

## GARSIDE & CO LLP

# GUIDANCE ON CA2006 WRITTEN RESOLUTIONS OF PRIVATE COMPANIES

### OVERVIEW

The 2006 Act makes it much easier for private companies to use written resolutions to conduct any business that requires the members' approval. Previously, under the 1985 Act, in order to pass a resolution as a written resolution, all the members entitled to receive notice of meetings had to consent to the resolution in writing.

The 2006 Act allows ordinary resolutions to be passed as written resolutions by members representing a simple majority of the total voting rights of eligible members, and special resolutions by members representing a 75% majority of the voting rights of eligible members (ss. 282 and 283 (2006)). A private company wishing to take advantage of the written resolution procedures set out in Part 13, Chapter 2, of the 2006 Act must send a copy of the proposed written resolution to every member who would have been entitled to vote on the resolution on the date it is circulated.

### TIME SCALE

A written resolution will lapse if it is not passed within the period of 28 days beginning with the circulation date or such other period specified for these purposes in the articles (s. 297(1) (2006)). The agreement of a member to a written resolution is ineffective if signified after the resolution has lapsed (s. 297(2) (2006)).

### MEMBERS AGREEMENT

A member signifies his agreement to a written resolution when the company receives from him (or someone acting on his behalf) an authenticated document identifying the resolution to which it relates indicating his agreement to the resolution (s. 296(1) (2006)). The document must be sent to the company in hard copy form or electronic form (s. 296(2) (2006)). A member's agreement to a written resolution, once signified (i.e. received by the company in accordance with the above rules), may not be revoked (s. 296(3) (2006)).

A written resolution will be passed when the required majority of eligible members have signified their agreement to it (s. 296(4) (2006)).

Written resolutions may not be used to remove a director or auditor from office before the expiry of his period of office (s. 288(2) (2006)).

## CIRCULATION OF WRITTEN RESOLUTIONS

Section 291 of the 2006 Act applies to the circulation of a written resolution proposed by the directors. The company must send or submit a copy of the resolution to every eligible member:

- (a) by sending copies at the same time (so far as reasonably practicable) to each of them in hard copy form, electronic form or by means of a website; or
- (b) if it is possible to do so without undue delay, by submitting the same copy to each eligible member in turn (or different copies to each of a number of eligible members in turn); or
- (c) by a combination of the above methods.

The copy of the resolution must be accompanied by a statement informing the member how to signify their agreement to the resolution and the date by which the resolution must be passed if it is not to lapse.

Failure to comply with s. 291 is an offence, but does not affect the validity of the resolution if passed (s. 291(7) (2006)).

Sections 300A–300D (2006) set out transitional adaptations required to pass certain resolutions as written resolutions. These adaptations generally require the same information to be circulated with the written resolution as would have been included in any notice had it been proposed at a general meeting. The adaptations apply to:

- (a) a resolution under s. 95(2) (1985) regarding disapplication of pre-emption rights (s. 300A (2006));
- (b) a resolution giving approval under s. 155(4) or (5) (1985) for financial assistance for purchase of company's own shares or those of holding company (s. 300B (2006));
- (c) a resolution under s. 164(2) (1985) conferring authority to make an off-market purchase of the company's own shares (s. 300C(1)(a) (2006));
- (d) a resolution under s. 164(7) (1985) conferring authority to vary a contract for an off-market purchase of the company's own shares (s. 300C(1)(b) (2006));
- (e) a resolution under s. 164(3) (1985) varying, revoking or renewing any authority (s. 300C(1)(c) (2006)); and
- (f) a resolution giving approval under s. 173(2) (1985) for the redemption or purchase of company's own shares out of capital (s. 300D (2006)).

The 2006 Act also contains other specific requirements to circulate certain statements with a proposed written resolution. Some of these provisions have already been brought into force (for example, a resolution approving a director's long-term service contract under s. 188 (2006) and a resolution approving a director's loan, quasi loan or credit transaction under ss. 197, 198 or 201 (2006)

respectively). Others have not yet been brought into force, such as the adaptations in s. 571 (2006) for a special resolution to disapply pre-emption rights.

### **MEMBERS' WRITTEN RESOLUTIONS**

The members of a private company may require the company to circulate a written resolution and to circulate with it a statement of not more than 1,000 words on the subject matter of the resolution.

A company is required to circulate the resolution and any accompanying statement once it has received requests to do so from members representing not less than 5% of the total voting rights of all members entitled to vote on the resolution or such lower percentage specified for this purpose by the articles (s. 292(4)–(5) (2006)). The requests may be made in hard copy or electronic form, must identify the resolution to which it relates together with any accompanying statement, and be authenticated by the person or persons making it (s. 292(6) (2006)).

If the members have deposited or tendered a sum to pay the expenses of circulating the resolution, the company must circulate it to all eligible members in accordance with the requirements of s. 293 (2006). Copies may be sent in hard copy or electronic form or by means of a website or, if it is possible to do so without undue delay, by submitting the same copy to each eligible member in turn, or a combination of these methods (s. 293(2) (2006)).

The resolution must be circulated to members not more than 21 days after the obligation under s. 292 arises (s. 293(3) (2006)) and be accompanied by guidance as to how to signify agreement to the resolution and the date by which it must be passed if it is not to lapse (s. 293(4) (2006)). Failure to comply with the circulation requirements in s. 293 is an offence but does not invalidate the written resolution concerned if it is passed.

The expenses of circulating a written resolution must be paid for by the members making the request unless the company resolves otherwise (s. 294(1) (2006)). Unless the company has previously so resolved, it is not bound to comply with a request unless the requisitionists deposit with it or tender a sum reasonably sufficient to meet the its expenses in doing so (s. 294(2) (2006)).

The company or any other person claiming to be aggrieved may apply to the court for an order preventing the circulation of a statement made in connection with a written resolution. The court may order the members who requested that the statement be circulated to pay the whole or part of the company's costs on such an application (s. 295 (2006)).

### **ELECTRONIC COMMUNICATIONS**

Where a company has given an electronic address in any document containing or accompanying a written resolution, it is deemed to have agreed that any document or information relating to that resolution may be sent by electronic means to that address subject to any conditions or limitations specified in the document (s. 298 (2006)).

If a company sends a written resolution or a statement relating to a written resolution to a person by means of a website, the resolution or statement is not validly sent unless it is available on the website throughout the period beginning with the circulation date and ending on the date the resolution lapses under s. 297 (s. 299 (2006)).

### **ARTICLES OF ASSOCIATION**

A provision of the articles of a private company is void in so far it would have the effect that a resolution that is required by or otherwise provided for in an enactment could not be proposed and passed as a written resolution (s. 300 (2006)). It should be noted that a written resolution is defined for these purposes as a resolution of a private company proposed and passed in accordance with Part 13, Chapter 2, of the Act.

### **FILING AND RECORDING OF WRITTEN RESOLUTIONS**

It should be stressed that simply passing a resolution in writing does not of itself impose a Companies House filing obligation – the resolution only has to be filed if it is to have effect as a resolution which needs filing in itself (see 12. 37).

It should also be noted that it is not a requirement of the Act that the original signed copies of the resolution be filed at Companies House. All that needs to be filed is 'a copy' of the resolution certified by a director or the secretary.

A company is required to keep a copy of every written resolution passed for at least 10 years (s. 355 (2006)) and to make those records available for inspection and copying (s. 358 (2006)).

### **COPIES TO AUDITORS**

A private company's auditors (if any) have a right to be sent all communications required to be circulated to the members under Part 13, Chapter 2 of the 2006 Act in relation to a written resolution (s. 390 (1985) as amended by the Third Commencement Order). This includes the written resolution itself, any statement by the members and any additional documents required under transitional adaptations in ss. 300A–D. Although not explicitly included, it would also be sensible to send a copy of any other documents the 2006 Act requires to be circulated with the written resolution. The wording of s. 390 implies, but does not specifically state, that a copy of these communications should be sent to the auditors at the same time as they are sent to the members. There is no suggestion in either the 1985 or 2006 Acts that failure to send a copy of such communications to the auditors will invalidate the resolution. The relevant provisions are merely expressed as a right given to the auditors rather than a condition that must be complied with in order to pass a written resolution. Under the 1985 Act, failure to send a copy of a written resolution to the auditors was an offence. This is no longer the case following the repeal of s. 381B of the 1985 Act.

**SUMMARY OF THE KEY POINTS FOR USING WRITTEN RESOLUTIONS**

Written Resolutions are for private companies only; the procedure is not available for public companies.

Written resolutions can be proposed by both the directors and members.

Written resolutions can be distributed either in hard copy or electronic form.

Written resolutions must be circulated to all eligible members and the company's auditors where one has been appointed.

A written resolution must be accompanied by a statement informing members of the closing date and the procedures for the passing of the resolution.

A written resolution need not be signed by the shareholders if it is considered to be authenticated with S1146 of CA2006

A written resolution will lapse if it is not agreed within 28 days of the circulation date.

The Articles of Association may specify a different time frame for the passing of written resolutions.

**SPECIMEN WRITTEN RESOLUTION – MINUTE BOOK COPY****WRITTEN RESOLUTION OF MEMBERS**

of

\_\_\_\_\_ **LIMITED (THE 'Company)****Circulation Date: XX Xxxx 20XX**

We the undersigned, being all the shareholders of the Company eligible to attend and vote at general meetings of the Company, hereby pass the said resolutions, designated as special resolutions, and agree that the resolutions shall be as valid and effective as if it had been passed at a general meeting the Company duly convened and held.

IT IS RESOLVED THAT \_\_\_\_\_

Signed:

\_\_\_\_\_

Members' details

Members'

details

Notes:

1. This written resolution has been proposed by the directors of the Company.
2. The circulation date of this written resolution is XX Xxxxx 2009.
3. If you agree to the resolution, please signify your agreement by signing against your name where indicated. Please then return the document to the Company.
4. As the resolution is a special resolution, it is approved when agreed to by members representing not less than 75% of the total voting rights of eligible members. If not passed by the requisite majority of members, this written resolution shall lapse on XX Xxxxx 2009.
5. Once this resolution has been signed and returned to the Company, your agreement to it may not be revoked.