ICAI	Institute of Chartered Accountants in Ireland
ICAS	Institute of Chartered Accountants of Scotland
ICTA 1988	Income and Corporation Taxes Act 1988
IoD	Institute of Directors
LILO	last in, last out
LR	Listing Rule
POBA	Professional Oversight Board for Accountancy
PRO-NED	Promotion of Non-Executive Directors
QTPIP	qualifying third party indemnity provisions
RPRP	Registered profit-related pay scheme
SAR	Rules Governing Substantial Acquisitions of Shares
SEs	Societas Europaea or European Public Limited-Liability Companies
SFO	Serious Fraud Office
VAT	value added tax

Chapter 1

THE COMPANIES ACT 2006[1]

INTRODUCTION

1.1 The Companies Act 2006 (CA 2006) has been passed. As detailed below, the implementation of the CA 2006 was extremely piecemeal with a huge amount of inconvenience and confusion being caused to commerce and the professions. What started its life as a Bill of 885 clauses, emerged (after 7 months in the House of Lords) as a Bill of 925 clauses. It then passed through the Commons. Over 1,600 amendments were tabled in the Lords. The Bill emerged from the Commons with 1,275 clauses. The Act, as passed, has 1,300 sections. It applies, except as specifically provided or where the context otherwise requires, to the whole of the UK.[2] Initially it was stated by the government that there was not going to be a consolidation of company law. About one-third of the Companies Act 1985 (CA 1985) would be left in place, about one-third would be amended in situ and about one-third would be repealed. However, no sooner had the Bill started its passage through the House of Lords than consolidation commenced. There has now been a substantial but not a complete consolidation of company law. It is inexplicable that the government failed to effect a complete consolidation, and due to this failure there remains in place a small rump of CA 1985, a small rump of the Companies Act 1989 (CA 1989) and a somewhat larger rump of the Companies (Audit, Investigations and Community Enterprise) Act 2004 (C(AICE)A 2004).

THE COMING INTO FORCE OF THE COMPANIES ACT 2006

1.2 Only limited provisions came into force on the passing of CA 2006 on 8 November 2006 and in the early part of 2007.

1.3 These are as follows:

(1) on 8 November 2006:

(a) CA 2006, Part 47 – containing the short title, the application to the whole of the UK and the commencement provision;

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1 This chapter provides an overview of the main provisions of the 2006 Act.
2 CA 2006, s 1299.

(b) CA 2006, Part 43 – transparency obligations and related matters, except the amendment in CA 2006, Sch 15, para 11(2) of the definition of 'regulated market' in the Financial Services and Markets Act 2000, Part VI;
(c) CA 2006, s 1274 – grants to bodies concerned with actuarial standards;
(d) CA 2006, s 1276 – application of provisions regarding grants bodies concerned with accounting standards in Scotland and Northern Ireland;
(e) CA 2006, Part 46 – general supplementary provisions, except CA 2006, s 1295 and Sch 16 (repeals).[3]

(2) on 1 January 2007:

(a) section 1068(5) (registrar's duty to accept delivery by electronic means of documents subject to Directive disclosure requirements);
(b) section 1077 (public notice of receipt of certain documents);
(c) section 1078 (documents subject to Directive disclosure requirements);
(d) section 1079 (effect of failure to give public notice);
(e) section 1080 (the register);
(f) sections 1085 to 1092 (inspection etc of the register);
(g) sections 1102 to 1107 (language requirements: translation); and
(h) section 1111 (registrar's requirements as to certification or verification).

(3) on 20 January 2007:

(a) sections 308 (manner in which notice to be given) and 309 (publication of notice of meeting on website);
(b) section 333 (sending documents relating to meetings etc in electronic form);
(c) section 463 (liability for false or misleading statements in reports);
(d) sections 791 to 810, 811(1) to (3), 813 and 815 to 828 (information about interests in a company's shares); and
(e) sections 1143 to 1148 and Schedules 4 and 5 (the company communications provisions).

(4) on 6 April 2007:

(a) section 1063 (fee payable to registrar), so far as not in force by virtue of art 3(3);
(b) section 1176 (power of Secretary of State to bring civil proceedings on company's behalf);
(c) section 1177 (repeal of certain provisions about company directors);

[3] CA 2006, s 1300.

(d) section 1178 (repeal of requirement that certain companies publish periodical statement);
(e) section 1179 (repeal of requirement that Secretary of State prepare annual report); and
(f) section 1281 (disclosure of information under the Enterprise Act 2002).

1.4 The remainder of CA 2006 has then to be brought into force by delegated legislation. At the last count, there were somewhere near 20 separate clauses under which delegated legislation was needed. There are many more where delegated legislation is possible. Much of this delegated legislation has yet to be published in draft. If current practice is followed, the draft will be followed by a consultation process. The final version will then have to be laid before Parliament. It must always be remembered that the old law, i e primarily the Companies Act 1985 remains in force, except to the extent that the 2006 Act has been brought into force or except in so far as it has been expressly repealed.

1.5 The timetable for the implementation of the remainder of the Act was as follows:

(1) on 6 April 2007:

- section 1175 (removal of special provisions about accounts and audit of charitable companies).

(2) on 1 October 2007:

- Part 9 (Exercise of members' rights);
- Part 10 (A company directors), other than provisions relating to directors' conflict of interest duties, directors' residential addresses and underage and natural directors;
- Part 11 (Derivative claims and proceedings by members);
- Part 13 (Resolutions and meetings), and, related to this, sections 485–488 of Part 16 (Audit);
- Part 14 (Control of political donations and expenditure) other than provisions relating to independent election candidates;
- Section 417 of Part 15 (Contents of directors' report: business review);
- Part 29 (Fraudulent trading);
- Part 30 (Protection of members against unfair prejudice);
- Part 32 (Company investigations: amendments).

(3) on 6 April 2008:

- Part 12 (Company secretaries);
- Part 15 (Accounts and reports), other than section 417 which came into force on 1 October 2007;

- Part 16 (Audit), other than sections 485–488 which came into force on 1 October 2007;
- Part 19 (Debentures);
- Part 20 (Private and public companies);
- Part 21 (Certification and transfer of securities);
- Part 23 (Distributions);
- Part 26 (Arrangements and reconstructions);
- Part 27 (Mergers and divisions of public companies);
- Part 42 (Statutory auditors).

(4) on 1 October 2008:

- Part 14 (Provisions relating to independent election candidates).

(5) also on 1 October 2008:

- sections 155–159 (every company to have a natural director, minimum age for directors etc);
- sections 175–177 (codification of fiduciary duties of directors);
- sections 182–187 (declaration of interest by directors).

(6) on 1 October 2009:

- Part 1 (General introductory provisions);
- Part 2 (Company formation);
- Part 3 (A company's constitution);
- Part 4 (A company's capacity and related matters);
- Part 5 (A company's name);
- Part 6 (A company's registered office);
- Part 7 (Re-registration as a means of altering a company's status);
- Part 8 (A company's members);
- Part 17 (A company's share capital);
- Part 18 (Acquisition by limited company of its own shares);
- Part 24 (A company's annual return);
- Part 25 (Company charges);
- Part 31 (Dissolution and restoration to the register);
- Part 33 (UK companies not formed under the Companies Acts);
- Part 34 (Overseas companies);
- Part 35 (The registrar of companies);
- Part 41 (Business names).

(7) 'Not being commenced for the time being':[4]

- Section 327(2)(c) (detailed provision on illegality of article regarding proxy votes);

[4] This is the term used on the BIS website.

- Section 330(6)(c) (detailed provision on illegality of article regarding poll voting).

The Department of Trade and Industry (DTI) – which became the Department for Business, Enterprise and Regulatory Reform (BERR) and is now the Department for Business, Innovation and Skills (BIS) – stated that it intended that the remainder of CA 2006 be brought into force by October 2009. Power to bring this into force lies with the Secretary of State or HM Treasury.[5] The Consultative Document of 28 February 2007 also included explanatory chapters, requests for responses and model articles.

1.6 An idea of timescales required may be gained from the publication of the first attempt at draft model articles for public companies. At one point the draftsman confused board and general meetings, and in several places the chairmen of board and general meetings are not distinguished. Then, having defined the chairman (of the directors) and the chairman of the meeting (ie of the general meeting), he then provides that a poll can be demanded by the chair, thus turning the inanimate object on which either the chairman or the chairman of the meeting sits into a sentient being with the ability to speak. Moreover, regulation 23 stated that a director was to be disqualified, inter alia, if a receiving order were made against him. The draftsman was apparently oblivious to the fact that receiving orders, a preliminary stage in old-style bankruptcies, were abolished in 1986.

A further attempt at producing draft model articles was then made and three sets have been produced, one for public companies, one for private companies limited by shares and one for private companies limited by guarantee. It has to be said that these represent a considerable improvement on both the 1985 Table A and also the first attempt at producing draft model articles for public companies. They are much more user friendly than any previous Table A, being written in reasonably plain English and being presented in a far more logical sequence.

However, the pushing back of the implementation of these model articles until October 2009 coupled with the implementation of the new statutory provisions regarding resolutions and meetings meant that a transitional version of the 1985 Table A was required for companies formed between these dates. A draft was produced by BERR in early September 2007 (to take effect on 1 October 2007). However, this draft contained errors based on the failure of the draftsman fully to appreciate the provisions of CA 2006. Therefore a revised draft was published on Thursday, 27 September 2007 to take effect at midnight on Sunday, 1 October 2007. Thus business and the professions were allowed one working day to get to grips with the Transitional Table A. It is nothing short of a disgrace that a government department, especially one which now

[5] CA 2006, s 1300(2).

bears the words 'Department for … Regulatory Reform' in its title can treat industry (the taxes of which provide for government to exist in the modern world) in this manner.

1.7 The Company Law Reform Bill was introduced into the House of Lords for the Government by Lord Sainsbury, who referred to it as simplifying company law. How the system, set out in the Companies Act 1985, the Companies Act 1989, the Companies (Audit, Investigations and Community Enterprise) Act 2004 and the Companies Act 2006, the latter of which contains 1,300 clauses, 16 Schedules and numerous provisions under which delegated legislation is still awaited can represent a simplification beggars imagination. And this only deals with going concern companies. For insolvency we have the Insolvency Act 1986, the Insolvency Act 2000, the Enterprise Act 2002, the Company Directors Disqualification Act 1986 and the two Insolvency Acts of 1994. Besides this, there is also the inevitable plethora of delegated legislation.

However, at this point one word of warning must be given. The Act expressly provides that:[6]

> 'the Secretary of State or the Treasury may by order make such provision amending, repealing or revoking any enactment to which this section applies as they consider necessary or expedient in consequence of any provision made by or under this Act'.

Just how far-reaching this power is can be seen from that legislation to which it relates:[7]

> '(a) any enactment passed or made before the passing of this Act;
> (b) any enactment contained in this Act or in subordinate legislation made under it; and
> (c) any enactment passed or made before the end of the session after that in which this Act is passed.'

In pursuance to this power there have already been passed numerous pieces of secondary legislation amending both the Act and secondary legislation made under the Act. Indeed some provisions in the Act were amended even before they were brought into force. It is suggested that the consequences of such provisions in legislation can be summarised as follows:

- there is little incentive for the draftsman to get the legislation right at his first attempt because errors and infelicities can easily be put right at a later date;[8]

[6] CA 2006, s 1294(1).
[7] CA 2006, s 1294(2).
[8] In this regard, one might contrast some of the great legislation of an earlier age such as the Partnership Act 1890, the Bills of Exchange Act 1882 and the Marine Insurance Act 1906 which have remained almost unchanged for over a century.

- there is woefully inadequate scrutiny of much secondary legislation;[9]
- often there is inadequate consultation about secondary legislation;
- frequently there is inadequate publicity given to secondary legislation;
- publishers of compendia of company legislation are having a field day with new editions, of necessity, having to be produced yearly or even more frequently;
- there is an inevitable knock-on effect in the expense for legal libraries attempting to keep their book stocks up to date.

OLD AND NEW COMPANIES

1.8 Under the new regime there are two types of company, existing companies formed under earlier Companies Acts (known as 'existing companies') and companies formed under the new regime (known as 'companies'). These will take the form of one or other type of company such as previously existed, private companies limited by shares, private companies limited by guarantee, public companies and so on.[10]

THE LEGISLATION

1.5 The 'Companies Acts' refers to the Companies Act 2006, the Companies Act 1985 (CA 1985), the Companies Consolidation (Consequential Provisions) Act 1985 and the Companies (Audit, Investigations and Community Enterprise) Act 2004.[11]

1.6 It was originally intended that about one-third of CA 1985 would remain intact, one-third would be amended and one-third repealed. There was to be no consolidation. However, the Government has changed its mind on this. As the CLRB proceeded through Parliament, there was substantial consolidation of earlier company legislation. Only a small rump of CA 1985, the Companies Consolidation (Consequential Provisions) Act 1985 and the Companies (Audit, Investigations and Community Enterprise) Act 2004 remain.

[9] This is not so much a criticism of Parliament as a comment on the sheer volume of secondary legislation which makes effective scrutiny often impossible because of time constraints.
[10] CA 2006, s 1(1).
[11] CA 2006, s 2.

- Financial assistance no longer an offence in private companies
- Terms of redemption no longer to be put in articles but must be authorised by members
- European Directive on Takeover Bids enacted and Takeover Panel made statutory
- Registrar can restore company to register
- Registrar can correct small errors informally
- Registrar can remove superfluous documents from register
- Registrar can annotate register, for example, RE: amendments of documents
- Companies generally only to be liable for criminal offences if victims are third parties and not members
- Only directors to be liable for criminal offences not affecting third parties
- Liquidator's expenses in winding up following after receivership to be paid from funds due to floating charge holder
- The Secretary of State or Chancellor of the Exchequer can revise any provision of company legislation.

Chapter 2

THE COMPANY AND ITS LEGAL FRAMEWORK

SUMMARY OF CHANGES IN THE COMPANIES ACT 2006

2.1 Changes in the Companies Act 2006 (CA 2006) which affect the company and its legal framework may be summarised as follows:

- Table A has been replaced by a variety of sets of model articles for different types of companies formed on or after 1 October 2009. There was a transitional Table A for companies formed between 1 October 2007 and 30 September 2009.
- The restriction on directors over seventy in public companies ceased to exist from 6 April 2007.
- As from 1 October 2009 it is no longer a criminal offence for a private company to offer shares to the public. Instead there is a possibility that a private company offering shares to the public will be ordered to convert to public.
- There is now a unified system of company law for the entire United Kingdom including Northern Ireland, though the traditional Companies Registries remain in Cardiff, Edinburgh and Belfast.
- Private companies are no longer required to have a company secretary as from 6 April 2008.
- Elective resolutions were replaced by a substantially more deregulatory system on 1 October 2007.
- The schedule of restricted words in company names has been redrafted.
- There is the new office of company names adjudicator to whom complaints may be made as from 1 October 2009 about the names of new companies and limited liability partnerships which infringe on the goodwill of existing businesses.
- Authorised capital has been abolished as from 1 October 2009.
- Reserve capital has been abolished as from 1 October 2009.

- The terms of redemption of redeemable shares have moved from the articles into a private contract document as from 1 October 2009.
- It is now possible to entrench clauses in the articles as from 1 October 2009.

BACKGROUND

2.2 This book deals with the powers and duties of directors of companies registered in the United Kingdom. The Companies Act 2006 applies to companies formed within the United Kingdom[1] but Her Majesty may by Order in Council direct that any provisions of Chapter 2 of Part 28 (Impediments to Takeovers) extend to the Isle of Man or the Channel Islands.[2] But before turning to the directors themselves, we should look briefly at the legal framework within which they work. What, then, do directors direct? The answer, for all practical purposes, is companies which are limited either by shares or by guarantee and which are registered under CA 2006 and prior companies legislation, going back to 1856.[3] The Joint Stock Companies Act 1844 introduced the principle of incorporation by registration which has been by far the most common form of incorporation ever since. Limitation of liability was achieved by shareholders in 1855 and private companies were set apart from public companies in 1907. Company law was reformed by ten Acts between 1862 and 2004, and on each occasion the overall trend was towards greater disclosure and transparency on the part of the company and greater powers of intervention by the State.

2.3 Before 1972, company law and its reform were purely domestic matters. Pressure for reform came largely from within the UK, and the strength of that pressure would determine the range and content of new Companies Acts (CA). Some, like CA 1948, were thoroughgoing overhauls of company law, while others, like CA 1967, merely embodied proposals which appealed to the government of the day.[4] On its entry to the European Community (EC), however, the UK became obliged to give legislative form to EC Company Law Directives.[5] Thus, although CA 1976 was essentially a 'domestic' Act, CA 1980 and CA 1981 were, to a considerable extent, designed to implement the EC Directives.

2.4 Directives by the EC Commission do not directly change UK law – it is the implementing UK Acts which have this effect. Nevertheless, it is a principle

1 CA 2006, ss 1, 1276 and 1284.
2 CA 2006, s 973.
3 CA 2006, s 1171.
4 Thus, the 1967 Act embodied a few of the very many proposals made by the *Report of the Company Law Committee under the Chairmanship of Lord Jenkins* (the 'Jenkins Report'), Cmnd 1749 (June 1963).
5 The infamous European Communities Act 1972, s 9 (now repealed and replaced by CA 1985, ss 35, 35A, 35B, 36, 42) itself was an attempt to comply with the first EC Directive on Company Law, Directive 68/151/EEC.

of Community law, and this principle does bind English courts, that the implementing legislation should be construed in the light of the Directives and that the domestic courts should therefore refer to the text of the relevant Directive.[6]

Companies Act 1985

2.5 In 1985, the scattered provisions of the previous Companies Acts[7] were consolidated. 'Consolidation' does not involve any changes in the substance of earlier Acts,[8] but seeks to provide a coherent body of legislation setting out that substance in a single document and in a rational order.[9] The result was CA 1985, which contains nearly all the law previously contained in CA 1948, CA 1967, CA 1976, CA 1980 and CA 1981. While CA 1985 itself has suffered many repeals, modifications and amendments, it remained the principal Act in relation to companies and did so until CA 2006 came into force. Sadly, CA 2006 is not a complete consolidation of company law. Small rumps of CA 1985, CA 1989 and the Companies (Audit, Investigations and Community Enterprise) Act 2004 will remain in place notwithstanding the fact that CA 2006 is fully in force.

Associated Acts

2.6 In 1985 three 'satellite' Acts which dealt with companies were passed. These were also consolidating measures drawn from the old legislation. The reason for their separation from CA 1985 was a mixture of principle and expediency. The Business Names Act 1985, although derived from CA 1980 and CA 1981, regulated the trading names of partnerships and sole traders as well as companies, and it was clearly appropriate to remove this regulation from a 'pure' Companies Act. The Company Securities (Insider Dealing) Act 1985 (since repealed and replaced by the Criminal Justice Act 1993) dealt with trading in listed or advertised securities. Whilst it had considerable bearing on the conduct of company directors and management, it was not concerned with company structure as such and operated in an area where further legal and self-regulatory developments were already occurring. It was therefore convenient to sever these provisions from CA 1985. Finally, the Companies Consolidation (Consequential Provisions) Act 1985 contained a number of repeals and amendments of 'specialist' legislation,[10] together with a number of necessary savings and transitional provisions.[11] The Companies (Audit, Investigations and Community Enterprise) Act 2004 then made substantial

6 *Re Friedrich Haaga GmbH (No 32/74)* [1975] 1 CMLR 32, ECJ.
7 Together with certain other relevant provisions, such as the Insolvency Act 1976, s 9 (disqualification of directors of insolvent companies).
8 Minor amendments were made before the consolidating legislation to remove anomalies.
9 But it does not form a comprehensive 'code' of company law. Many of the most important principles of company law are to be found predominantly in decided cases, for example, as to directors' duties.
10 For example, repeal of the Insurance Companies Act 1982.
11 For example, in relation to companies which enjoyed 'public company' status until the reclassification of public and private companies introduced by CA 1980.

changes to the rules regarding auditors, their powers and the supervision of their regulatory bodies, and investigations into the affairs of companies by the Department of Trade and Industry and introduced the new concept of community interest companies. Some, but not all, of these Acts have been revised and many of the provisions are now parts of CA 2006. Sadly, however, as has been stated, CA 2006 does not constitute a complete statement of company law in the United Kingdom and parts of some earlier Companies Acts remain in force.

Table A

2.7 At the same time, the opportunity was taken in 1985 to modify Table A, the statutory 'model form' for a company's articles of association. CA 1985, s 8 removed Table A from the Act and provided that it should be in the form prescribed by regulations.[12] This enabled modifications to be made from time to time without consequential amendments becoming necessary to the principal Act.[13] However, the 1985 Table A was a set of default articles applicable to all companies and so might be described as a 'jack of all trades, master of none'. There was no specific type of company to which they might be applied. For this reason, companies would always need at least to modify Table A by means of special resolutions. The term *Table A* has now been abandoned for new companies and replaced by perhaps the rather more meaningful term *model articles*. There are three sets of model articles, one for public companies, one for private companies limited by shares and one for private companies limited by guarantee.

Further developments prior to the Companies Act 1989

2.8 As is noted elsewhere, company law, as it affects directors, is, to a surprisingly large extent, the creation of the courts rather than of Parliament. As far as statutory controls are concerned, however, the 1985 consolidation provided a welcome breathing space. It was no longer necessary to hunt through different Acts to root out an original provision and its amendment, and possible re-amendment or repeal. Sadly this approach has not been followed through in CA 2006 and some parts of earlier Companies Acts remain in force. Immediate Company Law is, however, not restricted to the Companies Acts. For example, the Insolvency Act 1986, which sought to consolidate all insolvency legislation, has itself been amended by the Insolvency Act 2000 and the Enterprise Act 2002 and also a variety of pieces of delegated legislation. On a smaller scale, the Company Directors Disqualification Act 1986 sought to blend and consolidate the rules disqualifying directors and others from company management. The Financial Services Act 1986, among many other things, sought to regulate 'investment business' including public offers. This has itself been replaced by the Financial Services and Markets Act 2000.

[12] Companies (Tables A to F) Regulations 1985, SI 1985/805, with minor amendments in SI 1985/1052.

[13] For discussion of articles of association, see **2.105** et seq.

Companies Act 1989 and later changes

2.9 Major changes were made by the Companies Act 1989 and the Companies (Audit, Investigations and Community Enterprise) Act 2004. The 1989 Act introduced significant and far-reaching changes, such as the pruning of the ultra vires rule (see **2.70**), and a largely unsuccessful attempt at 'deregulation' of private companies (which has since had to be revisited in order to deal with anomalies). Particularly, the 1989 Act implemented the EC Directives on regulation of auditors and in relation to group accounts. Those changes which are within the scope of this book are looked at in detail later.

2.10 Most parts of CA 1989 were brought into force by delegated legislation, as was the case with the Companies (Audit, Investigations and Community Enterprise) Act 2004. However, it is much to be deprecated that the CA 1989, Part IV dealing with the rules on company charges has never been brought in. That legislation can be passed but never brought in shows a disregard by the DTI (subsequently replaced by BERR and then BIS) for Parliament, the business community and those concerned with the administration of industry.

2.11 Other changes have been brought about by the Insolvency Act 2000 and the Enterprise Act 2002, the latter bringing about radical changes to the rules governing the enforcement of securities.

Statutory instruments

2.12 A further feature of CA 1989 and subsequent Acts is that they contain considerable delegated power for the Secretary of State to decide upon the substantive law to be introduced in relation to certain matters, rather than setting it out in the Act itself. The general area in which such a power may be exercised is specified in a particular section of the Act, and the Secretary of State can then legislate as he wishes within those parameters. He exercises this power by means of delegated or subordinate legislation, which takes the form of regulations set out in a document called a 'statutory instrument'. For example, the audit exempt company was introduced by the Secretary of State by means of the Companies Act 1985 (Audit Exemption) Regulations 1994[14] pursuant to a power given to the Secretary of State in that regard by CA 1985, s 257.

2.13 Traditionally, there were relatively few statutory instruments and they dealt only with peripheral housekeeping matters. For example, devolved powers were, in the past, exercisable in relation to relatively minor matters such as fees to be charged by Companies House or the format of statutory forms. However, as the example of the audit exempt company shows, the current trend is to devolve power in relation to a substantial number of quite significant matters. The governments between 1997 and 2011 have made a vastly increasing use of delegated legislation to get their rules into the form of law. This cannot by any

[14] SI 1994/1935.

stretch of the imagination be regarded as a satisfactory state of affairs. There is so much that there cannot be adequate parliamentary scrutiny and there is an increasing danger that legislation is introduced with grossly inadequate publicity. The reader has only to consider the Table of Statutory Instruments at the beginning of this book for an inkling of their breadth and importance.

2.14 The advantage of statutory instruments is that they enable the Secretary of State to introduce changes swiftly and easily in response to immediate needs. However, statutory instruments are usually not debated, and so do not use up parliamentary time in the way that new, primary legislation (such as a new Companies Act) does, because usually they merely have to be 'laid' before Parliament.

2.15 However, one disadvantage is that there is a temptation to sacrifice attention to detail in the quest for speed. Unfortunately, this is happening to an increasingly unacceptable extent. The upshot is that a depressingly large number of new statutory instruments are made to clear up ambiguities, inconsistencies or omissions in previous instruments.

2.16 The consequence of the existence of these amending instruments is that the search for the latest version of a rule can involve labyrinthine investigation of a number of instruments to trace the original rule, and any subsequent amendments or repeals.

2.17 Of course, this problem would be eased if there were effective consultation prior to laying important new instruments. In the late 1980s and early 1990s, such consultation as took place was often perfunctory, resulting in the laying of many defective instruments. The defects were, of course, discovered by the hard-pressed practitioner who had to waste time, and his clients' money, struggling to comply. For a while there was some consultation, but over recent years that appears to have declined and such suggestions as are made by consultees are not treated with the respect and consideration that they sometimes merit.

2.18 Another disadvantage is that, unlike an Act, there is a relative lack of publicity attached to the introduction of a new statutory instrument. Whilst most company lawyers will subscribe to the 'Daily List' of new statutory instruments issued by Her Majesty's Stationery Office (HMSO), few directors will and therefore rely on their advisers to alert them to relevant new instruments.

2.19 A third disadvantage is that, even if directors are aware of a new instrument, they may have difficulty accessing it. While all new legislation is placed on the internet these days, it is not always easily findable, particularly by the layman.

2.20 Doubtless the whole process could almost appear to have been designed to introduce vast quantities of company law by the back door and keep it from the directors who need access to it.

2.21 A final characteristic of statutory instruments is that, in certain circumstances, the Secretary of State has power to amend primary legislation by means of a statutory instrument. Frighteningly s 1294 of the Companies Act 2006 allows the Secretary of State or the Treasury to amend, repeal or revoke any provision of the companies legislation. It does not require an expert in constitutional law to appreciate that it is constitutionally repugnant that the Chancellor could, on a whim, abolish the concept of limited liability. The ability to amend anything by delegated legislation also means that the draftsmen of primary legislation do not have to be too particular in their drafting because any errors which come to light can always be corrected by secondary legislation.

2.22 These factors all make the task of finding the latest version of a particular rule, complete with all amendments and repeals, and whether in an Act or in a statutory instrument, even more problematic for the director and his advisers.

Other developments

2.23 The tide of legislation arising as a result of the obligations of membership of the EU continues unabated.

2.24 For example, as mentioned above, single member companies were introduced in 1992. These companies are able to operate, if they are private companies, and subject to certain safeguards, with a sole shareholder, who may also be the sole director. In effect, sole traders are able to incorporate and parent companies no longer need to find a nominee to hold one share in their wholly owned subsidiaries if they are to retain limited liability.

2.25 The Public Offers of Securities Regulations 1995[15] substantially amended the law relating to public offers of unlisted securities, as well as amending the Financial Services Act 1986, Part IV in relation to offers of listed securities. These complex regulations were necessary as a result of the EC Prospectus/Public Offers Directive.[16] A stream of delegated legislation has followed in this area also, the latest offerings being Uncertificated Securities (Amendment) Regulations 2007 and the Financial Services and Markets Act 2000 (Exemption) (Amendment) Order 2007.

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[15] SI 1995/1537.

[16] Directive 89/298/EEC, OJ 1989 L124/8.

2.26 The rules prohibiting insider dealing (see Chapter 8) in the Company Securities (Insider Dealing) Act 1985 have also been repealed and replaced by provisions in the Criminal Justice Act 1993 in the drive to create common laws as to insider dealing across the EU.[17]

2.27 The Electronic Communications Act 2000 introduced changes to allow electronic communications to be used by companies in dealing with and between their members. The Limited Liability Partnerships Act 2001 brought about a new form of business corporation, the limited liability partnership which could emerge as a rival to the traditional company as a vehicle through which to do business.

The future

2.28 The advent of the Labour Government led to a major review of company law which was intended to result in root and branch reform in the new millennium to make the UK economy more competitive. This culminated in the Companies Act 2006.

The Companies Act 2006

2.29 This is the biggest Act ever to be passed by the UK Parliament. It is supposed to simplify company law and, indeed, in some places it does so. However, just how an Act with 1300 sections can be regarded as simplifying an already complex area of law really challenges the credibility of the persons making such an assertion.

TYPES OF COMPANY

2.30 For all practical purposes, we are considering directors of companies limited by shares and registered under CA 2006, referred to here as 'registered companies'. These are not the only types of company which can exist, but they are by far the most numerous and significant and all references in this book are to such companies unless the contrary is stated. The full range of possibilities is as follows:

(1) A registered company limited by shares, in which case the liability of a member is limited to the amount, if any, unpaid on his shares[18] and which in turn are subdivided into:

[17] Directive 89/592/EEC, OJ 1989 L334/30 (Directive co-ordinating regulations on inside dealing); and see **8.53** et seq.
[18] CA 2006, s 3(2).

(a) a public company, ie a company limited by shares or limited by guarantee and having a share capital which is registered as a public company and the certificate of incorporation of which states that it is a public company;[19] and
(b) a private company, ie all other companies which are not public.[20]

(2) Registered unlimited companies, where a member's liability to contribute is unlimited.[21] Such companies are always private.

(3) Registered companies limited by guarantee, where a member's liability is limited to the amount which he has guaranteed to contribute in the event of winding up.[22] Such companies are always private companies.

(4) Companies incorporated by Royal Charter, for example, Hudson's Bay Co.

(5) Companies incorporated by special Act of Parliament, for example, public corporations.

2.31 Types (4) and (5) do not concern us here and, of the registered companies, type (1) must have a share capital, type (3) must not and type (2) may or may not, as its promoters wish. Unlimited companies have the privilege of a general exemption from filing accounts[23] and may more easily repay or reduce their share capital than limited companies. Guarantee companies are often members' clubs, residents' associations and other non-commercial institutions.

2.32 The Companies (Audit, Investigations and Community Enterprise) Act 2004 introduced a new variation on a limited company, the community interest company. This is a company formed in much the same way as any other company by registration with the Registrar of Companies but which is subject to very considerable regulation.

2.33 We are dealing here with directors of private and public companies limited by shares and the significant difference between such companies should be briefly looked at before we go on to consider the administrative machinery of limited companies generally.

[19] CA 2006, s 24(2).
[20] CA 2006, s 4(1).
[21] CA 2006, s 3(4).
[22] CA 2006, s 3(3).
[23] CA 2006, s 448. But see Partnerships and Unlimited Companies (Accounts) Regulations 1993, SI 1993/1820 for unlimited companies or another unlimited company or Scottish form each of whose members is a limited company.

The Companies Act 2006

2.34 The Companies Act 2006 made no changes to the various types of company.

PUBLIC AND PRIVATE COMPANIES

2.35 A public company is one registered as such and the certificate of incorporation of which states that it is a public company.[24] All other companies are private companies.[25] While the public company is the defined type of company with private companies being those which are not public, in terms of numbers the public company is the exception, and the private company (which accounts for over 99 per cent of registered companies) is the norm. In general, both types of company are governed by CA 2006, but there are many provisions which are expressed to apply only to one type or the other.

2.36 The principal distinctions[26] between public and private companies are as follows:

(1) The name of a public company must end with the words 'public limited company' or, as an alternative, the abbreviation 'plc'.[27]

Companies the registered office of which is in Wales can use the Welsh equivalents.

(2) A public company must not commence business or borrow unless the Registrar has certified that he is satisfied that its allotted share capital is at least the statutory minimum of £50,000[28] and that at least one-quarter of the total allotted share capital, and any premium, is paid up.[29]

(3) A private company need have only one director (although he cannot also be secretary). A public company must have two.[30]

(4) A secretary of a public company must fulfil certain criteria.[31]

(5) A public company is subject to many more restrictions on its share capital and payment of dividends.[32]

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24 CA 2006, s 4(2).
25 CA 2006, s 4(1).
26 Further consequential distinctions will be found, in particular, in **2.94**, **5.125** et seq and Chapter 8 generally.
27 Or their Welsh equivalents: CA 2006, s 59.
28 The company's share capital must therefore include shares to the nominal value of at least this amount in sterling, even if the remainder of the company's share capital is in a currency (or currencies) other than sterling. See *Re Scandinavian Bank Group plc* [1988] Ch 87. This decision is put on a statutory footing by CA 2006, s 542(3) as from 1 October 2006.
29 CA 2006, ss 586 and 761 et seq.
30 CA 2006, s 154.
31 CA 2006, s 273.
32 See Chapter 4.

Some former restrictions on public companies have now disappeared:

(1) It used to be that a public company had to have at least two members but that restriction has now gone. Section 24 of CA 1985 was not carried forward into CA 2006.

(2) Restrictions on the tenure of directors aged 70 used to apply only to public companies and their subsidiaries.[33] This discriminatory provision ceased to be law on 6 April 2007.

(3) Proxies may now speak at public company meetings. There used to be a restriction on this, but it was not carried forward into CA 2006.

(4) It used to be a criminal offence under the Companies Act for a private company to offer its shares to the public though this criminality disappeared as from 1 October 2009.

Since the coming into force of the Financial Markets and Services Act 2000 the public offer of shares has been under the Admission and Disclosure Standards issued by the London Stock Exchange in April 2002. The rules of the Stock Exchange and the AIM provide that breaches of the Listing Rules can lead to a civil prosecution. The FSA can impose unlimited fines on companies and natural persons who breach the rules.

2.37 'Public' companies are not necessarily also 'listed' companies. Listed companies must, by definition, be public companies but the converse is not the case. A company may register as a public company and commence business with no intention of seeking a quotation. The reason is often the desire of their proprietors for the prestige and status of owning a public company. Not infrequently the financial journalists use the adjectives 'public' and 'listed', or 'quoted' or 'market' as synonyms in the context of companies. Only a public company can be listed or quoted or deal on a stock market, but it is not axiomatic that this will happen. Unfortunately many members of the public fall into the trap seemingly set for them by the journalists and treat all these words as meaning the same. A market company must be a public company, but not all public companies are market companies.

The Companies Act 2006

2.38 Section 755 of the Companies Act 2006 provides that a private company must not offer any securities of the company to the public. Breach of this rule will lead to the possibility that either a member or creditor of the company or the Secretary of State may apply to the court for an order that the company should re-register as a public company.

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33 CA 1985, s 293.

THE MACHINERY OF THE COMPANY

2.39 All companies are now registered in the same way, although there are certain special requirements in the case of public companies and community interest companies.

2.40 The components to register a company limited by shares are as follows:

(1) **The memorandum of association** – It is much to be regretted that this document is referred to as the memorandum since most directors, lawyers and accountants will have in their mind's eye what a memorandum looks like. The new style memorandum is no longer a constitutional document of the company and merely part of the application for incorporation. It consists of a single sentence stating a desire to be incorporated and an agreement by the subscribers to take up the shares set against their names. Apart from this single sentence the only other information is, on the top, the name of the company and, on the bottom, details of the subscribers and their authentication of the memorandum. This document is intended as a snapshot of the company as at the time of incorporation. It will never change. Even if the company changes its name, the memorandum itself will never change.

(2) **The articles of association** – These contain the internal regulations of the company. Registration of articles is not compulsory, as the relevant set of model articles will apply automatically to any company, public or private, except as modified or extended.[34] Under the earlier company legislation, companies would almost always register special articles amending certain provisions of Table A. However, it is felt that the new model articles, and especially those relating to private companies limited by shares, are so much more user friendly, that those forming companies will often be happy to rely upon the model articles alone.

(3) There must also be a form of application for incorporation. This will give details of the type of company, its domicile, the address of the registered office, details of the directors and also of the secretary if there is one.

(4) These documents must be accompanied by the appropriate fee.

2.41 If all is in order, the Registrar of Companies issues a Certificate of Incorporation[35] whereupon the company becomes a legal entity separate from its members.[36]

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[34] CA 2006, s 20.
[35] CA 2006, s 15.
[36] *Salomon v Salomon & Co Ltd* [1897] AC 22.

The Companies Act 2006

2.42 The Companies Act 2006 has disposed of the need for new style companies to state their objects in the memorandum of association. Section 31 states that the company's objects are unrestricted. As has been stated new companies will be formed in a similar way to existing companies in that documents will have to be sent to the Registrar of Companies in return for which he will issue a certificate of incorporation bringing the company into existence. However, it will be appreciated that in the absence of an objects clause, the application for incorporation has become no more than a form filling exercise. Thus formation will generally be much easier. A draft memorandum has been published. It contains a statement that the subscribers desire to be registered as a company. Apart from this it contains only two pieces of information: the name of the company and details of the subscriber(s). As from 1 October 2009 the memorandum will never change. This will be the case with both existing companies and companies formed under CA 2006. The memorandum was described by the government spokesman in the House of Lords as a 'snapshot', and this is a good word in this context. The memorandum will never change; the only constitutional document of the company will be the articles.

2.43 In the case of a community interest company, registration cannot take place until the Regulator has indicated to the Registrar of Companies that the company satisfies the community interest test.

Same day registration

2.44 It is possible to obtain a Certificate of Incorporation on the same day that the documents are filed. This can be extremely useful in the case of transactions such as reconstructions or acquisitions when secrecy might be essential until the parties are ready to complete the transaction.

2.45 The procedure is simple. The paperwork must be presented at Companies House (either in hard copy or electronically), before 3 pm on the relevant day, together with a special fee. The name of the company has to satisfy certain requirements if it is to be acceptable to the Registrar:

- The last word or words must be 'limited', 'Public limited company', 'plc' or other acceptable alternatives.

- The name must not constitute a criminal offence; for example the Anzac (Restriction of Trade Use of Word) Act 1916 makes it an offence to use the word 'Anzac' in a company name without the consent of the secretary of State for Foreign Affairs; the Geneva Convention Act 1957 provides that 'Red Cross' and 'Geneva Cross' cannot be used without the consent of the Army Council.