

INTRODUCTION AND OVERVIEW

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A. GENESIS OF THE ACT

The Companies Act 2006 (CA 2006) has been a long time coming. The Company Law Review (CLR), which ‘provides the essential blueprint’ for CA 2006, was launched in March 1998 by Margaret Beckett, then Secretary of State for Trade and Industry, with the aim of developing a ‘modern company law for a competitive economy’.² Some 11 reports, two White Papers, and nearly nine years later, the project has finally come to fruition. 1.01

The CLR, overseen by a ‘steering group’ of eminent company lawyers and business-people (CLRSG) and supported by ‘working groups’ of relevant specialists and interested persons, submitted its final report in July 2001. The CLRSG’s consultation process had proceeded in three main stages³ and involved a detailed dialogue with a wide range of interested parties. Their recommendations were set out in a two-volume Final Report⁴ which they believed represented ‘a major reworking of the whole framework of company law’. 1.02

‘Modernising company law’ became a commitment of the government in its manifesto for the 2001 general election. The following year, the DTI responded to the CLR process in a White Paper (published July 2002),⁵ which also included further draft clauses for a Companies Bill and which was itself subject to detailed consultation. 1.03

However, work then appeared to stall and nothing more was heard until a second, comprehensive, White Paper was published in March 2005. This was a substantial piece of work and included in draft much of the Bill which the government eventually brought forward. 1.04

CA 2006 was introduced to Parliament in the House of Lords in November 2005 and started its passage as the Company Law Reform Bill. Its name was, however, changed by a Conservative amendment in the House of Commons in July 2006 by dropping the words 1.05

¹ *Company Law Reform White Paper* (Cm 6456, March 2005) 3.

² DTI, *Modern Company Law for a Competitive Economy* (March 1998).

³ DTI, *The Strategic Framework*, URN 99/654 (February 1999), *Developing the Framework*, URN 00/656 (March 2000), and *Completing the Structure*, URN 00/1335 (November 2000) respectively. There were also various other specialized consultations.

⁴ DTI, *Company Law Review: Final Report*, URN 01/942 (July 2001).

⁵ *Modernising Company Law* (Cm 5553, July 2002).

'Law Reform' to maintain the 'traditional' nomenclature of companies legislation and to reflect the fact that the Bill as then proposed would partially consolidate, as well as reform, the law. Despite its size, consideration of the Bill by committee in the Commons was 'programmed', meaning that only a short period of about a month was available to consider the Bill in its entirety.

- 1.06 Reportedly the biggest Bill ever to have gone through Parliament, CA 2006 runs to some 1300 sections and 16 Schedules. Although—mercifully—many of those provisions either 'restate', or make relatively minor technical changes to, the existing law, CA 2006 does contain significant changes across all areas of company law which affect companies of all types. As such, it will be imperative for lawyers (both transactional and litigation) and others advising companies to have a good grasp of its content.
- 1.07 CA 2006 received Royal Assent on 8 November 2006.

B. SCOPE OF THE ACT

1. The Companies Acts

- 1.08 One of the main criticisms of the Bill from a practitioner's point of view was that there would be a division of core companies legislation across four major Acts: CA 1985, CA 1989, Companies (Audit, Investigation and Community Enterprise) Act 2004 (C(AICE)A 2004), and CA 2006. The government has, to a large extent, ameliorated this position by incorporating all of the 'company law' provisions of the other three Acts into CA 2006 (although restating those parts in consistent language) so that, it says, CA 2006 is a 'comprehensive statement of company law'.
- 1.09 However, parts of CA 1985, CA 1989, and C(AICE)A 2004 remain. These mostly relate to: Scots law provisions (which, since they are 'devolved matters', have to be dealt with by the Scottish Parliament); investigations (CA 1985); assisting overseas regulatory authorities (CA 1989); and community interest companies and provisions relating to the Financial Reporting Review Panel and the Financial Reporting Council (C(AICE) 2004).
- 1.10 It is still difficult to see why all of companies legislation could not finally have been consolidated in one place. The government's justification for retaining the provisions described in paragraph 1.09 above is that they are not 'core company law'. However, although the government has, for example, retained provision for investigations in CA 1985, Part 32 of CA 2006 makes provision on investigations too, ie CA 2006 already contains some of what, according to the government, is not 'core company law'.

2. Northern Ireland

- 1.11 One innovation in scope terms is to bring Northern Ireland within the ambit of the Companies Acts (see Part 45 of CA 2006) so that there will now be 'UK', rather than 'GB', company law. This is good news for Northern Ireland, which often had to wait even longer for new company law provision to be 'translated' by Order in Council.

3. Purely restated provisions

- 1.12 As indicated above, in addition to reform measures, some of CA 2006 merely 'restates' wholesale parts of CA 1985. It is clear that this is only intended to be a convenience measure

and that the firm intention behind these ‘restated’ provisions is solely to consolidate, and not to change, the law.⁶ Chapter 19 contains a table of purely restated provisions which are generally not comprehensively dealt with in this book.

C. KEY THEMES AND REFORMS

The 2005 White Paper sets out the government’s four ‘crucial objectives’ for CA 2006: 1.13

- (1) ‘to enhance shareholder engagement and a long term investment culture’;
- (2) ‘to ensure better regulation and a “Think Small First” approach’;
- (3) ‘to make it easier to set up and run a company’; and
- (4) ‘to provide flexibility for the future’.

1. ‘Think Small First’ and ease

Objectives (2) and (3) are closely linked and are sought to be reflected throughout CA 2006, 1.14 so that companies legislation is ‘reclaimed’ for the ‘average’ smaller private company. The statutory language of this approach is to distinguish between ‘larger’ and ‘smaller’ companies (rather than simply as between ‘public’ and ‘private’). Structurally, it adopts a ‘tiered’ system with three levels, proceeding on the assumption that all private companies are small and, as regards public companies, maintaining a difference between ‘quoted’ and ‘other’. However, since the approach to private companies only creates a *default* position, the larger, more sophisticated, private companies can, if desired, opt for more intense regulation by providing it for themselves,⁷ such as in their articles of association.

The approach described above is reflected in various ways. 1.15

(a) *Structure*

Structurally, CA 2006 generally states the provisions relating to small companies first and 1.16 groups them together so that they are easier to find. This contrasts with CA 1985 and previous Acts, which generally expressed the law relating to small/private companies as exceptions to that relating to large/public companies. For example, contrast the ‘exemption’ for small and medium-sized companies which is now outlined at the beginning of Part 15 of CA 2006, with the former ‘exemption’ placed in the middle of Part 7 of CA 1985.

(b) *Substance*

Substantively, CA 2006 seeks to ‘remove unnecessary [regulatory] burdens on small firms’. 1.17 This is exemplified by the removal of the requirement for a company secretary, and the abolition of the financial assistance regime, for private companies—discussed further in Chapters 11 and 8 respectively.

Section 19 of CA 2006 also comprehends that there will now be different ‘Table A’ 1.18 default/model articles for different types of company, so that small private companies will benefit from their own, greatly pared down, version: see further, Chapter 4.

⁶ See, eg, Secretary of State for Trade & Industry, *Hansard*, HC, cols 123 and 125 (6 June 2006).

⁷ Secretary of State for Trade & Industry, *Hansard*, HC, col 132 (6 June 2006).

(c) *Practicality*

- 1.19 On a practical note, CA 2006 attempts to reflect the way in which the vast majority of companies (ie small private companies) work. Therefore, recognizing that such companies rarely, if ever, hold them, the *obligation* to hold AGMs is removed; conversely CA 2006 makes it easier for such companies to pass written resolutions by, inter alia, removing the unanimity requirement. We discuss meetings and resolutions more fully in Chapter 12. Finally, although essentially a non-statutory innovation, small companies are promised much more in the way of ‘plain English guidance’ from Companies House.

2. Other key themes and headline reforms

- 1.20 The main changes made by CA 2006 are highlighted more fully and by category in Chapter 2. A few introductory words are offered here on the other key themes behind the Act by reference to its ‘headline’ aspects.

(a) *Accessibility and flexibility*

- 1.21 Undoubtedly the most noteworthy aspect of CA 2006 is the introduction of a comprehensive codification of directors’ general duties⁸ in Part 10 of CA 2006. The fundamental driver for this is a desire to improve company law’s ‘accessibility’, the government wanting to ensure ‘that the duties are widely known and understood’.⁹
- 1.22 However, the approach adopted has not been universally popular—with the most significant opposition coming from, among others, the Law Society. In essence, opponents of the statement are concerned that it does not meet its stated aim of ‘accessibility’ and in fact results in the loss of ‘flexibility’ (another of the government’s crucial objectives) inherent in the common law and equitable rules. On any view, the statement has the potential to spawn widespread litigation; we deal with it more fully in Chapter 13.
- 1.23 Further evidence of the government’s desire to bring company law to a wider audience is found in Part 11 of CA 2006, which places the increasingly obsolescent derivative action on a statutory footing. This reform caused some concern during the Act’s passage through Parliament—the main fear being its potential exploitation by rogue ‘single-issue’ shareholders who seek to paralyse companies with derivative litigation. We consider it more fully in Chapter 14.
- 1.24 The government’s ‘flexibility’ agenda (part of its fourth ‘crucial objective’) suffered a serious blow when one of the most controversial proposals in the Bill, a generalized power to reform ‘core company law’ by secondary legislation, was roundly criticized and defeated in the House of Lords. The government did not reintroduce the measure in the Commons.

(b) *Transparency*

- 1.25 ‘Transparency’ is, in company law as in other areas of life, much trumpeted. Indeed, EU corporate law now contains a whole directive on ‘Transparency Obligations’,¹⁰ which Part 43 of CA 2006 (discussed further in Chapter 9) seeks to transpose.

⁸ Described as ‘the heart of the Bill’ by the Secretary of State, *Hansard*, HC, col 125 (6 June 2006).

⁹ 2005 White Paper [3.3].

¹⁰ Council Directive (EC) 2004/109 on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and amending Directive 2001/34/EC [2004] OJ L390, (December 2004).

Underpinning much of the transparency agenda is a desire to encourage greater ‘shareholder activism’, hence the introduction of provisions making it easier for ‘indirect investors’ (ie those who ‘stand behind’ a nominee registered shareholder, such as an investment fund) to receive information and to exercise the various rights attaching to shares: see, eg, Part 9 of CA 2006, supplemented by the new provisions relating to proxies in ss 324–331, discussed in Chapters 6 and 12 respectively. The Secretary of State also takes a controversial¹¹ new power in s 1277 to require pension schemes, unit trusts, and other similar entities to disclose how they exercised voting rights attached to shares they hold whether directly or indirectly (see the fuller discussion in Chapter 9). 1.26

Yet, there is a tension between the goal of greater ‘transparency’ and another of the key themes, ‘deregulation’ (discussed below). That is evident from the repeal of the obligation for quoted companies to produce an Operating and Financial Review (OFR), touted as a great contribution to corporate transparency, before it had even got going. Its scrapping caused a wide degree of disgruntlement in Parliament and among many business people and others.¹² In place of the OFR comes the more narrowly focused ‘business review’ (see s 417) discussed along with other accounting and reporting provisions in Chapter 15. 1.27

(c) *Deregulation*

Many of the deregulatory measures have been introduced in the discussion of ‘small’ companies above. However, CA 2006’s deregulatory zeal benefits not just companies themselves but external bodies too. CA 2006 relaxes the traditional rules prohibiting the limitation by auditors of their liability. Auditors may now enter into ‘liability limitation agreements’ with the companies they audit, so long as those agreements are authorized or approved by the company’s members. Audit is discussed more fully in Chapter 16. 1.28

D. PROGNOSIS

CA 2006 will undoubtedly give rise to increased litigation as well as uncertainty for transactors—at least in the short to medium term. Largely, this will be the result of the various reforming measures but will also no doubt arise from what will have to be very complex transitional measures (which the government won’t even begin consulting on until February 2007!). Inevitably there will also be at least an interim period of ‘testing’, as companies and their advisers, as well as external groups, try to take advantage of the ways in which previously malleable common law areas (such as derivative actions and directors’ duties) are comprehensively set down in writing, as well as the way in which familiar old statutory provisions are ‘restated’. 1.29

The government has indicated that the whole of CA 2006 will be fully in force by October 2008.¹³ 1.30

However, some provisions came into force upon Royal Assent—the most important being provisions relating to transparency obligations (save for the new definition of ‘regulated’ 1.31

¹¹ The clause was voted out during Committee Stage in the HL, but the government reintroduced it in the House of Commons.

¹² See, eg, *Hansard*, HC, cols 147, 152–3 and 161–2 (6 June 2006) and *Financial Times* (London 21 August 2006) 3.

¹³ Statement made by Lord Sainsbury: see *Hansard*, HL, col 432 (2 November 2006) and statement by Secretary of State for Trade & Industry, *Hansard*, HC, col 126WS *et seq* (18 December 2006).

market' in the Financial Services and Markets Act 2000 (FSMA 2000)). Provisions relating to electronic communication with shareholders (discussed in Chapter 11) came into force on 20 January 2007 as did provisions relating to public companies' powers to investigate who is interested in their shares; the Secretary of State's powers to make regulations; and s 463 (which sets out directors' liabilities for reports to the market).

- 1.32 The government has also indicated that it intends to commence the following provisions from 6 April 2007: extension of the community interest companies regime to Northern Ireland; s 1281 allowing public authorities to disclose information they have obtained for the purposes of certain civil proceedings; and provisions implementing the Takeovers Directive in Part 28 of CA 2006.
- 1.33 Yet other provisions, such as those relating to auditors' resignation statements and sign-off of audit reports by a 'senior statutory auditor' will need to be commenced by June 2008 so as to comply with the amended 8th Company Law Directive.
- 1.34 As for the transitional regime, DTI are still consulting and, at the time of writing, had indicated that they would not have a proposed transitional scheme until at least February 2007. One major problem to be addressed is how the move from memorandum and articles to essentially a single constitutional document in the articles will apply to existing companies: this could involve transactional lawyers undertaking a serious amount of reviewing of existing arrangements. Then there is the vast array (thanks to the move away from Schedules in favour of regulations) of (often horrendously) complex regulations to be consulted on, drafted, and made. Again, consultation is not scheduled to happen before February 2007.¹⁴ Therefore, there is still a great amount of work to be done—by government and by practitioners.
- 1.35 Modernizing company law has been a nine-year process and is still ongoing. That process alone, with its various iterations, must have been a hugely expensive exercise. It will also undoubtedly give rise to huge expense for companies and their advisers as they get to grips with the changes, incorporate them into transactions, and test them in the courts. Ultimately, though, only time can tell whether the benefits promised to be delivered by CA 2006—the Secretary of State proclaimed CA 2006 would save businesses £250m a year—justify those costs.

¹⁴ Statement by Secretary of State for Trade & Industry, *Hansard*, HC, col 128WS (18 December 2006).

2

KEY CHANGES

A. All Companies	2.02
B. Private Companies	2.03
C. Public and Quoted Companies	2.04
D. Other	2.05

There follows a list of the 'key' changes made by CA 2006 with an indication of where they are discussed in this book. 2.01

A. ALL COMPANIES

2.02

- Comprehensive statutory statement of directors' duties replacing common law/equitable duties (Chapter 13).
- 'Single' constitution: Memorandum of Association now simply a historical record and all constitutional provisions to be contained in Articles of Association (Chapter 4).
- Derivative actions on a statutory footing (Chapter 14).
- Companies able to communicate electronically with shareholders (Chapter 11).
- Auditors able to agree limitations of their liabilities to the companies they audit (Chapter 16).
- Ability for 'indirect investors' to receive information and exercise rights attached to shares (Chapter 6).
- Improved rights for proxies (Chapter 12).
- No requirement for companies to specify their objects (Chapter 4).
- New regime for company and business names (Chapter 5).
- Directors and shareholders able to specify service addresses on register (Chapters 11 and 6).
- New regime for company offences and 'officers in default' (Chapter 18).

B. PRIVATE COMPANIES

2.03

- Removal of obligation to hold an AGM (Chapter 12).
- Abolition of the financial assistance regime (Chapter 8).
- Removal of requirement to have a company secretary (Chapter 11).
- Separate version of 'Table A' model articles with small private companies in mind (Chapter 4).
- Easier to pass written resolutions (Chapter 12).
- Time for filing accounts and reports down from ten months to nine (Chapter 15).
- Removal of medium-sized group exemption from group accounts regime (Chapter 15).

C. PUBLIC AND QUOTED COMPANIES

2.04

- New requirement to publish accounts on a website (Chapter 15) and to publish members' concerns about audit on a website (Chapter 16).
- Increased reporting requirements for 'business review', including 'supply chain' information (Chapter 15).
- Takeovers Directive implemented in full and Takeovers Panel given statutory recognition and powers (Chapter 17).
- Takeovers: new disclosure requirements for directors' reports and new statutory basis for calculation of 'squeeze-out' and 'sell-out' thresholds (Chapter 17).
- Clarification of liability for reports to the market (Chapter 9).

D. OTHER

2.05

- Power for Secretary of State to require investors to disclose how they vote at company meetings (Chapter 9).
- Reversal of *Re Leyland Daf*¹—liquidators now entitled to be paid out of floating charge assets (Chapter 18).

¹ [2004] UKHL 9; [2004] 2 AC 298.