

THE STATES OF DELIBERATION
of the
ISLAND OF GUERNSEY

THE COMMITTEE FOR ECONOMIC DEVELOPMENT

AMENDMENTS TO COMPANIES LAW

The States are asked to decide: -

Whether, after consideration of the Policy Letter dated 4th July, 2019, of the Committee *for* Economic Development, they are of the opinion:-

1. To agree to that the amendments set out in the Policy Letter be made to the Companies (Guernsey) Law, 2008.
2. To direct the preparation of such legislation as may be necessary to give effect to those amendments.

The above Propositions have been submitted to Her Majesty's Procureur for advice on any legal or constitutional implications in accordance with Rule 4(1) of the Rules of Procedure of the States of Deliberation and their Committees.

THE STATES OF DELIBERATION
of the
ISLAND OF GUERNSEY

THE COMMITTEE *FOR* ECONOMIC DEVELOPMENT

AMENDMENTS TO COMPANIES LAW

The Presiding Officer
States of Guernsey
Royal Court House
St Peter Port

4th July, 2019

Dear Sir,

1 Executive Summary

- 1.1 As part of its monitoring and review of the Companies (Guernsey) Law, 2008 (the “**Law**”), the Committee *for* Economic Development (the “**Committee**”) issued a consultation in June 2018, reflecting feedback received from industry.
- 1.2 This Policy Letter recommends a number of amendments to the Law which are intended to address certain issues, which have been identified, and to introduce changes to ensure that the Law continues to best serve the needs of the local business community.

2. Background

- 2.1 The Law was introduced in 2008 and the Committee has continued to keep it under review, to ensure that it keeps pace with the needs of local business and to respond to developments in other jurisdictions. As such, numerous amendments have been made to the Law during the 10 years in which it has been in force. Ordinances in 2013, 2014 and 2015¹ implemented Resolutions of the States of Deliberation (the “**States**”) in November 2012², following a major post implementation review of the Law. Further amendments have been made, by regulation, in a number of areas following consideration of discrete

¹ The Companies (Guernsey) Law, 2008 (Amendment) Ordinance, 2013; Companies (Guernsey) Law, 2008 (Amendment) Ordinance, 2014 and Companies (Guernsey) Law, 2008 (Amendment) Ordinance, 2015.

² Billet d’État XXIII of 2012, Article VII

issues.

- 2.2 As part of its ongoing monitoring and review of the Law, a consultation was issued by the Committee in June 2018, reflecting feedback received from industry. This Policy Letter recommends a number of amendments to the Law as a result of consideration of the consultation feedback.
- 2.3 The proposed amendments are detailed in paragraph 4 below.

3 Consultation

The Committee has engaged in a consultation process with the Commercial Bar Association, the Guernsey Financial Services Commission and the Registrar of Companies (the “**Registrar**”), as well as inviting responses from members of the public.

4 Proposed amendments to the Companies Law

4.1 Section 25 - Application to change name

Section 25 of the Law provides that a company may apply to the Registrar to change its name, and any application must be accompanied by a special resolution authorising that change of name. The Committee proposes that this section be amended to include provisions allowing a company to authorise a change of name by other means, (for example a board resolution), if provided for in the company’s articles. The Committee believes that companies would welcome the greater flexibility this would afford.

4.2 Section 52A - Conversion of a cell of a protected cell company into a non-cellular company

- 4.2.1 Section 52A was inserted into the Law in September 2015, reflecting demand from local industry. It provides for a cell of a protected cell company to be able to convert into, and incorporate as, a non-cellular company. Section 52A(3) provides that if cell shares have been issued in respect of a cell, the holders of those shares must give the requisite consent to the matters identified in subsections (a) to (f). The mechanism in section 52A(3) was designed to allow cell shareholders to be able to approve a conversion even where, for example, they do not constitute a single class or where cell shares had no voting rights.
- 4.2.2 By virtue of section 52A(3) of the Law, for the purposes of that subsection the holders of the cell shares are considered to have given consent only if the holders of not less than 75% in number of those shares give their written consent, or consent is given at a meeting on a show of hands by not less than 75% of the holders of those shares who vote in person, or by proxy.

4.2.3 However, there is presently no provision for poll voting under section 52A(3) of the Law and other provisions relating to poll voting on resolutions do not apply, as the requisite consent mechanism is not a shareholder resolution. On a show of hands, each member present has one vote without regard to the number of shares held by him personally or as a proxy holder for a third party. Accordingly, no matter how many proxies a member may hold he will have only one vote on a show of hands. In such a scenario, shareholders holding a small minority stake could potentially block any proposed consent, despite another party holding proxies representing more than 75% of relevant shareholders voting in favour of the consent. As such, the Committee proposes that section 52(A) of the Law be amended to permit a poll of cell shareholders to be held, or demanded, on a proposal to convert a cell into a non-cellular company.

4.2.4 The Committee also considers it desirable to replicate the effect of certain other provisions of the Law relating to polls on resolutions, as set out in paragraphs a – e below, so that equivalent requirements apply to requisite consent under section 52A(3) including:

- a. that requisite consent would be considered to have been given where consent is given by the holders of cell shares representing not less than 75% of the total voting rights of cell shareholders who, being entitled to do so, vote in person or by proxy (replicating section 178(5) of the Law);
- b. that where requisite consent is given on a poll taken at a meeting, each cell shareholder has one vote in respect of each share and every proxy present who has been duly appointed has the same number of votes that the member would have (replicating section 191(3) of the Law);
- c. that restrictions on signifying requisite consent on polls are void (replicating the effect of section 193 of the Law); and
- d. that votes in respect of multiple shares may be split (replicating section 196 of the Law).

4.2.5 The Committee additionally considers that the Law should be amended to make it clear that there is no requirement that all members sign the memorandum of incorporation of a new cellular company as part of a conversion pursuant to section 52A. This is due to the impracticality of obtaining all shareholders signatures, not least where one or more cell shareholders have not consented to the conversion.

4.3 Section 110 - Court sanction for compromise or arrangement

Section 110 of the Law provides that a majority in number, representing 75% in value, of the members or class of members, or creditors or class of creditors, of a company must agree a compromise or arrangement, in order for an application to be made to the Court to sanction that compromise or

arrangement. The Committee proposes that wording be inserted into this section to clarify that the reference to 75% in value applies to creditors and that in respect of members, the requirement is members representing 75% of voting rights.

4.4 Section 136 - Requirement for an incorporated cell company and each cell to have the same directors

4.4.1 Section 136 of the Law currently requires that each director of an incorporated cell company must also be a director of each of its incorporated cells, and that no person may be a director of an incorporated cell unless he is a director of its incorporated cell company. The Committee is of the view that this restriction does not always allow an incorporated cell company to appoint the most appropriate directors and that removing this restriction would allow experts in a particular field relating to the business of an individual cell to be appointed to the board, without needing to be appointed to the board of the incorporated cell company, or to any other individual cell. As such the Committee recommends that the requirement for an incorporated cell company and each of its incorporated cells to have the same board be removed.

4.4.2 The Committee further proposes amendment of sections 241, 246, 253 and 261 of the Law so that the duty to keep accounting records lies with the incorporated cell and the directors of an incorporated cell are responsible for preparing the accounts of that cell, delivering accounts and reports to members, and appointing, etc., an auditor; rather than those duties and functions falling to the incorporated cell company and/or its directors, as is currently the case.

4.5 Sections 224 and 226 - Notice required of the appointment and termination of the authority of proxies

4.5.1 Section 224(2)(c) and section 226(6)(c) of the Law make void any provision of a company's articles of incorporation requiring notice of the appointment and termination of the authority of proxies to be received by the company earlier than the time at which the poll was demanded, where the poll is taken not more than 48 hours after it was demanded.

4.5.2 When the Companies Law was drafted, these sections replicated sections 327 and 330 of the UK Companies Act 2006 ("**UK Act**"). Sub-sections 327(2)(c) and 330(6)(c) of the UK Act were never brought into force in the UK and were repealed by paragraph 30 of Schedule 6 to the UK Deregulation Act 2015 as the UK Government considered these to be drafting errors. The policy intention is to remove these provisions as they are causing difficulties in respect of company administration.

4.6 Section 260 - Qualification for appointment as an auditor

4.6.1 Section 260 of the Law governs qualification for appointment as an auditor of a Guernsey company. It sets out a requirement, in order to be appointed auditor of a Guernsey company, that partnerships and bodies corporate must be controlled by 'qualified individuals' (defined in section 260(1) of the Law as individuals who are members of one of the specified British or Irish supervisory accountancy bodies, or who are for the time being authorised by the Committee).

4.6.2 'Control' is defined, in section 260(8) of the Law as "entitlement to exercise a majority of the votes cast (a) in the case of a partnership, at any meeting of the partners [or members] or other management body, and (b) in the case of a body corporate, at any meeting of the members or directors or other management body".

4.6.3 The Committee believes that these requirements should be amended so that a partnership and body corporate would be qualified to act as an auditor of any Guernsey company where control rests with any of the following:

- a. qualified individuals;
- b. individuals who hold a qualification to audit accounts under the law of a European Economic Area member state other than the United Kingdom or the Republic of Ireland;
- c. partnerships or bodies corporate which are themselves controlled by qualified individuals;
- d. partnerships or bodies corporate accepted by an 'appropriate body', as defined in section 260(8) of the Law, as being qualified for appointment as auditors of companies incorporated in the United Kingdom or Ireland;
- e. any combination of the above;

as long as each person responsible for the conduct of an audit of a company is a 'qualified individual'.

4.6.4 The Committee also proposes that the power of the Committee to authorise an individual for the time being under section 260(1)(b) of the Law should be extended so that the Committee may also authorise a partnership or body corporate. The Committee further proposes that a power be inserted for the Committee to make regulations prescribing a fee payable to the Committee by any person or body making an application pursuant to section 260(1)(b). The Committee also proposes the inclusion, for the avoidance of doubt, that any authorisations granted under section 260(1)(b) are subject to such terms and conditions as the Committee sees fit.

4.7 Section 283 - Conversion of shares to stock

4.7.1 The Companies (Guernsey) Law, 1994, permitted both conversion of shares into stock and reconversion of that stock into paid-up shares of any denomination. When the Law was enacted, the conversion of shares into stock was prohibited by section 283. However, in the last round of amendments to the Companies Law, industry feedback was that the ability to use stock conversion was useful, particularly in share reorganisations, and respondents to the consultation supported permitting conversion of shares into stock. Section 283 of the Companies Law was therefore amended, with effect from 3rd September, 2015, so that conversion of shares to stock was permitted.

4.7.2 This provision has been the subject of some debate and the Committee consequently wished to consult on whether it is appropriate for this provision to remain in the Law, or be repealed. The Committee has received detailed feedback and analysis from respondents and, following careful consideration of those responses, the Committee agrees that the ability to convert shares to stock in the Law is unnecessary and consequently, section 283 should be amended to reflect this.

4.8 Section 306(a) – Shares in lieu of dividends

Section 306(a) currently requires that any offer of shares in lieu of dividends be made to all shareholders of the same class. The Committee understands that this provision causes problems as some jurisdictions restrict the ability to make offers of shares in lieu of dividends. The Committee therefore proposes inserting a qualification in section 306 so that companies may make the offer by other means, such as by notice in La Gazette Officielle, should the jurisdiction in which the shareholder is resident prohibit or restrict the making of an offer of shares in lieu of dividends.

4.9 Sections 312-314 – Terms of purchase by a company of its own shares

Under section 314 of the Law, a company may presently only acquire its own shares in pursuance of a contract authorised in advance by way of a special resolution. This is to prevent one shareholder receiving excessive consideration for the shares, from the company, at the expense of the other shareholders. The Committee understands that such concerns do not arise where the shares are held by an employee share scheme and as such proposes that the Law be amended to provide that a company only need require member approval by way of ordinary resolution to the purchase of the shares, and the minimum and maximum amounts to be paid, but not authorisation of specific terms of each acquisition, if such acquisition is for the purposes of an employee share scheme, and is off market. This would reflect the position in England.

4.10 Section 313 – Compulsory purchase by a company of its own shares

4.10.1 Section 313(3) of the Law requires that a company must obtain the consent of the shareholders whose shares are being acquired, in an acquisition by a company of its own shares. The need for consent in section 313 of the Law represents a departure from provisions that existed previously, in the Companies (Guernsey) Law, 1994, pursuant to which compulsory purchases were permitted without consent, if a company was authorised to do so by virtue of (a) its memorandum and articles, (b) the terms and conditions on which the relevant shares were issued, or (c) the share subscription agreement.

4.10.2 The Committee is advised that this additional express requirement for shareholder consent creates an additional hurdle for the creation of the right to acquire shares but does not increase shareholder protection. As such, the Committee proposes to repeal section 313(3) of the Law.

4.11 Section 314 - Purchase by a company of its own shares ('off market' acquisition)

4.11.1 Section 314 of the Law deals with authority for the 'off market' purchase, by a company, of its own shares. A company may acquire its own shares, other than under a market acquisition under section 315 of the Law, in pursuance of a contract authorised in advance by a special resolution of the company. Subject to a requirement that the authority must state a date on which it is to expire, the authority may also be varied, revoked or renewed by special resolution of the company.

4.11.2 'On market' acquisitions by a company of its own shares are governed by section 315 of the Law and only require authorisation by ordinary resolution, or by the company's memorandum or articles of incorporation.

4.11.3 The Committee proposes that the Companies Law be amended to align the requirement for 'on market' acquisitions with the position for 'off market' acquisitions by enabling authorisation of 'off market' purchases of own shares by ordinary, instead of special, resolution.

4.12 Section 337 - Right of transferee to acquire shares

4.12.1 Part XVIII of the Law deals with takeovers and section 337 of the Law sets out the percentage of shares of a company that would enable a transferee to issue a notice to acquire to dissenting shareholders and the relevant periods of time in which a notice to acquire may be issued.

4.12.2 Section 337 currently provides that the last date on which an offer made under that section can be approved or accepted must have passed before a notice, to acquire, can be given. Consequently, a takeover cannot progress even if the

90% threshold has been reached prior to this date. The Committee proposes that this restriction is removed.

4.12.3 Additionally, section 337(7) of the Law provides that shares purchased during the bid period do not count towards the 90% threshold. The Committee recommends amending this section so that purchases during the bid period do count towards the relevant share threshold, provided that the price paid for shares, so acquired, does not exceed the offer price. This would make the Law more consistent with other jurisdictions, including the UK.

4.13 Section 498A – Retention of copies of records in electronic form

4.13.1 Section 498A was introduced with effect from 3rd September 2015 following the move to an electronic register of companies under the Law. Section 498A(1) states that the Registrar may destroy or dispose of original documents received or issued for the purposes of the Law provided that an electronic copy is kept and, if the document was not originally sent electronically, the original hard copy is kept for three years.

4.13.2 The Committee considers it unnecessary for the Registrar to retain hard copy documents alongside an electronic copy and therefore considers it appropriate to amend Section 498A of the Companies Law to remove the requirement for an original hard copy document to be kept for three years.

4.14 Additional information and amendments

4.14.1 Whilst many of the proposed changes outlined above are expressed in precise terms and by reference to specific sections and sub-sections of the Law, the Committee does not intend that the suggested wording, or location of amendments, should to fetter the discretion of the draftsman in identifying the most appropriate way of implementing the desired amendment. In general, it is the substance of the proposals that is important, not the precise wording or the precise mechanism for implementation.

4.14.2 In addition to the specific amendments identified above, there are a number of typographical matters, corrections, clarifications, consequential and minor amendments which will be addressed in the amended Law, which the Committee does not believe will substantively alter the provisions of the Law and which have not been specifically set out in this Policy Letter in the interests of brevity.

5 **Resources**

No resourcing issues have been identified, outside of the required drafting of legislation.

6 Compliance with Rule 4

In accordance with Rule 4(4) of the Rules of Procedure of the States of Deliberation and their Committees, it is confirmed that the propositions above have the unanimous support of the Committee.

Yours faithfully

C Parkinson
President

Vice-President
A C Dudley-Owen

J I Mooney
N Inder
D de Lisle