the chairman as to the votes cast on a resolution at a meeting otherwise than by calling a poll.

Section 321: Right to demand a poll

567. This section replaces section 373 of the 1985 Act. It restricts companies' ability, through their articles, to exclude members' rights to call a poll. However, it allows articles to exclude the right to a poll on the election of the chairman of the meeting and the adjournment of the meeting. The section provides for three effective types of demands for a poll, including a demand made by at least 5 members with a right to vote on the resolution.

Section 322: Voting on a poll

568. This section replaces section 374 of the 1985 Act. This provision recognises that a member may hold shares on behalf of third parties and allows the member to cast votes in different ways according to instructions from his clients. The reference to class meetings in section 374 is dealt with by section 334.

Section 323: Representation of corporations at meetings

569. This section replaces section 375 of the 1985 Act. The section expressly provides for the appointment of multiple corporate representatives. This is possible under section 375 of the 1985 Act, although the effect of appointing multiple representatives under the existing law is in some cases unclear. The new section spells out the position. Any one of the corporate representatives will be entitled to vote and exercise other powers on behalf of the member at meetings, but in the event that representatives' votes or other powers conflict, the corporation is deemed to have abstained from exercising its vote or power. If a corporation wishes to appoint people with different voting intentions or with authority to vote different blocks of shares, they should appoint proxies.

Proxies

Section 324: Rights to appoint proxies

570. This section sets out new provisions for the appointment of proxies, expanding on the existing rights given under section 372 of the 1985 Act and Table A. It puts on a statutory footing certain rights that under the 1985 Act are subject to the articles. In future, members of both private and public companies will have the right to appoint more than one proxy. All proxies will be able to attend, to speak and to vote at a meeting. As to the voting rights of a proxy on a show of hands, see sections 284(2)(b) and 285. The effect of those sections is that the default position will be that, where a member appoints more than one proxy, each proxy will have a vote. The articles will be capable of restricting the number of votes of the proxies, provided that they still have at least one vote between them.

Section 325: Notice of meeting to contain statement of rights

571. This section replaces sections 372(3) and 372(4) of the 1985 Act with changes consequential on the extended rights to appoint proxies under section 324. The new

provision requires every notice calling a meeting to contain a statement informing the member of his rights to appoint one or more proxies and any more extensive rights conferred by the company's articles. Failure to include such a statement will not invalidate the meeting, but is an offence attracting a fine for every officer of the company found in default.

Section 326: Company-sponsored invitations to appoint proxies

572. This section reproduces the effect of section 372(6) of the 1985 Act and requires a company to ensure that if it invites members to appoint a particular person or persons as proxy, such an invitation must be issued to all members entitled to vote at the meeting. *Subsection (2)* lists two exceptions to the requirement. Failure to comply attracts a fine for every officer in default.

Section 327: Notice required of appointment of proxy etc

573. This section replaces section 372(5) of the 1985 Act. There are two changes. The first relates to the timing required for a notice of proxy appointment. The new provision ensures that weekends, Christmas Day, Good Friday and any bank holiday are excluded from the time counting towards the minimum 48 hour notice required to appoint proxies. This means, for example, that for a meeting to be held at 3.00 pm on a Tuesday after a bank holiday Monday, the cut-off point for proxy appointment will be 3.00 pm the previous Thursday, not 3.00 pm on Sunday as under the 1985 Act. The second is that polls which are not taken immediately are covered by the rules as well as meetings and adjourned meetings.

Section 328: Chairing meetings

574. This section provides as a default rule, subject to the articles, that a proxy may be elected as chairman of a general meeting by resolution of the company passed at the meeting.

Section 329: Right of proxy to demand a poll

575. This section sets out the way in which a proxy may participate in a demand for a poll.

Section 330: Notice required of termination of proxy's authority

576. This section provides a default regulation to replace article 63 of Table A. This ensures that, subject to the articles, an appointed proxy's actions at a meeting are valid unless notice of termination of the proxy's authority is given before the meeting starts. The company's articles may specify a longer advance notice period but this cannot be more than 48 hours in advance of the meeting (excluding weekends, Christmas Day, Good Friday and bank holidays).

Section 331: Saving for more extensive rights conferred by articles

577. This section makes clear that the company's articles may confer more extensive rights than are provided for under the provisions of the Bill on members and their proxies.

Adjourned meetings

Section 332: Resolution passed at adjourned meeting

578. This section reproduces the effect of part of section 381 of the 1985 Act as it applies to members' meetings. It ensures that a resolution of the members of the company passed at an adjourned meeting is treated as passed on that date and not on any earlier date. The reference to class meetings in section 381 is dealt with by section 334.

Electronic communications

Section 333: Sending documents relating to meetings etc in electronic form

579. This section needs to be read together with the provisions about electronic communications to companies in Part 3 of Schedule 4. Taken together these provisions allow a member to communicate with the company by electronic means where the company has given an electronic address in a notice calling a meeting or in an instrument of proxy or proxy invitation.

Application to class meetings

Section 334: Application to class meetings

580. This section applies the provisions of this Chapter with some modifications to meetings of holders of a class of shares in companies having a share capital.

Section 335: Application to class meetings: companies without a share capital

581. This section applies the provisions of this Chapter with some modifications to meetings of classes of members of companies without a share capital.

Chapter 4: Public Companies: Additional Requirements for Agms

582. The requirements for public companies relating to annual general meetings are set out in this Chapter. The main substantive changes to the 1985 Act are, as the CLR recommended, that:

- private companies will no longer be required to hold an AGM. The provisions of this Chapter therefore do not apply to private companies; and
- public company AGMs must be held within six months of their financial year-end.

Section 336: Public companies: annual general meeting

583. This section replaces section 366 of the 1985 Act but will apply only to public companies since private companies are no longer to be required to hold an AGM. Where section 366 required an AGM to be held each year and not more than 15 months after the previous AGM, a public company will now be required to hold an AGM within 6 months of its financial year-end. This new requirement is intended to ensure that shareholders have a more timely opportunity to hold the directors of a public company to account.

Section 337: Public companies: notice of AGM

584. This section reproduces the effect of parts of section 369 of the 1985 Act relating to the AGM notice. The minimum notice period for calling a public company AGM is 21 days as set out in subsection (2) of section 307 or longer if provided for in the company's articles. An AGM may be called at shorter notice if all members of the company agree.

Section 338: Public companies: members' power to require circulation of resolutions for AGMs

585. This section, with section 339, replaces sections 376 and 377 of the 1985 Act (to the extent that they relate to resolutions proposed by members to be moved at an AGM). Members holding at least 5% voting rights or at least 100 members holding on average £100 paid-up capital have the right to propose a resolution for the AGM agenda and to require the company to circulate details of the resolution to all members. A change from the existing legislation is that the shares must in each case carry rights to vote on the relevant resolution. The key policy change is that, if the members' request is

received before the financial year-end, then the members are not required to cover the costs of circulation.

Section 339: Public companies: company's duty to circulate members' resolutions for AGMs

586. This section replaces the remaining parts of sections 376 and 377 of the 1985 Act (to the extent that they relate to resolutions proposed by members to be moved at an AGM). It specifies what a company has to do when it is required to circulate a members' resolution for an AGM.

Section 340: Public companies: expenses of circulating members' resolutions for AGM

587. This section provides that the expenses of complying with section 339 need not be paid by the members who requested the circulation of the resolution if requests sufficient to require the company to circulate it are received before the company's year-end. Otherwise the company's expenses will have to be met by the members who requested the circulation of the resolution unless the company resolves otherwise. In this case, the members requesting the statement must deposit a sum to cover the company's costs (unless the company has resolved otherwise).

Chapter 5: Additional Requirements for Quoted Companies

588. This Chapter imposes new requirements on quoted companies relating to the disclosure on a website of the results of polls at general meetings, and an independent report on a poll if a sufficient number of members demand one. These two measures were recommended by the CLR (Final Report, paragraph 6.39(ii) and (iv)).

Website publication of poll results

Section 341: Results of poll to be made available on website

589. This section requires quoted companies to disclose on a website the results of all polls taken at a general meeting. *Subsection (1)* sets out the minimum information that must be disclosed. Companies may disclose additional information about the poll results if they wish. *Subsection (4)* imposes a penalty on every officer in default for non-compliance. Non-compliance however does not invalidate the poll, the resolution or other business to which the poll relates. Section 353(requirements as to website availability) sets out the requirements relating to the website on which the poll results must be published.

Independent report on poll

Section 342: Members' power to require independent report on poll

590. This section gives members of a quoted company the right to require an independent report of any poll taken, or to be taken, at a general meeting. The minimum threshold required for the demand is the same as that for requiring the circulation of a resolution – that is members holding 5% of the voting rights or 100 members holding on average £100 of paid-up capital. The members' request must be made within one week of the meeting where the poll is taken. This allows members to decide after a poll is taken whether they wish to require an independent report, for example on a controversial resolution or where there appears to be a problem relating to voting procedures. Members may make their request in advance of the meeting if they wish, but unless the company's articles already require all votes to be taken on a poll, members may need to take steps to ensure that a poll is called.

Section 343: Appointment of independent assessor

591. The appointment of an independent assessor must be made within one week of the members' request. This means that the appointment could be made either before or after the meeting depending on when the members' request is made. The independent assessor must be independent (see section 344) and must not be someone already involved in the voting process for the company.

Section 344: Independence requirement

592. This section prevents a person acting as an independent assessor on a poll if he is too closely connected to the company or an associated undertaking of the company. The independence requirements are set out in *subsection (1)*. They correspond to the independence requirements for a statutory auditor (see section 1214). *Subsection (2)* allows, but does not require, an auditor to be appointed as an assessor.

Section 345: Meaning of "associate"

593. This section defines "associate" for the purposes of the independence requirements in section 344.

Section 346: Effect of appointment of a partnership

594. This section provides for where a partnership that is not a legal person is appointed as an independent assessor on a poll.

Section 347: The independent assessor's report

595. This section sets out the minimum information the independent assessor's report must contain.

Section 348: Rights of independent assessor: right to attend meeting etc

596. This section gives the independent assessor rights to attend the meeting at which the poll or polls may be taken and to be provided with information relating to the meeting. He is to exercise these rights only to the extent he considers necessary for the preparation of his report.

Section 349: Rights of independent assessor: right to information

597. This section gives the independent assessor the right to access company records relating to any poll on which he is to report and to the meeting at which the poll or polls may be taken.

Section 350: Offences relating to provision of information

598. This section imposes a penalty on any person listed in subsection (2) of section 349 who fails to comply with the requirement to provide information or explanation relating to the poll on which the independent assessor is preparing a report.

Section 351: Information to be made available on website

599. This section requires the company to publish on a website the independent assessor's report of the poll or polls and sets out the minimum information relating to the assessor's appointment, his identity, the text of the resolution and the assessor's report that must be made available. *Subsections (3) and (4)* impose a penalty on every officer in default for non-compliance with this requirement. Failure to comply, however, does not invalidate the poll or the resolution or other business to which the poll relates. Section 353 sets out the requirements relating to the website on which the independent report must be published.

Supplementary

Section 352: Application of provisions to class meetings

600. This section applies the provisions of this Chapter to meetings of holders of a class of shares of a quoted company.

Section 353: Requirements as to website availability

601. This section sets out the minimum requirements that should apply to information to be published on a quoted company's website under section 341 and section 351. The website on which the information is made available must be maintained by or on behalf of the quoted company and must identify the company in question. This provides flexibility as to whether a website is the company's own or one operated by a website service provider. Information published on a website must be kept available for a minimum of two years. *Subsection (5)* provides a let-out when a company's failure to make the information available on a website for part of the period is wholly attributable to circumstances beyond the company's control.

Section 354: Power to limit or extend the types of company to which provisions of this Chapter apply

602. At present the provisions of this Chapter apply to quoted companies as defined in section 385, which replaces the definition of "quoted company" in section 262 of the 1985 Act. This section confers on the Secretary of State a power to make regulations to limit or extend the types of company to which the provisions of this Chapter apply. The Parliamentary procedure that will apply to such regulations depends on whether they extend or limit the application of the Chapter.

Chapter 6: Records of Resolutions and Meetings

603. The following provisions replace sections 382, 382A, 382B and 383 of the 1985 Act relating to the records of company proceedings. They should be read in conjunction with the provisions on company records in Part 31. The main changes are the ten year minimum period for keeping records (the 1985 Act envisaged that records would be retained forever); that meetings of directors are dealt with elsewhere (in Part 10 of the Act); and that the new provisions apply to class meetings.

Section 355: Records of resolutions and meetings etc

604. This section requires all companies to maintain records comprising: copies of all resolutions passed otherwise than at general meetings (which would include all written resolutions), minutes of all proceedings of general meetings, and details of decisions of a sole member taken in accordance with section 357. All records must be kept for a minimum of 10 years. *Subsections (3) and (4)* impose a penalty on every officer in default for non-compliance.

Section 356: Records as evidence of resolutions etc

605. This section ensures that all records of resolutions or written resolutions and minutes of meetings, where signed off by a director or a company secretary or by the chairman in the case of a general meeting, are evidence of the passing of a resolution or the proceedings at the meeting. In legal proceedings, a litigant will have to accept that the records are accurate unless he can prove that they are not.

Section 357: Records of decisions by sole member

606. This section makes provision for the recording of decisions of a company with only one member.

Section 358: Inspection of records of resolutions and meetings

607. This section requires every company to keep its records available for inspection by members for 10 years. *Subsection (5)* enables a member to seek a court order to compel the company to make the records available for inspection or to provide copies of the records.

Section 359: Records of resolutions and meetings of class of members

608. This section applies the provisions of this Chapter to resolutions and meetings of holders of a class of shares in the case of a company with share capital or to classes of members in the case of a company without a share capital.

Chapter 7: Supplementary Provisions

Section 360: Computation of periods of notice etc: clear day rule

609. This is a new provision to ensure clarity and consistency in the calculation of time periods in relation to meetings and resolutions under Part 13. The section provides that in calculating periods of notice, or periods before a meeting by which a request must be received or sum deposited or tendered, the following are to be excluded –

- the day of the meeting,
- the day on which notice is given,
- the day on which the request is received or the sum is deposited or tendered.

Section 361: Meaning of "quoted company"

610. This section provides that the definition for "quoted company" is as stated in Part 15 (Accounts and reports) of the Act.

Part 14: Control of Political Donations and Expenditure

Background and summary

611. In October 1998 the Committee on Standards in Public Life presented to the Prime Minister its report on the funding of political parties in the UK. The Report recommended that any company intending to make a donation (whether in cash or in kind, and including any sponsorship, or loans or transactions at a favourable rate) to a political party or organisation should be required to have the prior authority of its shareholders. The Government accepted this recommendation, and implemented it through the Political Parties, Elections and Referendums Act 2000 ("the PPERA"). The new regime for control of political donations and expenditure is in Part 10A of the 1985 Act, as inserted by section 139 of and Schedule 19 to the PPERA.

612. Part 14 of the Act restates the existing provisions in a style consistent with the other sections, but most of the key elements of the framework established by the PPERA remain. In particular:

- companies will continue to be prohibited from making a donation to a political party or other political organisation or from incurring political expenditure unless the donation or the expenditure has been authorised, in a typical case by the members of the company;
- a "political donation" will continue to be defined by reference to sections 50 to 52 of the PPERA, and for this purpose amendments made to the PPERA by the Electoral Administration Act 2006 (which remove from the definition of "donations" loans made otherwise than on commercial terms) will be disregarded;

- an approval resolution may authorise the making of donations and incurring of expenditure for a period of not more than four years commencing with the date of the passing of the resolution up to a value specified in the resolution;
- donations or expenditure by a subsidiary must, in general, be authorised by resolutions of the members of the subsidiary and of the holding company; and the directors of such a holding company will continue to be liable for unauthorised donations by the subsidiary company;
- a company need not seek prior shareholder consent for a donation to a political party or organisation unless the aggregate amount of the donation together with any other relevant donations made by the company and other companies in the group of which it is a member in the previous 12 months exceeds £5,000;
- there are no criminal sanctions in relation to the making of unauthorised donations or the incurring of unauthorised political expenditure;
- civil remedies are available to a company in the event of breach of the prohibitions and may be pursued in the normal manner by the company. There will continue to be available an action under which shareholders may enforce on behalf of the company any of the remedies available to a company.

613. The main changes from Part 10A of the 1985 Act are that:

- in line with the general approach in the Act, references to the general meeting are removed to make it clearer that private companies can authorise donations and/or expenditure by written resolution;
- a holding company must authorise a donation or expenditure by a subsidiary company only if it is a "relevant holding company" (that is, the ultimate holding company or, where such a company is not a "UK-registered company", the holding company highest up the chain which is a "UK-registered company");
- a holding company is permitted to seek authorisation of donations and expenditure in respect of both the holding company itself and one or more subsidiaries (including wholly-owned subsidiaries) through a single approval resolution (section 367(1));
- companies are permitted to table separate approval resolutions in respect of donations to political parties and donations to other political organisations (section 367(3));
- companies are required to seek authorisation for donations to independent candidates at any election to public office held in the UK or other EU member state and for expenditure by the company relating to independent election candidates;
- the sections provide greater clarity for companies about the provision of facilities (for example, meeting rooms) for trade union officials by introducing a specific exemption for donations to trade unions (section 374). The Act does not introduce a specific exemption in relation to paid leave for local councillors because this does not constitute a political donation or political expenditure under Part 10A of the 1985 Act or this Act;
- there are important changes to the rules on ratification and liability in cases of unauthorised donations or expenditure;
- the special rules in respect of the parent company of a non-GB subsidiary undertaking (sections 347E and 347G of the 1985 Act) are not reproduced;
- The new provisions apply to Northern Ireland.