

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

COMPANIES ACT 2006

EXPLANATORY NOTES

COMMENTARY

Part 18: Acquisition by Limited Company of Its Own Shares

Chapter 5: Redemption Or Purchase by Private Company Out of Capital

1017. Sections 171 to 177 of the 1985 Act provide a statutory scheme for the redemption or purchase of own shares out of capital. This scheme is available to private companies only and the facility to redeem or purchase shares out of capital is carried forward in the following sections.

Section 709: Power of private limited company to redeem or purchase own shares out of capital

1018. This section replaces section 171(1) of the 1985 Act and restates section 171(2) of that Act. It removes the current requirement for prior authorisation in the articles where a private company makes a payment out of capital in respect of a redemption or purchase of its own shares. If they wish, the members may, however, restrict or prohibit such a payment by including a provision to this effect in the company's articles.

Section 714: Directors' statement and auditor's report

1019. This section replaces section 173(3) to (5) of the 1985 Act.

1020. Currently, before a private company may make a payment out of capital in respect of a purchase of own shares, the directors must have made a full enquiry into the affairs and prospects of the company and are required, under section 173, to make a statutory declaration confirming that: as regards the company's situation immediately after the date on which the payment out of capital is made, there will be no grounds on which the company could then be found unable to pay its debts; and as regards the company's prospects for the year immediately following that date, the company will be able to continue to carry on business as a going concern and be able to pay its debts as they fall due in the year immediately following the date on which the payment out of capital is made. In forming their opinion on the company's solvency and prospects, the directors must take into account the same liabilities (including contingent and prospective liabilities) as would be relevant under section 122 of the Insolvency Act 1986 (winding up by the court) to the question whether a company is unable to pay its debts.

1021. Consistent with the approach taken in respect of reductions of capital using the new solvency statement procedure (see sections 642 and 643 and in particular subsection (2) of section 643), this section requires a private company limited by shares that wishes to use this statutory scheme for a purchase or redemption of shares to take account of all contingent and prospective liabilities, not just those that are relevant for the purposes of section 122 of the Insolvency Act 1986 (see *subsection (4)*).

1022. Again, to achieve consistency with the approach taken elsewhere in the Act, the current requirement for a statutory declaration is replaced with a requirement for a simple statement. In contrast to a statutory declaration, the directors' statement does not need to be sworn before a solicitor or Commissioner of Oaths.

Section 715: Directors' statement: offence if no reasonable grounds for opinion

1023. This section restates section 173(6) of the 1985 Act and Schedule 24 to that Act (but substitutes the reference to "declaration" with "statement"). The offence that is currently contained in subsection (6) of section 173 (offence of making declaration without reasonable grounds) is replaced with an offence of making a statement under section 714 without having reasonable grounds for the opinion expressed in it. As now, the offence is committed by every director of the company who is in default.

Section 720: Directors' statement and auditor's report to be available for inspection

1024. This section replaces section 175(6)(a) and (7) and restates section 175(4), (6)(b), and (8) of the 1985 Act and Schedule 24 to that Act. *Subsection (2)* alters the current requirement, contained in section 175(6)(a), by providing that the directors' statement and auditor's report may, alternatively, be kept available for inspection at a place specified in regulations made under section 1136. There is a new requirement (in *subsection (3)*) for the company to give notice to the registrar of the place where the statement and report are kept available for inspection and of any change to that place. This change is consequential on the change introduced by subsection (2).
1025. *Subsection (5)* provides that if the company fails to give such notice to the registrar within 14 days or an inspection of the statement and report are refused, the company and every officer in default commit an offence.