

Companies Act 2006

The long-awaited Companies Bill (formerly known as the Company Law Reform Bill), was given Royal Assent on 8 November 2006.

The Government intends that the Act will apply to both new and existing companies. It has announced that it will consult on the Act's implementation and transitional arrangements for existing companies in February 2007. The Government expects to commence all parts of the Act by October 2008.

The Government has, however, already implemented or set a date for implementation of some provisions, which include:-

- with effect from 1 January 2007, provisions whereby all companies must have their full name (in legible characters), place of registration, company number and registered office on their websites, business

letters and order forms (in both electronic format (e.g. emails) and hard copy), in other words information which was already required to be included in hard-copy company letters;

- with effect from 20 January 2007, provisions on company communications to shareholders and others, which include provisions facilitating electronic communication with shareholders, provisions concerning a public company's right to investigate who has an interest in its shares and provisions which set out a statutory basis of directors' liability to the company in relation to the directors' report (including business review), the directors' remuneration report and any summary financial statement derived from such reports; and
- with effect from 6 April 2007, provisions relating to the disclosure of share dealings by directors and their families will be repealed, as will the age limit for directors of public companies.

Shona Unwin

Incorporation of a Dental Practice

After much delay, the changes to the Dentists Act 1984 came into force on 31 July 2006. Section 42 of the Dentists Act which prohibited bodies corporate from carrying on the profession of dentistry has been repealed. For the first time in 50 years, dentists can run their professions as a limited company.

A company has a separate legal entity and so it can own property and enter contracts in its own right. Instead of being a partner or a sole trader, the owner of the business can own shares in the company following incorporation and, probably, be a director. At least half of the directors of the company must be registered with the General Dental Council on its new register of dental care professionals. The company would also have to be registered.

One of the principal advantages of incorporation is that a shareholder's liability is limited whereas a sole trader or partner has unlimited liability. Although this gives greater protection against the creditors of the company, the normal professional indemnity requirements will continue and insurers will need to be consulted.

The tax consequences of incorporation can be hugely beneficial. Substantial tax savings can be created by reducing the tax payable on releasing capital at a low capital gains tax cost. In simple terms, each partner will transfer the assets of the business which will include goodwill to a company. The goodwill being transferred is likely to be equivalent to several years' income. The price payable by the company for the transfer of the business is the creation of a loan equivalent to the value attributed to the assets transferred. However, the tax regime is complex and does need careful consideration, especially in relation to the value of the assets to be transferred.

Shares in a company are easier to pass to family members and so this can help with succession planning. How effective this is practically will depend upon the nature of the business concerned. There is no barrier to external ownership, which means other investors including family members could become shareholders.

Incorporation will require a formal contract to transfer the business and assets to the new company. Staff members will transfer automatically with all their accrued rights. A shareholders' agreement (similar to a partnership agreement) will be needed if there is more than one shareholder.

We have recently incorporated one of the largest practices in Yorkshire. We were able to provide corporate finance, taxation and legal advice. We have now developed a suite of documentation tailored for the incorporation of a dental practice. These agreements implement the transfer and regulate the future relationship of the shareholders.

We can work with existing tax advisers and accountants or provide such taxation advice as may be required.

If you would like to speak to us about incorporation of a dental practice, or if you would like to receive a copy of a leaflet we have prepared on the subject, please contact either Richard Field or John Flanagan on 01482 323239; richard.field@rollits.com or john.flanagan@rollits.com



IN THIS ISSUE

COMPANIES ACT 2006 • CORPORATE • EMPLOYEE SHARE INCENTIVES • CORPORATE AND PENSIONS • FOOD GROUP • DEAL ALERT • COMMERCIAL

Share buy-backs: avoid the void

The ability of a company to purchase its own shares, commonly known as a buy-back, is a familiar feature of the modern corporate landscape. A buy-back is often the best way to deal with an exiting shareholder: the remaining shareholders do not need personally to raise funds to acquire the shares and the exiting shareholder in certain circumstances can be regarded as receiving the proceeds of sale as a capital sum and might be able to enjoy an effective tax rate of less than 10% on any gain made on the sale of his shares.



There was a time when it was not lawful for a company to purchase its own shares. The rules permitting a buy-back were introduced with abundant - perhaps too much - caution with the intention of protecting the other shareholders in the company, its creditors and even future shareholders.

In order properly to carry out a buy-back, it is necessary for a company: to have power to carry it out, to involve its directors and other shareholders in the buy-back process, to have a certain financial standing and to comply with strict rules relating to the contract for the purchase of the shares.

Failure to follow all the rules can be catastrophic as the buy-back is treated as being void. On a practical level this means the buy-back will be regarded as never having taken place with the surprising effect that the individual remains a shareholder.

If there has been an unlawful buy-back, then there might be steps that can be taken to repair the situation. Invariably these will be more time-consuming and expensive than if the buy-back had been properly carried out in the first place.

Rollits have a wealth of experience in the area of buy-backs and related tax issues, including applying for tax clearances. If you, or your company, is considering a share buy-back (or you think you might have been involved in a defective buy-back) then please feel free to contact us. **Nasim Sharf**

Confidentiality orders - Keeping directors' details out of the public domain

Directors who fear that they, or someone who lives with them, may be at risk of violence or intimidation as a result of their position as a director of a particular company can apply to Companies House to be granted a Confidentiality Order. A director who has the benefit of a Confidentiality Order does not have to disclose his or her home address on any Companies House forms and can instead use a service address, which in most cases is the registered office of the company.

Confidentiality Orders became available in 2003 when a change in the law meant that directors' home addresses no longer always had to be disclosed. Since 2003 the number of individuals applying for Confidentiality Orders has increased each year as more and more directors feel concerned about having their home address in the public domain. In a business environment which is becoming increasingly disrupted by the actions of protestors such as animal rights groups and, in some circumstances, human rights groups an increasing number of directors are fearful that their involvement, or connection with,

some companies means that they may become the target of activists who are not afraid to use methods outside of the law to get their message across.

Confidentiality Orders are granted on an individual basis. Applications are submitted with supporting evidence and a statement on behalf of the Company setting out details of the situation and why the director should be considered to be at risk. Upon receipt Companies House refers the application to the local Police Force who then undertake a risk assessment for each individual application. If there is considered to be a genuine risk an Order will be granted and the director can then use the service address on all Companies House returns.

Applicants should be aware the Order does not give Companies House power to amend forms already on the public register and so, for example, previous annual returns which have been filed with a home address cannot be changed.

A Confidentiality Order lasts for five years following which a further application should be made, to confirm that the risk is still present.

As part of the raft of changes to company law proposed by the Companies Act 2006, the system for applying for Confidentiality Orders is to be changed. Currently there is no date for the implementation of these changes; we will keep you informed of any further announcements. **John Flanagan**



Repayment of unlawful dividends: Knowledge of shareholder

The Companies Act 1985 ("the Act") makes it unlawful for a company to pay dividends when it does not have any profits available for distribution. A shareholder has to repay any unlawful dividend paid to him if he knows, or has reasonable grounds to believe, that it is being made in contravention of the Act.

In a recent case, dividends were paid to shareholders (who were also the directors) when the company had no available profits for the purpose of paying dividends. The shareholders argued that they had been informed by their accountants that such payments were just a tax efficient manner of withdrawing salary, that this was a normal practice and was not unlawful.

The Court of Appeal had to decide whether or not a shareholder had to repay dividends where he knew, or had reason to believe, that the company did not

have profits available for distribution but was unaware that a payment in those circumstances was in contravention of the Act.

The Court decided that the shareholders were liable to repay dividends in such circumstances. All that is required is that the shareholders knew, or had reasonable grounds to believe, that the Company did not have profits available for distribution. It is not necessary for the shareholder also to know that a dividend is unlawful in such circumstances and has to be repaid. This overturned a decision of a lower court earlier in the year.

Tom Farrington



Loans to Directors

Section 330 of the Companies Act 1985 prevents a company from making loans and similar payments to their directors, subject to certain exceptions and allowances. Breach renders directors who benefited from, or authorised, the loan liable to account to the company for any gain and to indemnify the company for any loss. A director is also under a fiduciary duty to his company to act honestly and in good faith in the best interests of the company.

The Court of Appeal recently decided that where a director knew his company made prohibited loans to another director in breach of the Companies Act 1985, he was jointly and severally liable with the director to whom the loans had been made to indemnify the company for its resulting loss. This was even

though the director did not have actual knowledge of each loan at the time the loans were made.

In addition, the Court also decided that once the director became aware of the loans, he should have taken steps to recover sums that had previously been loaned and to end the practice of making such loans. By failing to do so, he was in breach of his fiduciary duty to the company. The director had to repay the company the difference between what could have been recovered from the other director at the time such steps should have been taken, and what could actually be recovered now.

Tom Farrington

Employee Share Incentives

Age discrimination and employee share plans

The Age Discrimination Regulations came into force on 1 October - their application is wide ranging, although this article focuses on their potential impact on employee share plans. The rules of employee share plans often have provisions that may discriminate between employees of different ages. For example, a discretionary scheme may apply only to senior managers and directors, who tend to be older employees.

Other provisions may be discriminatory, for example having different rights on leaving employment for various reasons, which can include retirement. If employees who cease employment on retirement are treated differently than other employees, then this may be discriminatory.

In HM Revenue & Customs approved schemes, ranges of retirement ages are specified by statute. If the scheme's specified retirement age is higher than the minimum age specified by statute, and an employee retires before the scheme's specified age with reduced rights under the scheme, this again may be seen as discrimination.

However, even if the rules contain some discriminatory practice, if that practice can be objectively justified, for example to incentivise senior employees, then that is a valid defence to a potential claim. Reasons for this justification should be recorded in writing.

It is also a defence if the practice is a requirement of statute - although a practice that is permitted by statute is not an adequate defence. Likewise compliance with investor guidelines is not a sufficient defence for a publicly listed company.

In order to correct any discriminatory practices, the rules of an employee share plan may be amended, and for listed companies, shareholder approval is generally not required for minor amendments for the purposes of complying with legislative changes.

Although the legislation is not retrospective, it would catch any awards made in an existing share plan that were granted before 1 October but which still subsist at that date, and so consideration should be given to whether any scheme amendments should extend to such options. In an approved scheme, HM Revenue & Customs approval to the amendments may be needed, particularly where existing options are to be affected. It is not yet clear whether HM Revenue & Customs would allow such amendments to extend to existing options.

Employers will need to review their existing employee share plan arrangements with a view to compliance with the age discrimination regulations.

Craig Engleman & Tom Farrington

Corporate and Pensions

Clearance and Corporate Transactions

On the occurrence of certain types of corporate transactions that the Pensions Regulator considers to be financially detrimental to a defined benefit (i.e. final salary) pension scheme in deficit, the Pensions Regulator has power to issue a notice requiring additional contributions to be paid in to the scheme by participating employers and associated parties. Parties to such transactions can apply to the Pensions Regulator for a clearance statement that they will not be subject to such a notice in respect of the transaction. An application for clearance is voluntary.

There are three main types of event that can be regarded as being materially detrimental to such schemes:

- transactions which would change the level of security given to creditors (for example granting a fixed or floating charge) which may consequently reduce the assets available to fund a pension deficit on insolvency;
- transactions involving a large or unusual return of capital (i.e. a share buy-back) which reduces the overall assets potentially available to fund a pension deficit; or
- a material change in the employer's control structure (particularly one that downgrades the employer's credit rating).

The clearance procedure has been in operation for more than a year now and over 330 applications have been received during the first year of operation.

Examples of clearances include:

- Sherwood Group plc (a lingerie manufacturing group) received clearance to a share buy-back on the basis that the FRS17 deficit (i.e. the deficit calculation used in annual accounts) be cleared in full by an immediate cash injection of £7.5m, granting security over its headquarters to the scheme trustees and agreeing a revised schedule of contributions;
- Marconi received clearance for the sale of the bulk of its assets to Ericsson

on the basis of a cash contribution of £185m of the net sale proceeds into its scheme to eliminate the FRS17 deficit and a further sum being secured in favour of the scheme's trustees.

- AEA Technology plc (formerly part of the United Kingdom Atomic Energy Authority, which was privatised in 1996) received clearance on the sale of a portfolio of its companies and rail businesses on the basis of a cash injection of £10m of the net sale proceeds into its scheme as part of an agreed schedule of contributions to clear the scheme's past service funding deficit. In addition, it agreed to pay to the trustees a third of any deferred consideration payable under the terms of the sale and to consult the trustees before making any recommendation to shareholders in support of a takeover bid and before entering into equity fundraisings.

The Regulator has indicated that there is evidence that deficits are being factored into corporate transactions, making applications for clearance less necessary. As the pension protection levy collected by the Pension Protection Fund includes a risk-based element based on the level of a scheme's deficit, it is also thought that this will provide a further incentive for schemes to reduce deficits (as this will minimise their levy payment). Parties to transactions will, however, need to consider whether it is necessary or desirable to make a clearance application on relevant transactions.

Craig Engleman

Food Group

Ofcom bans junk foods ads for kids

In November 2006 Ofcom, the independent regulator and competition authority for the UK communications industries, announced a ban on junk food advertising aimed at children - whether through children's programming, children's channels or programmes with "particular appeal" to under 16-year-olds. The ban stopped short of the complete pre-watershed ban sought by organisations like The National Consumer Council, which estimates that one million children will be obese in England alone by 2010.

Key to the proposals will be the restrictions on any programme, any time of the day or night, which has a "significantly higher than average" audience of under 16-year-olds. Such a programme would need to have a 20% higher proportion of under 16-year-old viewers than the UK average.

The definition of "junk food" is that set by the Food Standards Agency's nutrient profiling system and targets products which are high fat, salt and sugar (HFSS). Ofcom is targeting a 50% reduction in the amount of advertising of HFSS products to children.

Ofcom estimates that the ban will reduce TV advertising revenue by

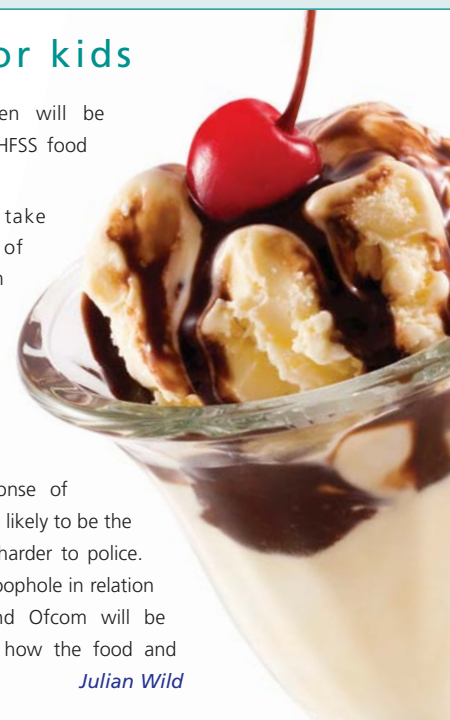
£39m and that children will be exposed to 41% fewer HFSS food and drink advertisements.

The new rules will take effect before the end of January 2007, but with a phasing in for existing/commissioned ads and for the harder hit dedicated children's channels.

What will be the response of advertisers? The answer is likely to be the internet, which is much harder to police.

There is also a potential loophole in relation to brand advertising and Ofcom will be watching closely to see how the food and drink industry responds.

Julian Wild



Deal Alert

Over the past 12 months, transactions we have acted on include the following:

CRANSWICK *plc*

Acquisition of DeliCo Limited, a producer of pre-packed cooked meats based in Milton Keynes, for a consideration of £17.9m.

The Rollits team included Steve Trynka, Tom Farrington and Shona Unwin (Corporate) and Glenn Craft (Commercial Property).

The Cranswick group, which is based in East Yorkshire, is an award winning food supplier whose range includes pork, bacon, ham, sausages, charcuterie and sandwiches. In addition the group supplies a range of products to the pet and aquatic sector. In 2005 they moved into the pre-cooked meat market by buying Perkins Chilled Foods creating Cranswick Convenience Foods.

For further information on Cranswick, please visit www.cranswick.co.uk.



Acquisition of Parripak Foods Limited, one of the leading fresh vegetable preparation specialists in the country.

The Rollits team was led by Richard Field and Tom Farrington and included Tim Wigglesworth (Due Diligence), Glenn Craft (Commercial Property) and Steve Hawkins (Planning and Environmental).

The William Jackson & Son group is a family business. The group is mainly a food production business, operating in growth segments of the market and includes Tryton Foods - home of Aunt Bessie's, Jackson's Bakery, Kwoks Foods - manufacturer of restaurant quality chilled Chinese & Oriental food and Hazeldene Foods - processor of salad and fresh produce.

For further information on the group, please visit www.wjs.co.uk.



Advising management on the Management Buy-Out from Gourmet Invest NV, a private equity investor based in Belgium.

With Julian Wild (Rollits' Food Group Director) as the deal introducer and food advisor, Neil Jennesson (Rollits' Corporate Finance Director) as lead corporate finance advisor and Steve Trynka leading the corporate legal team, we were able to help the management team to negotiate terms with the owners and arrange funding for the buy-out as well as provide legal advice to the management team.

The deal marked the first time our Food Group worked in conjunction with our Corporate Finance Director and corporate legal team to provide a full food, corporate finance and legal service to a management team.

TSC Foods, who are based in Scunthorpe, are one of the UK's leading manufacturers of high quality chilled and frozen sauces, soups, risottos, dips, dressings, glazes, marinades and recipe dishes.

For further information on TSC Foods, please visit www.tsfoods.com.



Food from Britain Council

Julian Wild, Food Group Director at Rollits, has been appointed to the Council of Food from Britain (FFB) by David Miliband, Secretary of State, for Environment, Food and Rural Affairs and the other three United Kingdom Agriculture Ministers.

Food from Britain is a non-departmental public body with a remit as the UK's international food and drink export marketing agency, to help build the competitiveness and sustainability of the UK's food and drink export business, as well as assist producers of quality regional food increase both their UK and international sales.

David Miliband said: "I am pleased to announce the appointment of Julian Wild as a new member of Food from Britain's Council. Food from Britain has an important role in supporting the development of UK food and drink companies. The considerable experience and skills that Julian brings to the Council will be of great value in delivering this role."



Julian Wild said: "I am delighted to join the Food from Britain Council. I hope that my experience and knowledge of the UK food industry gained from working in the food sector for 28 years will be of benefit to the Council."

Commercial

Information Commissioner takes action over call centre abuse

Channel 4's Dispatches programme showed that some UK companies' call centres in India are not providing adequate safeguards to protect customers' personal information. Indeed some of the call centres' employees are selling customer information for personal financial gain.

The Information Commissioner has launched an investigation into the practices uncovered by the programme and has warned that it may take enforcement action against any UK company which uses overseas call centres and data processing operations without first putting adequate safeguards in place.

Regardless of where outsourced call centres and data processing operations are based, the companies for whom they are taking calls or processing data are obliged under the Data Protection Act 1998 to have a written contract in place guaranteeing, amongst other things, that all information will be held securely. Any processing or handling of calls outside the European Economic Area places additional compliance obligations on the UK company.

Tom Morrison



RFID Product Tagging - Information Commissioner's Guidance Released

The Information Commissioner has released guidance for businesses and consumers in response to the increasing use of RFID (radio frequency) tags. The tags enable businesses, for example, to track packs of products around their warehouses and retailers to keep a log of products moving throughout their stores.



Whilst the technology offers benefits in terms of automated stock control and security, consumer groups are fearful that the tags could be used in the future to track the movements of consumers after they have left a store and to collect large amounts of personal information as to consumers' shopping preferences without their knowledge or consent.

The potential applications for RFID technology are not limited to supermarket shopping: they are currently used in the UK in the monitoring of livestock and keeping

track of airline baggage. The potential for the technology goes further with some countries already using it to tailor advertising to individuals, to monitor staff movements in the workplace and even as implants under the skin to allow VIP access into nightclubs.

Assistant Information Commissioner Phil Jones warns that organisations using RFID technology need to be aware of the requirements of the Data Protection Act 1998, including making sure that:

"... individuals are informed, that information is accurate and up-to-date, and that it is held securely, for specific purposes and not kept longer than is necessary. The principles of the Act should ensure that this technology can be used to full effect without breaching people's privacy rights."

If you require advice in relation to using RFID technology within the constraints of data protection law, or if you would like to discuss how the Data Protection Act 1998 affects your business, please contact Tom Morrison on 01482 323239 or email tom.morrison@rollits.com

INFORMATION

If you have any queries on any articles in this newsletter or other corporate or commercial matters generally please contact:

Keith Benton or Tom Farrington on (01482) 323239

This newsletter is for the use of clients and will be supplied to others on request. It is for general guidance only. It provides useful information in a concise form.

Action should not be taken without obtaining specific advice.

We hope you have found this newsletter useful. If, however, you do not wish to receive further mailings from us, please write to Mrs. Pat Coyle, Rollits, Wilberforce Court, High Street, Hull, HU1 1YJ.

The law is stated as at 1 January 2007

Wilberforce Court, High Street, Hull HU1 1YJ
Rowntree Wharf, Navigation Road, York YO1 9WE
www.rollits.com